

ORIGINAL

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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

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JAMES M. FLEMING,

Plaintiff,

-vs-

KENT STATE UNIVERSITY,

Defendant.

**Case No. 2011-09365
(Judge Patrick M. McGrath)**

**Kent State University's
Memorandum on Remand**

I. Overview

Kent State University reassigned James Fleming from his position as an assistant football coach to a new one as an assistant to the Athletics Director at the same salary he was earning as a coach. The reassignment, in other words, caused him no damages at all. But Mr. Fleming refused to accept that or any other reassignment. Instead, he quit and found another job in Florida at a much higher salary. In this lawsuit, he says he deserves a \$95,333.33 windfall by virtue of a so-called liquidated-damages clause—a clause in his employment contract that would have applied only if KSU had fired him without cause.¹ This Court analyzed the clause under the first prong of the three-pronged liquidated-damages test set forth in *Samson Sales, Inc. v. Honeywell, Inc.*,

¹ The clause applied only to “terminations,” not “reassignments.” See Plaintiff’s Ex. c at ¶6 (admitted during the liability hearing). If Mr. Fleming had remained at KSU, he “would have received \$95,333.33 (\$5,958.33 X 16 months).” See Damages Decision at 4. After quitting and taking a job at the University of Central Florida, he earned \$102,635.53 during that same period. *Id.*

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12 Ohio St. 3d 27, 29 (1984).² And it held that the clause was an unlawful penalty—not a bargained-for estimate of Mr. Fleming’s possible damages—because damages were neither “uncertain as to amount” nor “difficult of proof.” The Court of Appeals reversed that finding and instructed this Court to consider the other two prongs of the *Samson Sales* test on remand. See *Fleming v. Kent State University*, 2014-Ohio-3471, ¶¶33-34 (10th Dist.). Those two prongs compel the conclusion that the clause is an unlawful penalty.

II. A \$95,333.33 windfall is “manifestly disproportionate” to “the possible damage that reasonably could be foreseen” from Mr. Fleming’s reassignment to a new position at the same salary. Therefore, the clause on which Mr. Fleming relies is an unlawful penalty under the second prong of the *Samson Sales* test.

In *Samson Sales*, the Supreme Court considered a purported liquidated-damages clause that capped the damages a burglar-alarm company’s customer could recover for the company’s breach of contract at \$50. An alarm had sounded at the customer’s business, but the company neither alerted the police nor the customer—as the contract

² “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 with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.” *Id.*, Syllabus at ¶1.

required—and the business lost \$68,303 worth of merchandise as a result. *Id.*, 12 Ohio St. 3d 27 at 27. The court found as a matter of law that the clause was a penalty, not a good-faith estimate of the customer’s potential damages. “As to the second [prong], the stated sum of \$50 in the contract involved in this case is manifestly disproportionate to either the consideration paid by [the customer] or the possible damage that reasonably could be foreseen from the failure of [the burglar-alarm company] to notify the police of the burglary.” *Id.* at 28-29.

The second prong “requires that liquidated damages must bear a reasonable, not necessarily exact, relation to actual damages.” *Triangle Properties, Inc. v. Homewood Corp.*, 2013-Ohio-3926, ¶44 (10th Dist.). “Although a party damaged by the acts of another is entitled to be made whole, the injured party should not receive a windfall; in other words, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred.” *Id.* at ¶52 (emphasis added). Mr. Fleming did not lose a dime as a result of his reassignment, and he has no right to a \$95,333.33 windfall courtesy of Ohio’s taxpayers.

III. “It is beyond comprehension that the parties intended” for Mr. Fleming to receive \$95,333.33 in damages for a breach of contract that caused him no damages at all. Therefore, the clause on which Mr. Fleming relies is an unlawful penalty under the third prong of the *Samson Sales* test.

Samson Sales summarized its holding as to the test’s third prong by noting that “it is beyond comprehension that the parties intended that damages in the amount of \$50 should follow the negligent breach of the contract.” *Samson Sales*, 12 Ohio St. 3d 27 at 30. It is equally “beyond comprehension” that KSU intended to pay an assistant coach nearly \$100,000 as compensation for having reassigned him from the playing field to the executive suite at the same salary had before.

IV. Conclusion

The Court of Appeals declined to address the second and third prongs of the *Samson Sales* test, instructing this Court to address them instead. Those two prongs compel the conclusion that the clause in Mr. Fleming’s employment contract is a penalty and not a valid liquidated-damages clause. KSU therefore urges this Court to award Mr. Fleming \$25 in damages, representing the cost of his filing fee, just as it did before.

Respectfully submitted,

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Certificate of Service

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