

**ORIGINAL**

**IN THE OHIO COURT OF CLAIMS  
COLUMBUS, OHIO**

<b>JAMES M. FLEMING,</b>	)	<b>CASE NO. 2011-09365</b>
	)	
<b>PLAINTIFF,</b>	)	<b>JUDGE JOSEPH T. CLARK</b>
	)	
<b>V.</b>	)	<b>PLAINTIFF'S REPLY BRIEF</b>
	)	<b>DAMAGES PHASE</b>
<b>KENT STATE UNIVERSITY,</b>	)	
	)	
<b>DEFENDANT.</b>	)	
	)	

Now comes Plaintiff, James M. Fleming, and for his Reply to Defendant's Trial Brief states as follows:

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COURT OF CLAIMS  
OF OHIO

**I. FACTS**

**1. Negotiations and Contract.**

In March 2010, after a period of negotiations, Plaintiff James Fleming ("Mr. Fleming") and Kent State University ("KSU") entered into an employment contract wherein the parties agreed Mr. Fleming would serve as an assistant coach reporting to the defensive coordinator of the Kent State Football team ("Contract"). See Transcript ("T") at 18-19, 26-29, 39, 47-48, 52, 55-62; Plaintiff's Exhibit C (a copy of the executed contract.) It is important to emphasize that the Contract was drafted by KSU legal counsel. T at 17-18. Now KSU argues, that the language of the Contract is not legally binding on the parties.

The Contract at ¶6 provides that the initiator of a termination of the Contract is liable to the other for specific agreed upon damages:

“. . . if this party terminates this Agreement prior to June 30, 2012 except for cause as defined in Rule 3342-09(D)(2) of the Administrative Code as contained in the University Policy Register, the initiating party shall pay to the other the

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agreed upon early termination cost. If the University is the initiator, it shall pay the balance of the then base salary due for the remaining term. If Fleming is the initiator, he shall pay the University in accordance with the declining scale below.”

See Plaintiff’s Trial Exhibit C. This language is common in Defendant’s contracts with other coaches. See Exhibit A to Plaintiff’s Trial Brief, Defendant’s discovery responses and documents produced at pages Bates Nos. KSU 000547, KSU 000552, KSU 000556, KSU 000561, KSU 000566, KSU 000570, KSU 000573, KSU 000576, KSU 000579, KSU 000588, KSU 000592, KSU 000598, KSU 000603, KSU 000606, KSU 000610, KSU 000614. Each of these contracts between KSU and an athletic coach contain early termination clauses in which the initiator of the termination agrees to pay a specified sum to the non-initiating party.

Under paragraph 6 of the Contract, Mr. Fleming “agrees that he will not seek potential job prospects nor accept a position within the MAC, nor will he seek job prospects with any other program during the term of this agreement.” See Trial Exhibit C at page 2, paragraph 6. This contributed to the uncertainty of damages he may have incurred upon a breach by KSU. His ability to mitigate his damages was limited by the express terms of the Contract. KSU benefited from this language in that it obtained the services of a well-seasoned coach with over 26 years of coaching experience, with little risk of losing his services for the term of the Contract. T. at 61-62.

Paragraph 6 of the Contract was important to Mr. Fleming as it protected him and his family from the possibility that the then head coach at the University would be terminated prior to the end of Mr. Fleming’s Contract. T at 59.

By agreeing to the specific amount due to the non-breaching party, the parties to the Contract acknowledged the uncertainty of damages upon breach. Mr. Fleming acknowledged the uncertainty in that if the head coach did not perform, he would be terminated, leaving Mr. Fleming in a position where his continued employment would be at the will of the new head coach. Trial Transcript (“T”) at p 59-61. In January 2010 he was notified that his services under the terms of the Contract were not needed. T at 63, 68-69. While the Contract was of a certain term, 28 months, T. at 21, it was uncertain at the time Mr. Fleming signed the Contract that he would be permitted to serve out that term. This contributes to the uncertainty of the damages he may incur upon termination without cause by the KSU. He was left with no employment in January 2011. He made efforts to obtain, and did obtain new employment in late 2011. See Exhibit A, attached to Trial Brief at document Bates No. KSU 000622; Exhibit B, attached to Trial Brief at document Bates Nos. Fleming 0009-0010 (Fleming executed a contract with UCF Athletics Association, Inc. with a term of December 16, 2011 to January 31, 2013.). He was unemployed during the 2011 college football season.

Additional evidence of the uncertainty of damages to Mr. Fleming for early termination of the Contract includes the numerous incentive clauses set forth in the Contract. Plaintiff’s Exhibit C at page 1. These clauses effect his compensation and an early termination could very well have affected his entitlement to these incentives. Plus there would be no way for him to mitigate those types of damages, as they relate to the specific performance of the football team.

## **II. LAW AND ARGUMENT**

In *O’Brien v. Ohio State University*, 139 Ohio Misc. 36, 45-46 (Ohio Ct. Cl. 2006) this Court set forth the test to judge a stipulated damages provision:

The test developed in Ohio to judge a stipulated damages provision was set forth in *Samson Sales*, *supra*, as follows: "Where the parties have agreed on the amount of

damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent [859 N.E.2d 615] with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." *Id.* at paragraph one of the syllabus, citing *Jones v. Stevens* (1925), 112 Ohio St. 43, 146 N.E. 894, at paragraph two of the syllabus. Whether a stipulated damages provision constitutes enforceable liquidated damages or an unenforceable penalty is a question of law for the court. *Lake Ridge Academy*, 66 Ohio St.3d at 380, 613 N.E.2d 183.

KSU contends that Mr. Fleming has not satisfied the first portion of the test: the damages would be uncertain as to amount and difficult of proof. At the time he entered into the Contract neither he nor KSU were certain as to the amount. Further the damages would be difficult to prove. The uncertainty of the damages Mr. Fleming would incur upon a breach by KSU was further compounded by the tenuous position the then head coach had with KSU. Mr. Fleming walked into a situation where his tenure at KSU was, at best, uncertain. The damages clause was an incentive for him to take the position with KSU, as neither party could determine, at the time they entered into the Contract whether KSU would honor the full term of his contract.

In *O'Brien* this Court addressed the uncertainty of a similar clause in a coach's contract. This Court held that "[A]dditionally, the contract contained numerous incentive clauses that affect both the amount of plaintiff's compensation and the duration of his employment. Thus, there is no doubt that at the time of contracting, the amount of plaintiff's damages in the event of any breach by defendant was 'uncertain as to amount and difficult to prove.'"

"A valid liquidated damages clause contemplates the nonbreaching party's inability to identify and mitigate its damages. If the damages are uncertain as to amount and difficult of proof, as they must be, the nonbreacher cannot be expected to reduce them after the breach."

*Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376, 385 (1993). Under the facts known at the time the parties entered into the Contract, the damages were uncertain as to amount and would have been difficult to prove. Therefore, Mr. Fleming is entitled to recover the damages contemplated by the parties at the inception of the Contract.

Finally, “[W]hether a stipulation providing for liquidated damages for the breach of a contract is to be construed as liquidated damages or a penalty depends upon the intention of the parties.” *Doan v. Rogan*, 79 Ohio St. 372 (1909) (at syllabus, para. 2). Both Mr. Fleming and KSU contemplated that the early termination clause was construed as liquidated damages. See T at 22-23, 59-61.

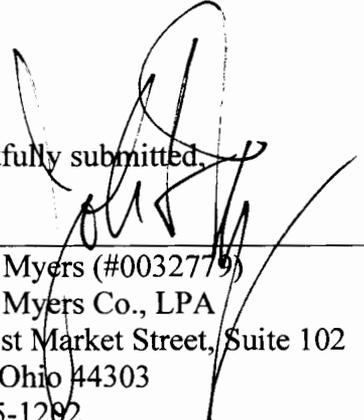
KSU negotiated and drafted the Contract. Only after KSU terminated Mr. Fleming, without cause, does it assert that the damages due to Mr. Fleming constitute a penalty. If this is the case, then KSU has systematically misrepresented to Mr. Fleming and its athletic coaches that it will honor the early termination clause that is standard in its athletic coach contracts. KSU’s argument is contrary to the express terms of the Contract and is contrary to law.

### **III. CONCLUSION**

The parties to the Contract negotiated and entered into a contract that provided for early termination costs the initiator of the early termination would be responsible to pay the other party. The University initiated early termination in the twelfth month of the twenty eight month term of the Contract, leaving Mr. Fleming unemployed. The early termination cost was the amount the parties agreed Mr. Fleming would be entitled to recover upon early termination. When the parties entered into the Contract the damages to either Mr. Fleming or KSU were uncertain as to amount and difficult of proof. Under the terms of the Contract Mr. Fleming is entitled to recover the early termination cost of \$97,619.91 from the University.

Wherefore, Mr. Fleming respectfully requests that this Court enter a judgment in favor of Mr. Fleming and issue an Order awarding him \$97,619.91 as the early termination cost due to him under the terms of the Contract.

Respectfully submitted,



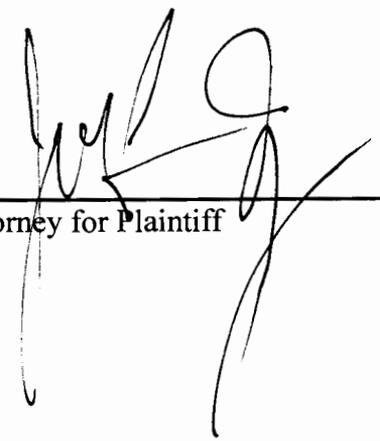
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#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing reply to Defendant's Trial Brief was served this 1<sup>st</sup> day of August, 2013 by regular US mail and email upon:

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August 1, 2013

Mark H. Reed  
Clerk of the Court  
The Ohio Judicial Center  
65 South Front Street, Third Floor  
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2013 AUG -2 AM 10: 52

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Re: James Fleming v. Kent State University; Case No. 2011-09365

Dear Sir:

Enclosed for filing please find Plaintiff's Damages Phase Reply to Defendant's Trial Brief.

Thank you for your prompt attention to this matter.

Very truly yours,

John F. Myers

Enclosure

cc: Randall W. Knutti, Esq.  
Christopher P. Conomy, Esq.

<sup>1</sup> Please note new address and email.