COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2015-CA-000769

CHARLES COWING — APPELLANT

vs. **APPEAL FROM FAYETTE CIRCUIT COURT**
CIVIL ACTION NO. 14-CI-2514

ANDY COMMARE — APPELLEE

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REPLY BRIEF FOR APPELLANT

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SUBMITTED BY:

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Certificate of Service

It is hereby certified that a true copy of this Reply Brief for Appellant was mailed postage prepaid, this 17 day of November 2015, to the following: Hon. Thomas L. Clark, Fayette Circuit Court, 120 N. Limestone Street, Lexington, KY 40507; and Kathleen Biggs Wright, Frost Brown Todd, 400 W. Market Street, 32d Floor, Louisville, KY 40202. It is certified that the record has been returned to the Fayette Circuit Court, Appeals Division.

Robert L. Abell

Counsel for Appellant

Reply Argument

1. The Intracorporate Conspiracy Doctrine Does Not Bar Cowing's Aiding and Abetting Claim Under KRS 344.280(2)

Appellee's argument that the intracorporate conspiracy doctrine bars Cowing's aiding and abetting claim pursuant to KRS 344.280(2) is meritless as shown by the following.

Appellee does not dispute that Andy Commare, an individual, or that Lockheed Martin, a corporation, is each a "person" as defined by the plain statutory language of both KRS 344.010(1) and KRS 344.280(2).

Although plain statutory language defines both Commare and Lockheed Martin as each a "person", defendant argues that the intracorporate conspiracy doctrine, which has never been applied by a Kentucky state appellate court, overrides the plain statutory language. Appellee asks this Court to disregard a basic rule of law: courts "look first to the language of the statute, giving the words their plain and ordinary meaning." *Richardson v. Louisville/Jefferson Co. Metro Govt.*, 260 S.W.3d 777, 779 (Ky. 2008).

Appellee does not dispute that the intracorporate conspiracy doctrine is a tool of statutory construction created to permit sensible application and administration of the Sherman Antitrust Act. *See Brief for Appellant* at 6. Appellee offers no argument as to how or why the intracorporate conspiracy doctrine would be consistent with the aims and purposes of the Kentucky Civil Rights Act (KCRA).

Appellee does not dispute that the KCRA should "be interpreted broadly in order best to achieve its anti-discriminatory goals." *Brief for Appellant* at 8 *quoting Kearney v. City of Simpsonville*, 209 S.W.3d 483, 485 (Ky. App. 2006). Instead, appellee asks this Court to disregard plain statutory language and narrow the Act's reach.

Appellee does not dispute that "[i]t is well-established that an agent for a corporation is personally liable for a tort committed by him although he was acting for the corporation." *Brief for Appellant* at 11, *quoting Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 425 (Ky. App. 1978). Appellee likewise does not dispute or contest that this Court should presume that this long-established principle of Kentucky law was incorporated into the KCRA. *See Brief for Appellant* at 11-12. And yet appellee contends that this Court should disregard this established principle of Kentucky law in favor of the intracorporate conspiracy doctrine, a doctrine not before applied by a Kentucky appellate court.

Appellee does not dispute that the plain statutory language of KRS 344.280(2) recites conspiracy and aiding and abetting as alternative grounds for liability. Appellee urges instead that this alternative recitation is superfluous, since appellee contends that conspiracy and aiding and abetting liability mean and are the same thing. This argument is contrary to another point of Kentucky law: "When interpreting statutes, we presume the General Assembly intended for all parts of the statute to have meaning." *City of Lebanon v. Goodin*, 436 S.W.3d 505, 513 (Ky. 2014).

Appellee misstates and misrepresents the court's holding in *McGee v. Continental Mills, Inc.*, 2009 WL 4825010 (W.D. Ky., Dec. 11, 2009). *McGee* did not involve or consider an aiding and abetting claim under KRS 344.280(2).

Following the misrepresentation regarding *McGee*'s holding appellee compounds and enlarges his error by claiming that three cases, *Roof v. Bel Brands USA, Inc.*, 2014 WL 5243051 (W.D. Ky. Oct. 15, 2014), *Bzura v. Lumber Liquidators, Inc.*, 2014 WL 798155 (W.D. Ky. Feb. 27, 2014) and *Dunn v. Gordon Food Services, Inc.*, 2010 WL 4180503

(W.D. Ky. Oct. 20, 2010), all "held that the intra-corporate conspiracy doctrine bars KRS 344.280(2) claims when the person who allegedly ... aided and abetted discrimination by another person against the plaintiff are supervisors of the same employer." *Brief for Appellee* at 9. None of these cases involved an aiding and abetting claim; accordingly, none could have decided the issue that appellee claims wrongly they decided. The Court is invited to review the complaints in those cases or request the record in this case be supplemented by their filing.

Appellee's assertion, *Brief for Appellee* at 10, that the district court's decision in *Adams v. UPS,* 2006 WL 1687699 (W.D. Ky. June 19, 2006), cannot be reconciled with *McGee* is incorrect. First, *Adams* like this case included an aiding and abetting claim under KRS 344.280(2) and *McGee* did not; thus the court had no need to reconcile and it does not appear the court was requested to do so.

Contrary to appellee's assertion at p. 12 of his brief, neither this Court's decision in *Conner v. Patton,* 133 S.W.3d 491, 493 (Ky. App. 2004) nor the Sixth Circuit's in *Wathen v. General Electric,* 115 F.3d 400 (6th Cir. 1997), held that individuals cannot be liable on a claim under KRS 344.280(2). In reality, the Sixth Circuit noted the limits of *Wathen*'s holding in *Morris v. Oldham Co.,* 201 F.3d 784, 794 (6th Cir. 2000), and held that KRS 344.280 "plainly permits the imposition of liability on individuals."

In sum, appellee's argument asks this Court to disregard plain, statutory language, numerous principles of Kentucky law, the emphatically-stated legislative purpose of the KCRA in favor of a legal doctrine – the intracorporate conspiracy doctrine – never applied or considered in any context by a Kentucky appellate court and apparently never applied by any court anywhere to bar an aiding and abetting claim.

2. Fact Issues for a Jury Exist Regarding Appellee's Aiding and Abetting Liability, Even if Appellee's Factual Argument May be Properly Presented to this Court

Appellee filed his motion for summary judgment prior to completion of discovery, and the court below did not rule on the factual argument presented in Point II of the appellee brief. Appellee did not request a specific ruling on this argument from the court below. A denial of a summary judgment based on a disputed issue of fact is not appealable. *Bell v. Harmon,* 284 S.W.2d 812, 814 (Ky. 1955). It is also improper for a trial court to grant summary judgment on a factual basis prior to completion of a discovery. *Suter v. Mazyck,* 226 S.W.3d 837, 841 (Ky. App. 2007). The cases cited by appellee, *Brief for Appellee* at 15 n. 4, do not counter these authorities, since they do not involve an argument that summary judgment may be affirmed on a factual ground not reached by the court below and even where discovery was not complete. Accordingly, the court below should not be affirmed based on an initial holding by this Court of no dispute of material fact.

Nevertheless, it is possible for a jury to find reasonably that Commare substantially assisted Lockheed Martin's disability discrimination toward Cowing. First, aiding and abetting liability arises where the defendant knowingly gave "substantial assistance and encouragement" to the wrongful conduct. *See Miles Farm Supply, LLC v. Helena Chem. Co.,* 595 F.3d 663, 666 (6th Cir. 2010). Second, Cowing sought on September 9, 2013, to return to work after a brief medical leave and could have resumed his same job without any accommodation at all. (Cowing depo., RA 61). As part of its effort to unlawfully exclude him from its workforce, Lockheed Martin fabricated a recitation of the essential functions of Cowing's job. (Cowing depo., RA 315-6). Cowing's view was corroborated

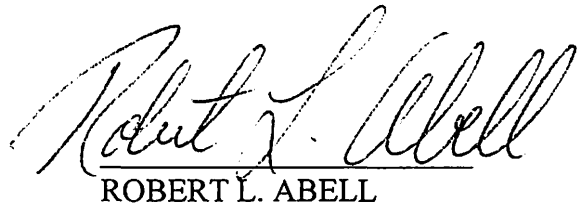
by other employees. (David King affidavit, RA 459-62; Mike Carter affidavit, RA 464-8). Lockheed Martin even went so far as to argue incredibly that a 20 lb. weight lift limit applied to lifting 10 lbs. or less. (Miculinich depo., RA 448).

Commare advocated against Cowing's return, cited prior experiences where workers with restrictions had proven a liability, and Commare's input contributed to Cowing's exclusion. (Miculinich depo., RA at 449-51). Furthermore, another of Lockheed Martin's managing agents, Rob Gates, reported to Cowing that Commare was blocking Cowing from returning to work. (Cowing depo., RA at 439). This evidence must be viewed most favorably to Cowing, and it is sufficient to establish Commare's aiding and abetting liability. Accordingly, a jury could find that Commare substantially assisted and encouraged Cowing's exclusion from Lockheed Martin's workplace. Therefore, summary judgment cannot be affirmed.

Conclusion

For the foregoing reasons and those stated in the *Brief for Appellant,* the Court should reverse the court below and remand this case for trial.

Respectfully submitted,



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