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SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000137-D

JANET OWEN MOVANT/APPELLANT

V. APPEAL FROM KENTUCKY COURT OF APPEALS
DOCKET NO. 2012-CA-0001681

UNIVERSITY OF KENTUCKY RESPONDENT/APPELLEE

BRIEF ON BEHALF OF APPELLEE
UNIVERSITY OF KENTUCKY

CERTIFICATE OF SERVICE

I hereby certify that the Appellee's Brief has been served on this the **8th** day of **April 2015,** by filing ten copies with the Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Ky. 40601, and by sending true and accurate copies by United States mail, first class postage prepaid to: Office of the Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Ky. 40601; Edward E. Dove, Esq., 201 W. Short Street, Suite 300, Lexington, Ky. 40507; and the Honorable Kimberly N. Bunnell, Judge, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507-1152.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee submits that oral argument will aid the Court in determining the issues raised in this appeal, particularly the continuing validity of *Vaezkoroni v. Domino's Pizza, Inc.*, 914 S.W.2d 341 (Ky. 1995) in light of the 1996 amendment to KRS 344.270.

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COUNTERSTATEMENT OF THE CASE

Appellee does not accept Appellant's Statement of the Case, and consideration of the following facts is essential to a fair and adequate understanding of the case.

Owen was employed by the University of Kentucky Medical Center ("University") as a Nursing Care Technician in the Clinical Decision Unit from October 17, 2005, until March 17, 2009. Shortly after her termination, Owen filed a charge of discrimination with the Kentucky Commission on Human Rights ("the Commission"). Appendix 1. In accordance with the procedure of the Commission, Owen's charge was dually filed with the Equal Employment Opportunity Commission ("the EEOC"). The EEOC issued a Notice of Charge of Discrimination which stated it was deferring investigation of the charge to the Commission. Appendix 2. The charge alleged that Owen had been subject to discrimination on the basis of an alleged disability. The Commission requested that the University provide a position statement and documents in response to the charge. The University fully responded to both requests.

By letter dated September 18, 2009, the Commission notified the University and Owen that after investigating Appellant's complaint it had "determined that a dismissal of the complaint is required pursuant to KRS 344.200(2)." Appendix 3. This letter also included a copy of the dismissal order dated September 17, 2009. Both the letter and the dismissal order informed Owen that pursuant to KRS 344.200(3), she had the right to file a request for reconsideration with the Commission within ten days following her receipt of the dismissal order. The order also stated that it was a final and appealable order.

Owen did, in fact, request that the Commission reconsider its decision. Appendix 4. The Commission assigned a new investigator, who reviewed information from the

previous investigation and also conducted a second investigation, issuing a second request for documents to the University to which the University responded. Appendix 5. This second investigation resulted in the issuance of a determination reaffirming a dismissal was required and issued a second notice of dismissal. Appendix 6. Owen had thirty days after the issuance of the second notice of dismissal to appeal the final order to circuit court pursuant to KRS 344.240. It is undisputed that she failed to file an appeal.

The EEOC subsequently issued a Dismissal and Notice of Rights dated October 1, 2010 which adopted the "findings of the state or local fair employment practices agency that investigated this charge." Appendix 7. The EEOC's Notice of Rights also notified Owen that "you may file a lawsuit against the respondents under federal law based upon this charge in federal or state court and it must be filed within ninety days of your receipt of this notice or your right to sue based on this charge will be lost." *Id.* (emphasis added).

After receiving the EEOC Dismissal and Notice of Rights, Owen filed through counsel a complaint with the Fayette Circuit Court on or about October 12, 2010.[1] Appendix 8. Owen's complaint alleged disability discrimination in violation of KRS 344 based on the same facts as those facts alleged, investigated, and dismissed by the Commission and the EEOC. The parties conducted discovery and, on July 31, 2012, the University filed its Motion for Summary Judgment. Appendix 9. The Motion for Summary Judgment was based, in part, upon the fact that Appellant had elected to pursue her remedy for her KRS 344 claim of disability discrimination with the Commission and

[1] At the hearing in the Fayette Circuit Court on this matter, Owen suggested that the EEOC's "right to sue" letter gave the Fayette Circuit Court jurisdiction over Owen's claims. Although Owen has apparently abandoned this argument, the language of the "Notice of Rights" itself makes it clear that the "right to sue" exists only under federal law. The claims asserted by Owen in the action before the Fayette Circuit Court arise solely under KRS 344. Thus, any "right to sue" that Appellant had under federal law was not timely asserted in the Fayette Circuit Court action.

permitted the Commission to complete its investigation and issue a final determination.[2] Judge Kimberly Bunnell held that the election of remedies doctrine barred Owen's complaint and granted Summary Judgment in favor of the University. Appendix 10.

Owen appealed the trial court's ruling to the Court of Appeals. On February 14, 2014, the Court of Appeals issued an opinion affirming the trial court's ruling, holding that Owen's suit was barred by the doctrine of election of remedies because she filed a complaint with the Commission, which was investigated, decided, then reconsidered, and ultimately the subject of a final determination. Appendix 11. Therefore, Owen could not subsequently file a lawsuit based on state law regarding the same claim. *Id.*

This Court granted discretionary review and has directed the parties to "address the continuing validity of *Vaezkoroni v. Domino's Pizza*, 914 S.W.2d 341 (Ky. 1995) in light of the 1996 amendment to KRS 344.270," in addition to the issues raised before the Court of Appeals.

ARGUMENT

First and foremost, the doctrine of stare decisis mandates that this Court's prior interpretation of KRS 344.270 should not be revised. A judicial interpretation of a state statute should not be changed unless the legislature subsequently amends the statute such that it is incompatible with that interpretation. The 1996 amendment to KRS 344.270 was not substantive and did not abandon, and is in fact is wholly compatible with and supports, the continuing application of the doctrine of the election of remedies. As such, a departure from this Court's clear precedent would be improper.

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[2] The University also argued that Plaintiff was not a qualified individual with a disability and, further, was not eligible for front pay damages. However, those arguments were not addressed by the Fayette Circuit Court and are not before this Court.

Second, the 1996 amendment did not excise the doctrine of the election of remedies from the Kentucky Civil Rights Act, KRS Chapter 344. Before and after the 1996 amendment, KRS 344.270 has been consistently and correctly interpreted to apply the doctrine of election of remedies to the administrative and judicial proceedings provided for in the Kentucky Civil Rights Act.

Finally, the doctrine of the election of remedies is in the best interest of parties, courts, and administrative agencies because it ensures that alternative pathways to relief are meaningful and effective. Contrary to Owen's arguments, it affords due process and does not deprive claimants of the right to trial by jury. Owen had multiple opportunities to pursue her claims in state or federal court, and her request that this Court abandon well-settled law to relieve her of her own choices and elections should be denied.

For all of these reasons, this Court should decline to abandon the doctrine of the election of remedies in KRS 344.270 and should affirm the Court of Appeals decision. Additionally, and in the alternative, any change to the interpretation of KRS 344.270 should be applied prospectively, not retrospectively to Owen's case.

I. Stare Decisis Should be Absolute in the Statutory Interpretation Context

The fundamental principles of stare decisis support adherence to the doctrine of the election of remedies in KRS 344.270. According to the United State Supreme Court, stare decisis:

> [I]s the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991). Although "not an inexorable command," *id.,* at 828, 111 2597, *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop "in a principled and intelligible fashion," *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 617, 88

> L.Ed.2d 598 (1986). For that reason, this Court has always held that "any departure" from the doctrine "demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 2305, 81 L.Ed.2d 164 (1984).

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014).

Of course, the force of stare decisis depends upon the context. Concerning federal constitutional or federal statutory claims, stare decisis should apply unless a subsequent decision of the Supreme Court of the United States, a federal court of appeals, or the highest court of a sister State has rendered a decision which casts doubt on the reasoning of this Court's decision. With respect to state constitutional claims, stare decisis should apply unless this Court's decision was contrary to the original public meaning of the Commonwealth Constitution and the resulting rule has proved unworkable. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78-80 (1993) (Scalia, J., dissenting). As to state statutory claims, stare decisis should be absolute. As explained below, the General Assembly can easily correct erroneous interpretations of a statute through the legislative process. *Neal v. United States*, 516 U.S. 284, 295 (1996). In the absence of such corrections, this Court should presume that its interpretation is correct.

Under the doctrine of stare decisis, a revision of this Court's prior interpretation of KRS 344.270 is unwarranted. Kentucky has long-recognized stare decisis. *South's Heirs v. Thomas' Heirs*, 23 Ky. 59, 62 (1828) (holding that "[c]ases adjudged by this court, have settled the law, whether right or wrong at first."). It is well-established that the doctrine requires increased deference to precedent in the context of statutory interpretation because the legislature is presumed to know the judicial interpretation of a statute and is free to change the statute if it disagrees with the interpretation. *Illinois*

Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); *c.f., Agostini v. Felton*, 521 U.S. 203, 235 (1997). Absent a clear directive from the legislature, a revision of a prior interpretation of a statute is unmerited. As this Court recently noted, "once the [statute's] meaning has been established, the meaning cannot change 'in light of' a later statute with which a different meaning would be compatible." *Pannell v. Shannon*, 425 S.W.3d 58, 71 n.11 (Ky. 2014) (*quoting* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 254–55 (2012)). As the Kentucky General Assembly has provided no such "clear directive," this Court's interpretation of KRS 344.270 should not be altered.

As discussed in more detail below, this Court's decision in *Vaezkoroni v. Domino's Pizza*, 914 S.W.2d 341 (Ky. 1995) ("*Vaezkoroni*") correctly interpreted KRS 344.270 to apply the doctrine of election of remedies to the alternative modes of administrative and judicial redress in KRS Chapter 344. Claimants who pursue claims before the Commission to a final determination – like Owen – cannot subsequently file a new lawsuit in state court based on the same state law claims. The 1996 amendment to KRS 344.270 is compatible with the *Vaezkoroni* decision's application of the election of remedies to claims under the Kentucky Civil Rights Act. The General Assembly did not remove the election of remedies from KRS 344.270, and, accordingly, a revision of this Court's interpretation is unmerited.

Even aside from the statutory interpretation context, Kentucky courts have long recognized that adherence to precedent "serves a necessary purpose, stabilization of the law, and should not be abandoned or substantially impaired. Its salutary effect as a stabilizing influence on the law must be preserved." *City of Louisville v. Presbyterian Orphans Home Soc. of Louisville*, 299 Ky. 566, 576, 186 S.W.2d 194, 199 (1945).

"Parties should not be encouraged to seek re-examination of determined principles and to speculate on a fluctuation of the law with every change in the expounders of it." *Ballard Cnty. v. Kentucky Cnty. Debt Comm'n*, 290 Ky. 770, 162 S.W.2d 771, 773 (1942) (*quoting* 14 Am. Jur. P. section 61, pages 284 and 285). The *Vaezkoroni* decision is not "ancient" law, nor does not embody principles based on social norms that have shifted in the last twenty years. *See Morrow v. Com.*, 77 S.W.3d 558, 559 (Ky. 2002). Rather, it is a considered interpretation of KRS 344.270, which has not been substantively amended, and is consistent with the well settled principles of jurisprudence discussed above. As such, pursuant to the doctrine of stare decisis, the Court should not alter the current interpretation of KRS 344.270, which provides that a complainant who has pursued a claim to a final determination with the Commission is barred from subsequently asserting the same claim in a new lawsuit based on state law.

II. The 1996 Amendment Did Not Overrule This Court's Decision in *Vaezkoroni.*

The General Assembly did not remove the election of remedies from the Kentucky Civil Rights Act through the 1996 amendment to KRS 344.270. Both before and after the 1996 amendment, Kentucky courts have consistently interpreted this provision as a bar to a suit based on state law regarding a claim that has been the subject of a final order from the Commission.[3]

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[3] *See, e.g., McKissic v. Com. Transp. Cabinet*, 334 S.W.3d 885, 890 (Ky. App. 2010), *disc. rev. denied* (Apr. 13, 2011); *Brown v. Diversified Decorative Plastics, LLC*, 103 S.W.3d 108, 112 (Ky. App. 2003) (en banc); *Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229, 232 (Ky. App. 2001), *disc. rev. denied* (Ky. June 5, 2002); *Vaezkoroni v. Domino's Pizza, Inc.*, 914 S.W.2d 341, 342 (Ky. 1995); and *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 820 (Ky. 1992).

a. Election of Remedies is an Essential Element of the Kentucky Civil Rights Act

The doctrine of the election of remedies in KRS 344.270 is an essential part of the Kentucky Civil Rights Act, and the 1996 amendment does not support the removal of that doctrine. The election of remedies doctrine "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." *Brown*, 103 S.W.3d at 113 (emphasis omitted); *see also Collings v. Scheen,* 415 S.W.2d 589, 591 (Ky. 1967). The Kentucky Civil Rights Act "create[d] a jural right as well as a right to redress by administrative procedure." *Meyers*, 840 S.W.2d at 820. First, the Act created the Commission and provides an administrative procedure through which individuals who believe they have been the subject of unlawful discrimination may file complaints and seek injunctive and monetary relief.[4] The Commission can issue orders providing for affirmative relief, including an award of back pay and "damage for injury caused by an unlawful practice." KRS 344.230. Final orders issued by the Commission are subject to judicial review pursuant to KRS 344.240.

Alternatively, individuals may forego filing a complaint with the Commission and instead file a lawsuit in Kentucky state court seeking injunctive relief and damages. KRS 344.450. Unlike federal civil rights law, Kentucky's Civil Rights Act does not contain an exhaustion of administrative remedies requirement, and claimants can file a civil suit based on state law without first filing and pursuing a claim with the Commission. Accordingly, the Kentucky Civil Rights Act provides two alternate modes of redress.

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[4] KRS 344.180, KRS 344.190, KRS 344.200, KRS 344.210.

Prior to the 1996 amendment, this Court expressly recognized the doctrine of the election of remedies adopted by KRS 344.270 in *Vaezkoroni*. *Vaezkoroni* involved a plaintiff who had filed three charges with a local human rights commission, each of which resulted in a "no probable cause" determination, was reconsidered at the claimant's request, and was dismissed by the Commission. *Vaezkoroni*, 914 S.W.2d at 341. Subsequently, the plaintiff filed suit under KRS Chapter 344 alleging the same three claims, and the defendant moved for summary judgment based on KRS 344.270 and res judicata. *Id.* at 342. The *Vaezkoroni* court recognized that:

> It is well settled that "[t]he Act provides alternative sources of relief, one administrative and one judicial." *Meyers v. Chapman Printing Co.*, Ky., 840 S.W.2d 814, 820 (1992). Given this reasoning, it is absurd to assume that an individual could in fact have the opportunity to choose between local or state administrative remedies and then still have the option of judicial relief. Taken to its logical extreme, this interpretation would offer an individual the option of proceeding before a local commission, then before the circuit court and finally before the Ky. Commission. This is not the case.

Id. The opinion finds support in KRS 344.020(2), which provides that KRS Chapter 344 "*shall* be construed to further the general purposes stated in this section and the special purposes of the particular provision involved." *Id.* at 342-43 (emphasis in original). Finally, this Court stated:

> In conclusion, we hold that KRS Chapter 344 authorizes alternative avenues of relief, one administrative and one judicial. The administrative avenue also includes alternatives; the individual may bring a compliant of discrimination before either the Ky. Commission or the local commission. Once any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion. This interpretation is necessary "to give meaning to and carry out the obvious purposes of the act as a whole."

Id. at 343; *see also Monmouth Street Merchants' Business Association v. Ryan,* 247 Ky. 162, 56 S.W.2d 963, 964 (1933). Accordingly, the 1995 *Vaezkoroni* court established

that KRS 344.270 applies the doctrine of election of remedies to the administrative and judicial rights created by KRS Chapter 344, creating a precedent that parties, the Kentucky Court of Appeals, Kentucky trial courts, and federal courts applying Kentucky law have relied upon for nearly two decades.[5]

b. The 1996 Amendment Did Not Abandon the Election of Remedies Doctrine

Shortly after the *Vaezkoroni* decision, the 1996 amendment to KRS 344.270 added words and phrases to the statute as set forth below, with the added language indicated in **bold**:

> The **provisions of KRS 13B.140[6] notwithstanding**, commission shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance under KRS 344.450 is pending. A state court shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending before the commission. 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.

KRS 344.270; *see also* 1996 Kentucky Laws Ch. 318 (S.B. 292).[7] These changes were made pursuant to Part 2 of a bill that primarily dealt with the procedures for administrative hearings codified in KRS Chapter 13B; Part 3 of the bill described the changes it made as "nonsubstantive, stylistic."[8] *See* 1996 Kentucky Laws Ch. 318 (S.B.

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[5] *See, e.g., McKissic v. Com. Transp. Cabinet, supra*; *Brown v. Diversified Decorative Plastics, LLC, supra*; *Herrera v. Churchill McGee, infra.*

[6] KRS 13B.140 requires that parties exhaust all available administrative remedies before filing a petition for judicial review. KRS 13B.140(2). Conversely, KRS 344.450 allows a judicial proceeding without the exhaustion of administrative remedies.

[7] While not previously cited in the record on appeal, Appellee cites this legislative history in response to the Courts directive that the parties address the continuing validity of *Vaezkoroni* in light of the 1996 amendment to KRS 344.270. A copy of relevant portion is provided at Appendix 12.

[8] "If a conflict occurs between a nonsubstantive, stylistic amendment in this Act and a substantive amendment in some other Act of the 1996 Regular Session of the Kentucky General Assembly, the Reviser of Statutes shall cause the substantive change to prevail in codification of these enactments notwithstanding the provisions of KRS 446.250." *Id.*

292) at Part 3. The resulting amendments to Chapter 344 were strictly incidental to the amendments made to Chapter 13B. Nothing about these amendments was substantive nor under any reading were they directed at eliminating the election of remedies contained therein. "There is a strong implication that the legislature agrees with a prior court interpretation of its statute when it does not amend the statute interpreted." *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996). Nothing in the text of the bill indicates that the 1996 amendment was intended to make a substantive change to KRS 344.270, and the textual additions do not support excising the election of remedies from KRS Chapter 344.

c. The Statutory Scheme Proposed by Owen is Untenable

Owen erroneously argues for a construction of KRS 344.270 that would produce absurd procedural results. She contends that KRS 344.270 should be interpreted to mean that 1) simultaneous actions in state court and before the Commission are impermissible, and 2) only a subsequent administrative action under KRS Chapter 13B is barred if the complainant pursues administrative or judicial remedies under KRS Chapter 344 to a final determination. Appellant Brief at 3. Owen's interpretation is simply not supported by the 1996 amendment or the statutory scheme of the Kentucky Civil Rights Act.

First, Owen's reading of KRS Chapter 344 would allow two judicial rulings on the same claim. An individual could seek redress through a complaint with the Commission, appeal the Commission's decision to circuit court for review under KRS 344.240, and then file a new lawsuit in circuit court under KRS Chapter 344 based on the same claim pursuant to KRS 344.450. Nothing in KRS Chapter 344 indicates that this result was intended by the legislature or provides guidance on how to resolve the two circuit court decisions that could potentially result regarding the same claim. Moreover,

the legislature did not intend to provide for de novo review of an administrative decision by the Commission; rather, it expressly provided for judicial review under a different standard in KRS 344.240.

Additionally, Owen's interpretation would only allow claimants to pursue both administrative and judicial remedies in a particular order. That is, a claimant could obtain a final ruling from the Commission and then file a new lawsuit in state court, but a claimant who begins the process with a state court lawsuit could not subsequently pursue administrative relief. *See McKissic*, 334 S.W.3d at 890. Similarly, Owen's position would require a defendant/respondent to answer the same claims multiple times.

Finally, Owen's construction of KRS 344.270 would either permit double recovery or render the administrative procedure established in KRS Chapter 344 meaningless. Any complainant that is dissatisfied with a final order from the Commission could file a new lawsuit and simply pursue the claim anew in state court, essentially nullifying the Commission's determination - exactly what Owen hopes to do here. Alternatively, nothing in Owen's construction of the statute would prohibit a complainant who is awarded damages by the Commission from bringing a subsequent action in state court seeking damages. Certainly, the legislature did not intend to render the administrative procedure, including judicial review under KRS 344.240, a mere practice round for a lawsuit under KRS 344.450. Owen's assertion that this Court should adopt a new interpretation of KRS 344.270 is simply not supported by the 1996 amendment, which was non-substantive, or the legislative scheme of KRS Chapter 344.

d. The Courts Have Consistently Applied the Election of Remedies to Claims under KRS Chapter 344.

Kentucky courts and federal courts applying Kentucky law have consistently interpreted KRS 344.270, as modified by the 1996 amendment, to apply the doctrine of the election of remedies to the administrative and judicial procedures established under the Kentucky Civil Rights Act.[9] Owen does not dispute that this is current Kentucky law.

Owen's arguments criticizing the election of remedies doctrine contained in the well-settled Kentucky case law are unavailing and do not justify total abandonment of the doctrine of the election of remedies. Owen argues that 1) the language in *Vaezkoroni* has been declared "dicta" by the Court of Appeals sitting en banc in *Brown v. Diversified Plastics, LLC, supra*; 2) her interpretation of KRS 344.270 is supported by *Grego v. Mejer, supra, Thomas v. Forest City Enterprises, Inc.*, No. CIV.A. 3:00CV-764-H, 2001 WL 1772018 (W.D. Ky. Oct. 17, 2001), and *Wright v. Highland Cleaners, Inc.*, No. 2000-CA-000949-MR, 2003 WL 21241505 (Ky. App. May 30, 2003); and 3) *Wilson v. Lowe's Home Center, supra*, indicates that a final decision from the Commission is not "on the merits." Appellant's Brief at 6-8.

Owen's arguments misconstrue the law and must be rejected for multiple reasons. First, Owen misstates the decision in *Brown v. Diversified Plastics, LLC, supra*. In *Brown*, the Court of Appeals, sitting en banc, did *not* interpret the application of the election of remedies doctrine in *Vaezkoroni* as dicta. The *Brown* court only considered

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[9] *Burton v. Kentucky State Police*, 341 S.W.3d 589, 592-93 (Ky. App. 2011); *McKissic v. Com. Transp., supra*, (holding that a claimant seeking damages must decide whether to pursue an administrative or judicial avenue for seeking damages from civil rights violations under KRS Chapter 344); *Brown v. Diversified Decorative Plastics, LLC, supra*, (holding that an employee can file a discrimination complaint with the Commission and dismiss it prior to a final order and then file a circuit court action); *Wilson v. Lowe's Home Ctr., supra*; *Founder v. Cabinet for Human Resources*, 23 S.W.3d 221 (Ky. App. 1999) (a claimant cannot file a lawsuit prior to the withdrawal of his pending claim before the Commission); *Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 544-46 (6th Cir. 2012); *Grego v. Mejer, Inc.*, 187 F. Supp.2d 689, 692-93 (W.D. Ky. 2001).

part of the *Vaezkoroni* decision to be dicta, specifically the statement that "[o]nce any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion." *Brown*, 103 S.W.3d at 111 (*citing Vaezkoroni*, 914 S.W.2d at 343). As the *Vaezkoroni* decision concerned a claimant who had pursued his claims through the Commission to a final determination, the *Vaezkoroni* court had not been faced with the question of whether a complainant may withdraw a complaint from the Commission prior to a final determination and proceed with an action in state court;[10] accordingly, the *Brown* court interpreted this language as dicta. *Id.* Conversely, the *Brown* plaintiffs had withdrawn their claims from the Commission prior to a final decision, and the *Brown* court interpreted KRS 344.270 to require a final order from the Commission before a subsequent lawsuit would be barred. *Id.*[11] Accordingly, the *Brown* court's decision confirms the election of remedies doctrine adopted in KRS 344.270. Moreover, the *Brown* decision is clearly distinguishable from this action. Owen did not withdraw her claim from the Commission prior to its determination on the merits; rather, she sought rehearing after an initial adverse ruling, obtained a second and final ruling from the Commission, then failed to elect her right to appeal that final ruling.

Second, nothing in *Grego v. Mejer, supra*, *Thomas v. Forest City Enterprises, Inc. infra*, or *Wright v. Highland Cleaners, Inc., infra*, indicates an abandonment by these

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[10] The *Brown* defendant had argued that the *Vaezkoroni* dicta, coupled with *Founder v. Cabinet for Human Resources*, *supra*, meant that merely filing a complaint without pursuing it to a final determination constituted an election of remedies and barred a subsequent lawsuit by the complainant.

[11] The 1996 amendment added language to the statute concerning finality – "final determination by a state court or **a final order of** the commission;" however, that language applies strictly to a complainant's ability to institute "**administrative** action or proceeding brought **in accordance with KRS Chapter 13B.**" KRS 344.270 (emphasis added). This is a . . . nonsubstantive change necessitated by the amendment related to administrative hearings codified in KRS Chapter 13B. Nothing in this language evidences a clear determination by the General Assembly to depart from the election of remedies provided for in KRS Chapter 344.

decisions of the election of remedies doctrine contained in KRS 344.270. Rather, those cases – like *Brown v. Diversified Plastics, LLC, supra* – held that KRS 344.270 only bars a state court action if the complainant previously pursued a claim before the Commission to a final determination and did not first withdraw the complaint.[12] Appellee would be prejudiced if the Court accepts Owen's tortured construction of these cases. Clearly, these decisions provide no relief to Owen.

Likewise, *Wilson v. Lowe's Home Center* does not support the abandonment of the doctrine of election of remedies. In *Wilson* the plaintiff withdrew his Commission complaint prior to a final determination. *Wilson*, 75 S.W.3d at 231. The *Wilson* court held that the plaintiff "withdrew his administrative claim sufficiently early in the process so as not to prejudice [the respondent] to any significant extent." *Id.* at 236. Thus, the *Wilson* decision supports the application of the election of remedies to KRS 344.270.

Logic, statutory history, and long-standing precedent support the interpretation of KRS 344.270 to apply the doctrine of election of remedies to the administrative and judicial modes of redress created in KRS Chapter 344. It was possible for Owen to (1) withdraw her claim before the Commission and file an action in the Circuit Court, (2) appeal the determination of the Commission to the Circuit Court, or (3) file a claim based on federal law in Circuit Court. She elected to do none of these. Simply stated, Owen has had her "bite of the apple."

III. This Court's Embrace of the Election of Remedies Doctrine Was Correct and Should Not Be Overruled.

The doctrine of election of remedies is a long-standing and valuable fixture of Kentucky law. It is an integral part of the relief afforded to individuals under the

[12] *Grego*, 187 F. Supp.2d at 692-93; *Thomas*, 2001 WL 1772018, at *4; *Wright*, 2003 WL 21241505, at *3.

Kentucky Civil Rights Act, KRS Chapter 344. Owen's position is the result of her desire to bend the law to rectify her personal elections, based upon repeated failure to choose alternative paths that were available to her, not a failing in the statutory scheme. Contrary to her arguments here, the doctrine of election of remedies provides for due process and does not deprive claimants of their right to a jury trial.

a. The Election of Remedies Doctrine is Beneficial to Parties, Administrative Agencies, and the Courts.

The doctrine is grounded in notions of fairness, choice, efficiency, and the axiom that "one is entitled . . . to only one 'bite at the apple.'"[13] The doctrine of election of remedies has been recognized for over a century in Kentucky. *See, e.g., Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co.*, 153 Ky. 20, 154 S.W. 374, 376 (1913). It allows alternate modes of redress to be meaningful and provides that an individual must abide by a final determination in a forum she has chosen to pursue a particular remedy.

While some claimants may prefer to proceed directly to a judicial forum, others may choose the administrative process, which is typically less expensive and time-consuming and yields a decision in a shorter time frame. Requiring claimants to abide by a final order once one is obtained prevents a multiplicity of litigation and inconsistent results. First, the doctrine prevents claimants from forum shopping by initiating a complaint in a new forum after being dissatisfied with the final determination of another forum. Second, it avoids double recovery for the same loss, should the claimant succeed through both modes of redress. Third, it eschews the confusion that could result from a

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[13] *Kindred Hospitals Ltd. P'ship v. Lutrell*, 190 S.W.3d 916, 921 (Ky. 2006), *as corrected* (June 12, 2006); *Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 795 (Ky. App. 1986); *Canamore v. Tube Turns Div. of Chemetron Corp.*, 676 S.W.2d 800, 804 (Ky. App. 1984).

favorable ruling in one forum and an unfavorable ruling in another. Fourth, it prohibits a claimant from requiring a respondent to answer the same charges multiple times in multiple forums.

Additionally, the doctrine of election of remedies preserves the utility of administrative and judicial resources. If a claimant chooses one mode of redress, is unsuccessful, and starts the process over again, the time and effort expended during the first procedure has been wasted, and the result is rendered worthless. Conversely, the doctrine of election of remedies prevents alternate remedies from becoming exercises in futility. It means that a complainant can choose whether to pursue an administrative or judicial proceeding and expend time, effort, and resources to obtain a final result. In fact, the judicial interpretation challenged here permits a claimant to take a Commission action all the way to the point of ruling and, if it appears the ruling may not be in claimant's favor, to withdraw the claim and file an action in the Kentucky courts. In essence, a claimant may already receive two bites at the apple.

b. The Election of Remedies Under KRS 344.270 Provides Fair and Adequate Process.

Owen's erroneous argument that the election of remedies doctrine does not provide adequate and fair process appears to be based upon her allegation that she was denied due process by her own election to pursue her claim with the Commission. Appellant Brief 3-6, 9-10. Accordingly, Owen seeks relief from her own decision to elect an administrative recourse in which to pursue her claims. Owen, however, had several opportunities to diverge from her pursuit of an administrative claim. Obviously, in lieu of filing a lawsuit, Owen was free to file a claim pursuant to KRS 344.450 in circuit court instead of an administrative action. Second, she could have withdrawn her

administrative complaint at any time prior to the issuance of a final determination by the Commission and instituted a Circuit Court action. Third, she could have sought judicial review in circuit court of the Commission's determination under KRS 344.240. Fourth, she could even have taken a "third bite at the apple" had she conformed to the directive contained in the EEOC's Notice of Rights, which clearly informed her of the right to file a lawsuit under federal law based upon her charge in federal or state court within ninety days. Appendix 7. Owen instead chose to pursue claims in circuit court pursuant to state law only, a claim not available to her under the EEOC's Notice of Rights. Having ignored both existing case and statutory law, as well as the aforesaid Notice, Owen now seeks the unprecedented right to try again and have her "third bite."

Owen requests that this Court reject well-established Kentucky law on this subject to relieve her from the consequences of her choices. Owen's claim that she has been denied due process is without merit. Procedural due process requires only notice and an opportunity to be heard by an unbiased decision maker.[14] The Commission's investigation process consists of taking statements from the complainant, respondent, and witnesses, as well as requiring answers to questions and the production of documents relevant to the complaint. KRS 344.190. As part of the investigation, the investigator requests information from both parties. Filing Complaints, Kentucky Commission on Human Rights, http://kchr.ky.gov/filingcomplaints.htm (last visited March 7, 2015).[15] The Commission's procedures provide both respondent and the complainant with notice

[14] *See Whitley v. Robertson Cnty.*, 396 S.W.3d 890 (Ky. 2013); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

[15] For the convenience of the Court, a printout of this page of the Kentucky Commission on Human Rights' website is provided at Appendix 13.

of the charge, an opportunity to present their case, and a decision rendered by an unbiased decision maker. Granting Owen's relief on this basis would render the aforementioned administrative process a nullity – a result clearly not contemplated by Kentucky law.

Before the Court of Appeals, Owen argued that the courts have recognized that the Commission's process is unfair, citing to *Clifton v. Midway College*, 702 S.W.2d 835 (Ky. 1985). She has not revisited that argument in her brief to this Court, as Owen's argument was unfounded and purposefully rejected below. In *Clifton*, the complainant filed an action in state court after her charge of discrimination was shuffled between the EEOC and the Commission, was not investigated by either agency and, most importantly, was never subject to final determination by either agency. She had also cited *Wilson v. Lowe's Home Ctr., supra*, in which the complainant withdrew his complaint after the Commission had scheduled a hearing. In both cases, any perceived alleged "flaw" in the Commission's process was vitiated because the reviewing courts determined that the election of remedies doctrine was not applicable because no final determination had been issued by the Commission. In the case at bar, there is no evidence in the record below that Owen's claim was mishandled - in fact it was investigated twice - and the election of remedies doctrine clearly applies. If Owen was serious about this position, she should have appealed the Commission's finding, which of course she failed to do.

Owen also argues that the Commission's investigative process is unfair and inadequate. Appellant Brief at 4. This statement is not supported by the record. The record demonstrates that (1) the first Commission investigator conducted an investigation including the request for documents and answers to questions, and (2) the second

Commission investigator reinvestigated the claim, including the issuance of a second request for production of documents to the University. Appendix 3; Appendices 4 & 5. Thus, the record demonstrates that Owen's charge was twice investigated and found not to be supported by probable cause. Owen's Complaint below is an attempt to litigate an issue that has already been finally adjudicated by the Commission and is thus barred by the election of remedies. *See, e.g., Canamore*, 676 S.W.2d at 804.

Most importantly, despite the final determination of the Commission, Owen continued to have recourse to the courts. In fact, more than one avenue of possible relief was available to her. First, Owen could have appealed the final determination of the Commission pursuant to KRS 344.240 to the Fayette Circuit Court. Owen criticizes this available avenue of appeal because it has a standard that is more deferential to the administrative decision than a de novo standard. Appellant Brief 4-5. The legislature, however, expressly provided for judicial review of a final determination by the Commission pursuant to a deferential standard under KRS 344.240, instead of the type of de novo action that Owen would have this Court adopt.[16] *Whispering Hills Country Club, Inc. v. Kentucky Comm'n on Human Rights*, 475 S.W.2d 645, 649 (Ky. 1972) (holding that an earlier iteration of KRS 344.240 was valid even though it did not "provide for a de novo trial in circuit court," stating that "whether the reviewing court may or may not conduct a de novo hearing is for the legislature to decide."); *see also Canamore*, 676 S.W.2d at 803. The Kentucky Civil Rights Act affords judicial review of a final determination by the Commission, but, instead of appealing this decision as permitted by KRS 344.240, Owen filed a stand-alone action pursuant to KRS 344.450 alleging disability discrimination in the Fayette Circuit Court.

[16] Such a standard would largely render the administrative forum meaningless.

Further, as previously noted, Owen continued to have recourse to the courts as set forth in the Notice of Rights issued by EEOC which clearly informed her of the right to file a lawsuit under federal law based upon her charge in federal or state court within ninety days of her receipt of that Notice, after which time her "right to sue based on this charge will be lost." Appendix 7. Owen criticizes Kentucky state law for not containing a similar procedure, but filing an action with the Commission is not mandatory. Unlike federal law, the Kentucky Civil Rights Act does not require litigants to exhaust available administrative remedies before pursuing an action in state court. KRS 344.270, KRS 344.450. Additionally, Owen could have pursued federal law claims as set forth in her EEOC Notice of Rights and chose not to. Owen clearly ignored the EEOC directive, and the well-established law of Kentucky should not be abandoned simply because Owen received an unfavorable ruling rendered by the forum she chose.

c. The Election of Remedies Doctrine in KRS 344.270 Does Not Deny Individuals Their Right to a Jury Trial.

Owen incorrectly argues that the election of remedies doctrine denies individuals the right to a jury trial pursuant to Section 7 of the Kentucky Constitution. Ky. Const. § 7. Owen claims that she was not aware that by pursuing a claim with the Commission she was giving up her right to a jury trial. Just as Owen ignored the clear directive of her Notice of Rights, however, Owen's decision to proceed without assistance of counsel (at that stage) does not excuse the failure to know and to comply "with relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

Significantly, Owen never relinquished her right to a jury trial by pursuing her claim with the Commission. Owen's receipt of a final determination from the Commission only limited her from asserting claims pursuant to KRS 344, not federal

claims. As the record establishes, Owen's charge of discrimination was dually filed with the EEOC and Owen received a "right to sue" letter from the EEOC following the final determination of the Commission. Accordingly, while electing her remedy under Kentucky law barred her from asserting KRS 344 claims in state court, Owen could have brought her claims of discrimination under Title VII in either the state or federal court and trial by jury; Owen's choice to ignore this option – presumably made with the advice of counsel – is what denied her a jury trial.

Notwithstanding the above, the issue whether the election of remedies doctrine violates Section 7 of the Kentucky Constitution has already been decided and should not be in question. In *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981), this Court held that a jury trial is not required for administrative adjudication under the Kentucky Civil Rights Act and stressed that administrative bodies, such as the Commission, may ascertain the facts and administer the law whenever the statute adequately defines prohibitive behavior, and that such acts are not unconstitutional usurpations of judicial power when judicial review is available.[17] This Court's precedent should not be disturbed.

Moreover, in *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992), this Court addressed the constitutionality of the Commission's procedures in light of the guarantees in Section 7 of the Kentucky Constitution. The Court determined that the Kentucky Civil Rights Act creates both a right to a jury trial and the right to "redress by administrative procedure." *Id.* at 820. These two processes are "intended to give those individuals who do not wish to proceed before the [Kentucky Commission on Human

[17] *Id.* at 854-55; *see also Kentucky Alcoholic Beverage Control Bd. v. Jacobs*, 269 S.W.2d 189 (Ky. 1954); *Keller v. Kentucky Alcoholic Beverage Control Bd.*, 130 S.W.2d 821 (Ky. 1939).

Rights] an opportunity in circuit court to have the fullest range of remedies allowable." *Id.* (*citing Canamore*, 676 S.W.2d at 804). Individuals may therefore choose their preferred "mode of redress" and are free to elect to pursue their claims for alleged violations of KRS 344 in state court. Kentucky law is clear that should a complainant elect to pursue an administrative remedy to a final determination, judicial appeal of that determination is available. *See* KRS 344.240. Kentucky law is likewise clear that complainants may withdraw their claim before the Commission at any point and file an action in circuit court, an option that Appellant chose to ignore. *See Brown*, 103 S.W.3d at 112; *Wilson*, 75 S.W.3d at 233. As discussed above, under the doctrine of stare decisis, this Court should not revisit its interpretation of the Commonwealth Constitution absent a showing that the result is contrary to the original public meaning of the Constitution and results in an unworkable rule. No such showing has been made in this case, and this Court should not alter its prior rulings regarding the constitutionality of the doctrine of election of remedies.

Owen asserts that waiver of the right to a jury trial must be made in a knowing and voluntary manner. While that is the applicable standard for waiver in a criminal matter, waiver of the right to a jury trial in a civil matter may be made by simply failing to demand trial by jury or, in the context of a civil rights violation, by pursuing the administrative remedy to a final determination. *See* CR 38.04; *Brown*, 103 S.W. 3d 108; *Wilson*, 75 S.W.3d 229. Here, Owen waived her right to a jury trial on claims pursuant to KRS 344 when she elected the administrative process to adjudicate her claim. KRS 344, unlike Title VII, does not require adjudication of a civil rights complaint at the administrative level prior to filing such charge in civil court. As such, Owen's waiver of

her right to a jury trial can be inferred from her election of the administrative process over the civil process and further, by her election not to seek a trial based on any claim she could have asserted under federal law.

Owen could have diverted from her chosen path to pursue an action in state court based on state law several times. She did not, and now asks this Court to absolve her of her failures at the expense of well-reasoned precedent. Election of remedies is a necessary piece of the alternative remedy scheme adopted in KRS Chapter 344, and the 1996 amendment does not support revision of this Court's interpretation of KRS 344.270.

IV. Any change in the Election of Remedies under KRS 344.270 Should be Applied Prospectively, not Retrospectively.

For the reasons set forth above, the Court should not abandon the doctrine of remedies provided for in KRS 344.270. If, however, the Court adopts a new interpretation of KRS 344.270, the change should not be applied retroactively to Owen.

It is well-established that when a new rule "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," there is a general presumption against applying the rule retroactively.[18] It is appropriate for a decision to apply prospectively "in order to avoid injustice of hardship," particularly "where property rights are involved and parties have acted in reliance on the law as it existed, and a contrary result would be unconscionable."[19]

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[18] *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 559 (1991); *Gosa v. Mayden*, 413 U.S. 665, 673, (1973); *Kindred Hospitals Ltd. P'ship*, 190 S.W.3d at 922.

[19] *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991); *see also Jacobs v. Lexington-Fayette County Urban Government*, 560 S.W.2d 10, 14 (Ky. 1978); *Bishop v. Bishop*, 343 S.W.2d 587 (Ky. 1961).

Here, Owen does not dispute that her lawsuit is barred under the current judicial interpretation of KRS 344.270. She has already filed a claim with the Commission, taken it through the reconsideration process and pursued it to a final determination. The University has already answered the claims twice before the Commission. Should the bar of the doctrine of election of remedies be removed from KRS 344.270, the retroactive application of this new interpretation to Owen's claim would require that the University defend Owen's claim a third time and could potentially expose the University to an award of damages that were not previously recoverable.

Accordingly, should the Court abandon the doctrine of election of remedies in KRS 344.270, its decision should only apply prospectively and should not apply retrospectively to Owen's lawsuit.

CONCLUSION

For the foregoing reasons, Appellant's arguments for the abandonment of the doctrine of the election of remedies under KRS 344.270 should be rejected. Kentucky law on this point is well-settled, justified, and provides a fair and adequate process for litigants. Owen should not be relieved from the consequences of her multiple choices in this matter, and the University having defended Owen's claims in the forum of her choice, should not be required to defend "another bite of the apple." The Court should affirm the courts below.

Alternatively, any change to the interpretation of KRS 344.270 should be applied prospectively, not retrospectively to resurrect Appellant's lawsuit.

Respectfully submitted,

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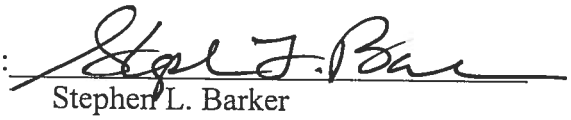
BY: 

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