

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

The Tenth District Court of Appeals reversed this Court's holding that the stipulated damages clause James Fleming wants to invoke was an unlawful penalty. It held that the clause satisfied the first prong of the three-pronged liquidated-damages test set forth in *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St. 3d 27, 29 (1984). See *Fleming v. Kent State University*, 2014-Ohio-3471, ¶¶30-31 (10th Dist.) However, the Tenth District expressly declined to consider whether the clause satisfied the second and third prongs of the *Samson Sales* test. Instead, it directed this Court to make that determination:

Next, Fleming contends the stipulated damages clause satisfied the other two parts of the *Samson Sales, Inc.* test. . . . **We decline to address whether the remaining parts of the test were satisfied in the absence of their consideration in the first instance by the Court of Claims.** Instead, we limit our holding to the confines of the Court of Claims' decision

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Therefore, to the extent the Court of Claims erred when it found the stipulated damages clause was an unenforceable penalty because it did not satisfy the first part of the *Samson Sales, Inc.* test, we sustain Fleming's third assignment of error. **However, we remand to the Court of Claims to determine whether the stipulated damages clause satisfies the other two parts of the test and to award damages consistent with its determination.**

Id. at ¶¶ 33-34 (emphasis added).

Mr. Fleming is entitled to the damages that resulted when KSU reassigned him to non-coaching duties. Under the common law of contracts, those damages are zero because he would have earned the same salary in his reassigned position as he did in his coaching position. And he cannot avail himself of the contract's stipulated damages clause because the second and third prongs of the *Samson Sales* test prove that what he would receive under that clause would be grossly "disproportionate in amount" to what his damages actually were and also would be inconsistent with the conclusion "that it was the intention of the parties that damages [equal to his base salary for the remainder of his term] should follow [a] breach" that caused no damages at all.¹

¹ See *Samson Sales*, 12 Ohio St. 3d 27, Syllabus at ¶1, describing those two prongs as whether "(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 . . . (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.

Therefore, his damages award must be \$25—representing his filing fee and nothing more—just as the Court determined before.

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.

Mr. Fleming recognizes that Ohio courts interpret stipulated-damages clauses in light of the Restatement of Contracts. See Fleming Memorandum at 4, citing *Lake Ridge Academy v. Carney*, 66 Ohio St. 3d, 376, 382 (1993), which quotes from Section 356(1) of the Restatement (Second). Illustration 4 of that section is precisely on point:

3. **A** contracts to build a grandstand for **B's** race track for \$1,000,000 by a specified date and to pay \$1,000 a day for every day's delay in completing it. **A** delays completion for ten days. If \$1,000 is not unreasonable in the light of the anticipated loss and the actual loss to **B** is difficult to prove, **A's** promise is not a term providing for a penalty and its enforcement is not precluded on grounds of public policy.

4. The facts being otherwise as stated in Illustration 3, **B is delayed for a month in obtaining permission to operate his race track so that it is certain that A's delay of ten days caused him no loss at all.** Since the actual loss to **B** is not difficult to prove, **A's** promise is a term providing for a penalty and is unenforceable on grounds of public policy.

Just as a \$1,000-per-day damages provision is an unlawful penalty when “it is certain that” a breach resulted in “no loss at all,” a nearly \$100,000

damages provision is an unlawful penalty when KSU's breach—reassigning Mr. Fleming to non-coaching duties *at the same salary he earned before*—caused him “no loss at all.”

The Court need not rest its decision on the Restatement, though. *Samson Sales* itself found *as a matter of law* that a \$50 damages provision was so disproportionate to the thousands of dollars in damages that “could have been foreseen” from a burglar-alarm company’s failure to notify the police of a burglary that it was an unlawful penalty. 12 Ohio St. 3d 27 at 28-29. And the Tenth District’s decision in this case itself cites to the dispositive—and binding—case here, *Triangle Properties, Inc. v. Homewood Corp.*, 2013-Ohio-3926 (10th Dist., Tyack, J.). *Triangle Properties* makes clear that windfall damages cannot be recovered whether under a stipulated-damages clause or under the common law: “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 ¶44 (emphasis added).

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.**

In the liability decision, Judge Clark expressly found that the parties reached no agreement at all as to the consequences of a reassignment of Mr. Fleming’s duties. *See Fleming v. Kent State University*, 2012-Ohio-6350 (Ct. of Claims) at ¶23: **“The court finds that the parties’ agreement is silent on the issue of a reassignment within the university and there is clearly no agreement regarding the missing term.”** (Emphasis added)

KSU plainly *did not intend* for Mr. Fleming to reap a nearly \$100,000 windfall for a mere reassignment. As the liability decision notes, one KSU coach who had a stipulated-damages provision that was triggered by a “reassignment” as well as a “termination” was Robert Lindsay. Mr. Lindsay’s contract contained the same stipulated-damages provision found in Mr. Fleming’s contract. But he “requested an express provision prohibiting reassignment, **which was subsequently added to his contract.**” *Id.* at ¶24. This was the additional language for which he negotiated:

It is understood and agreed that this Contract is for **ROBERT LINDSAY'S** assignment and performance as the Head Women's Basketball Coach. While the supplemental duties contained in paragraph 6 may be amended from time to time by mutual agreement, ***reassignment to any other position at the UNIVERSITY which does not include the title and functions of a Division I head Women's basketball coach shall be a breach of this Contract by the UNIVERSITY the same as if ROBERT LINDSAY were terminated without cause.***

See Defendant's Ex. B at KSU000111, ¶15 (capitalization in original; bolded italics added). And Robert Senderoff, KSU's head men's basketball coach, negotiated for a similar provision. *Id.* at KSU000064. What Mr. Fleming asks this Court to do, in other words, is to give him the benefit of a provision for which Mr. Lindsay and Mr. Senderoff expressly negotiated despite the fact that he never even requested that provision. 2012-Ohio-6350 at ¶24.²

In this case, therefore, the third prong of the *Samson Sales* test reduces to this question: Did KSU and Mr. Fleming really intend that damages of nearly \$100,000 "should follow [a] breach" caused by Mr.

² Judge Clark concluded that Mr. Fleming's reassignment had the same effect as a termination because, in his view, it amounted to a "constructive discharge," which is the common law's equivalent of a termination without cause. 2012-Ohio-6350 at ¶28. But Mr. Fleming now concedes that he *was not constructively discharged*. In fact, he argued precisely that in the Tenth District. 2014-Ohio-3471 at ¶¶9, 11, 21, 23. For purposes of this remand, it is irrelevant whether *as a matter of law* only a termination of Mr. Fleming's employment without cause—not a mere reassignment—could trigger the stipulated-damages clause. What is relevant now is what the parties intended. And there can be no debate that (1) the parties never reached an agreement on that point, (2) KSU plainly intended the clause to be triggered only by a termination without cause, and (3) Mr. Fleming never considered the matter.

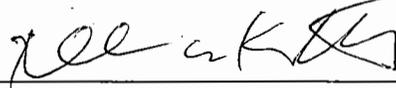
Fleming's reassignment to non-coaching duties at the same salary he earned before? The answer is what Judge Clark already found. "There is clearly no agreement regarding" that term. *Id.* at ¶23. As for KSU, it plainly did not intend that result because if it had it would have added the "reassignment is the same as a termination without cause" language negotiated by Mr. Lindsay and Mr. Senderoff to Mr. Fleming's contract. And as for Mr. Fleming, there is not a shred of evidence even hinting that he considered the matter at all.

IV. Conclusion

The second and third prongs of the *Samson Sales* test, the *Samson Sales* decision itself, the binding *Triangle Properties* decision, and common sense all yield the same result. The stipulated-damages provision Mr. Fleming hopes to parlay into a nearly \$100,000 windfall for a breach that cost him nothing at all is an unlawful penalty. His damages are exactly \$25.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

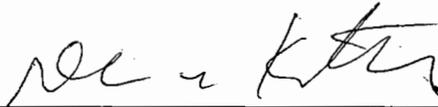


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