

**ORIGINAL**

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

FILED  
COURT OF CLAIMS  
OF OHIO

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<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 DAMAGES</b>
	)	<b>PHASE BRIEF ON REMAND</b>
<b>KENT STATE UNIVERSITY,</b>	)	
	)	
<b>DEFENDANT.</b>	)	
	)	

Now comes Plaintiff, James M. Fleming, by and through undersigned counsel hereby submits his damages phase trial brief.

**I. PROCEDURAL STATUS**

The parties to this action each appealed this Court's Judgment Entry of October 4, 2013 ("Entry"). The Tenth District Court of Appeals ("Tenth District") in a decision dated August 13, 2014 affirmed in part and reversed in part the Entry. On September 12, 2014 the Tenth District entered a Judgment Entry consistent with its August 12, 2014 Decision remanding the case to this Court for further proceedings in accordance with law and consistent with the Decision. Defendant filed an application for reconsideration with the Tenth District, which the Tenth District denied in a decision dated October 8, 2014. This matter is properly before this Court.

**II. ISSUES ON REMAND**

This case arose out of Mr. Fleming claim that he is entitled to liquidated damages under the terms of an employment contract entered into between him and Defendant in March 2010. Under the terms of the Contract he agreed to perform as a coach for the Kent State men's football team (hereinafter "Contract"). The Contract contained reciprocal liquidated damages clauses which set forth stipulated damages to be paid by the party terminating the Contract.

**ON COMPUTER**

After the damages phase of the trial, this Court applied the test set forth in *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St. 3d 27, syllabus ¶2 (1984)<sup>1</sup> to determine the validity of the liquidated damages clause:

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."

This Court held that Mr. Fleming's damages were not uncertain as to amount and difficult of proof and thus the liquidated damages clause was an unenforceable penalty. The Tenth District concluded the contrary, and reversed and remanded the case to this Court for a finding as to whether Mr. Fleming satisfied the second and third prong of the *Samson Sales test*, and, if so, to determine the damages due Mr. Fleming under the liquidated damages clause.

Plaintiff also seeks a calculation of damages and prejudgment interest.

### III. 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.) The Contract was of a certain term, 28 months. T. at 21. The Contract was drafted by KSU legal counsel with input and direction

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<sup>1</sup> In *Sampson Sales*, the Ohio Supreme Court simply adopted the test set forth in *Jones v. Stevens*, 112 Ohio St. 43 (1925).

from the KSU Athletic Director. T at 17-18. The Athletic Director supports the head coach and provides the necessary resources to attract the most outstanding candidate for a coaching position. T at 22, 39, 44.

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 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; see also Defendant Trial Exhibits A and B (KSU coach contracts with liquidated damages provisions). Each of these contracts between KSU and an athletic coach contain early termination clauses (liquidated damages clauses) in which the initiator of the termination agrees to pay a specified sum to the non-initiating party as liquidated damages. This was a standard clause KSU used in contracts with coaches. T at 22. Clearly, Defendant's extensive experience with this type of transaction is undisputed.

In January 2011 Mr. Fleming was notified that his services under the terms of the Contract were not needed. T at 63, 68-69. Effective March 10, 2011, Mr. Fleming was terminated. T at 75: Plaintiff's Exhibit F.

#### IV. LAW AND ARGUMENT

In *O'Brien v. Ohio State University*, 139 Ohio Misc. 36, 45-46 (Ohio Ct. Cl. 2006) this Court applied the test developed in Ohio 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.

This Court upheld the liquidated damages clause in *O'Brien*, where the coach was terminated three years prior to the end of the term of his contract. *Id.* The decision was affirmed on appeal. *O'Brien v. Ohio State University*, 2007-Ohio-4833, 06AP-946 (10<sup>th</sup> District 2007). In the instant case, the Tenth District determined that Mr. Fleming satisfied his burden under the first prong of the *Samson Sales* test. The remaining issues for determination are the second and third prong of the *Samson Sales* test. At the outset it is important to note:

"that when a liquidated damages provision is challenged, *the court must step back and examine it in light of what the parties knew at the time the contract was formed and in light of an estimate of the actual damages caused by the breach.* If the provision was reasonable at the time of formation and it bears a reasonable (not necessarily exact) relation to actual damages, the provision will be enforced. See 3 Restatement of Contracts, *supra*, at 157, Section 356(1).

*Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376, 382 (1993). (Emphasis added).

- A. The Contract as a whole is not manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties.**

The second prong of the *Sampson Sales* test looks to whether the “contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify that it does not express the true intention of the parties. *Sampson Sales, supra*, at 29.

The Ohio Supreme Court has long recognized that “the parties themselves best know what their expectations are in regard to the advantages of their undertaking and the damages attendant on its failure, and when they have mutually agreed on the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce the agreement as it is the other provisions of the contract.” *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180, 185 (1909), quoting *Doan v. Rogan*, 79 Ohio St. 372, 388 (1909).

Clearly the parties’ intent was set forth in the Contract. Whether Mr. Fleming or Defendant was seeking liquidated damages under the terms of the Contract, each calculation was to be based upon Mr. Fleming’s salary. At the time of contracting, with the uncertainty of the damages that might occur from a breach, a calculation based upon lost salary was a reasonable measure, since neither party could begin to estimate the value of the incentives set forth in the Contract or other business opportunities that may have been available to Mr. Fleming.

Laing Kennedy, the Director of Intercollegiate Athletics, negotiated the Contract with Mr. Fleming. T at 17-18, 55-58. The University legal counsel drafted the Contract. T at 17-18. The University clearly had the opportunity to prepare, object to or modify the terms of the Contract. Interestingly, the Contract provides that Mr. Fleming is liable to pay damages to the University if he initiates termination of the Contract. *See*, Plaintiff’s Trial Exhibit C. Each party to the Contract agreed to the liquidated damages each would be liable to pay other as an early termination cost. The mutuality of the termination costs gave either party the option to terminate the Contract for other than cause, but defined the liquidated damages that would accompany such

a decision. The record simply does not support an argument that the liquidated damages clause was unconscionable.

KSU recently prevailed in a comparable situation in which a head basketball coach breached the terms of an employment contract by leaving to coach at another school prior to the end of the contract. See, *Kent State University v. Gene A. Ford*, 2015-Ohio-41, No. 2013-P-0091 (11<sup>th</sup> District Court of Appeals). (A copy is set forth in the Appendix to this brief.) In *Ford*, KSU sought and was awarded damages in the amount of \$1.2 million under the terms of a liquidated damages clause of a coaching contract similar to the clause in Mr. Fleming's contract.

In *Ford*, the court held that:

In cases involving a valid liquidated damages clause, however, "***the party seeking such damages need not prove that actual damages resulted from a breach.***" (Citation omitted.) *Physicians Anesthesia Serv., Inc. v. Burt*, 1st Dist. Hamilton No. C-060761, 2007-Ohio-6871, ¶ 20; *USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist.1993) (the court agreed with the "majority view" that proof of actual damages is not required to prevail on a liquidated damages claim); *Kurtz v. Western Prop., LLC*, 10th Dist. Franklin No. 10AP-1099, 2011-Ohio-6726, ¶ 41.

*KSU v. Ford*, at ¶37. (Emphasis added.) An inquiry that requires the demonstration of actual damages proportionate to the liquidated damages must focus on the time at which the parties contemplated and negotiated the liquidated damages clause. In the instant case the Tenth District concluded that "at the time of contracting in this case, damages were uncertain as to amount and difficult of proof. *Fleming* at ¶31. In a footnote, the Tenth District noted "that even at the time of breach, the parties could not know what future bonuses or business opportunities Fleming was missing out on due to the early termination. *Id.* at fn. 3. There is simply no evidence to support a conclusion that the damages due Mr. Fleming under the liquidated damages clause are disproportionate in amount so as not to support the true intention of the parties.

In light of the outcome in *Ford*, Defendant is hard pressed to challenge as unconscionable, unreasonable, and disproportionate in amount a liquidated damages clause it negotiated and drafted. The record reflects that Defendant routinely used such clauses in contracts with coaches. It seeks to enforce this clause against Mr. Fleming when in the same breath is pursues coaches for liquidated damages under a comparable liquidated damages clause. What is unreasonable and unconscionable are Defendant's actions toward Mr. Fleming.

**B. 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.**

The third prong of the *Sampson Sales* test looks to whether 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.

KSU and Mr. Fleming freely entered into a contract that specified damages to be paid by the party that initiates an early termination of the Contract. A court must interpret a contract so as to carry out the intent of the parties. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997).. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 638 (1992).. Courts have an obligation to give plain language its ordinary meaning and to refrain from revising the parties' contract. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978), , and paragraph two of the syllabus. In the absence of fraud or bad faith, a court will not save one party from an improvident contract when both parties had equal bargaining power. *Ullmann v. May*, 147 Ohio St. 468 (1947) paragraph two of the syllabus.

Defendant and Mr. Fleming contemplated that damages in the amount stated in the Contract would be paid out by the initiator of any termination. Laing Kennedy, KSU Athletic Director, testified that upon a no fault termination by the University, the balance due should be paid to the coach. T at 22-23. This was the practice of the University under these terms in other coaching contracts. T at 23. Mr. Fleming concluded that the damages would provide his financial security should the University terminate his contract prior to the end of the state term. The written word of the Contract is consistent with the intent of the University and Mr. Fleming.

KSU negotiated and drafted the Contract. Only after KSU terminated Mr. Fleming, without cause, did 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 not 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. Surely this is not, and was not the intent of KSU.

## **V. MR. FLEMING'S DAMAGES CALCULATION**

### **A. Liquidated Damages**

Pursuant to the terms of the Contract, the University paid Mr. Fleming \$69,213.42 in 2010 and 2011. See Exhibit A, attached hereto, Defendant's Responses to Plaintiff's Second Set KSU 000529 (Fleming's 2010 IRS Form W-2) and 000530 (Fleming's 2010 IRS Form W-2). The term the Contract was 28 months and the agreed yearly salary was \$71,500.00. See Trial Exhibit C (the Contract at paragraphs 1 and 2.)

The total amount payable to Fleming under paragraph 6 of the Contract and the amount due to Mr. Fleming as an early termination cost are as follows:

#### ***a. Term of the Contract:***

March 2010 – June 30, 2012

**b. Yearly salary:**

\$71,500.00

**c. Termination date:**

March 10, 2011

**d. Total compensation available to Mr. Fleming under the terms of the Contract:**

$\$71,500.00 / 12 \text{ months} = \$5,958.33 \text{ per month} \times 28 \text{ months} = \$166,833.33.$

**e. Total due to Mr. Fleming as an early termination cost:**

$\$166,833.33 - \$69,213.42 = \$97,619.91$

Since the University was the initiator of the early no-cause termination of Mr. Fleming the remaining balance due Mr. Fleming under the terms of the Contract is \$97,619.91.

## **B. PREJUDGMENT INTEREST**

The Ohio Supreme Court, interpreting O.R.C. §2743.18(A) and O.R.C. §1343.03(A),

has held that:

In a case involving breach of contract where liability is determined and damages are awarded against the state, the aggrieved party is entitled to prejudgment interest on the amount of damages found due by the Court of Claims. The award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court. (R.C. 2743.18[A] and 1343.03[A], construed and applied.)

*Royal Electric Constr. Corp. v. Ohio State Univ.*, 652 N.E.2d 687, 73 Ohio St.3d 110, 1995-Ohio-131 (Ohio 1995).

Mr. Fleming is entitled to prejudgment interest on his claim from the date of his termination, March 10, 2011, though the date this Court issues a monetary judgment in this matter.

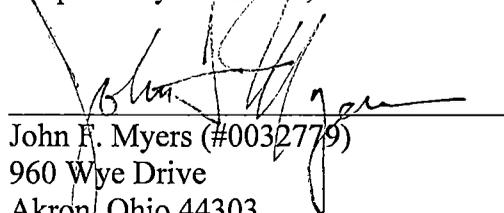
## **VI. CONCLUSION**

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. Defendant drafted the contract. It was a custom and practice of Defendant to include reciprocal liquidated damages provisions in a coach's contract. Defendant initiated the early termination in the 12th month of a 28 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, together with prejudgment interest from the date of his termination and costs.

Respectfully submitted,



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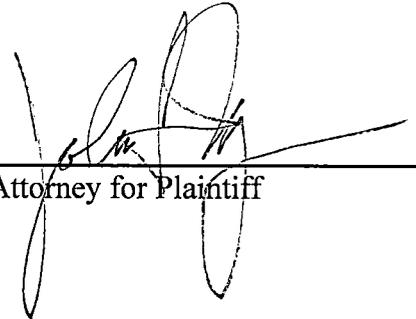
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Plaintiff's Damages Phase Brief on

Remand was served this 19th day of February 2015 by regular US mail:

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February 19, 2015

Mark H. Reed  
Clerk of the Court  
Ohio Court of Claims  
The Ohio Judicial Center  
65 South Front Street, Third Floor  
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Re: James Fleming v. Kent State University; Case No. 2011-09365

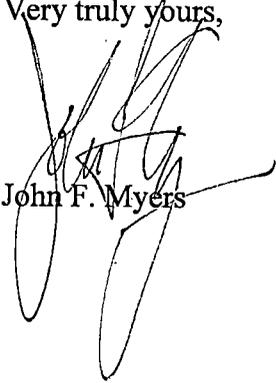
Dear Sir:

Enclosed for filing please find Plaintiff's Damages Phase Brief on Remand.

I have enclosed a copy for return in the enclosed self-addressed, stamped envelope. 

Thank you for your prompt attention to this matter.

Very truly yours,

  
John F. Myers

Enclosure

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

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