

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE OHIO COURT OF CLAIMS
COLUMBUS, OHIO

2015 MAR -5 PM 2: 24

JAMES M. FLEMING,

PLAINTIFF,

V.

KENT STATE UNIVERSITY,

DEFENDANT.

)
)
)
)
)
)
)
)
)
)
)

CASE NO. 2011-09365

JUDGE JOSEPH T. CLARK

PLAINTIFF'S DAMAGES PHASE
REPLY BRIEF ON REMAND

I. ARGUMENT

In its brief on remand, KSU relies upon *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St. 3d 27 (1984) to support the proposition that the damages Mr. Fleming is due under the stipulated damages clause are disproportionate to the possible damage that could have been foreseen from an early termination of the Contract by KSU. The holding in *Samson Sales, Inc.* supports Mr. Fleming's contention that the stipulated damages provision satisfies the *Samson Sales, Inc.* test and is therefore not an unenforceable penalty and should be paid to Mr. Fleming.

In *Samson Sales, Inc.* the Ohio Supreme Court reviewed a liquidated damages clause that capped the damages for breach of an alarm services contract at \$50.00. *Id.* at A burglary occurred. *Id.* *Samson Sales, Inc.* brought an action alleging negligence in the part of Honeywell. *Id.* Honeywell refused to pay more than the \$50.00 liability set forth in the contract, despite an actual loss of 68,303.00. *Id.* The Supreme Court applied the test set forth in *Jones v. Stevens*, 112 Ohio St.43 (1925), syllabus at ¶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

ON COMPUTER

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."

In applying the test set forth in *Jones*, the Supreme Court held:

With reference to the initial test suggested in *Jones*, the court of appeals expressly noted that "the damages here are patently estimable," and this finding is attuned to the indisputable fact that the damages in this case would be as readily ascertainable as the damages in a multitude of other conceivable situations involving negligence and/or breach of contract. *As to the second guideline recommended by this court, the stated sum of \$50 in the contract involved in this case is manifestly disproportionate to either the consideration paid by Samson or the possible damage that reasonably could be foreseen from the failure of Honeywell to notify the police of the burglary. And with particular emphasis upon the third condition proposed in Jones v. Stevens, supra, it is beyond comprehension that the parties intended that damages in the amount of \$50 should follow the negligent breach of the contract.*

In other words, an examination of the minute type used in the standard contract issued by Morse, as well as a fair construction of the contract provision as a whole, fails to evince a conscious intention of the parties to consider, estimate, or adjust the damages that might reasonably flow from the negligent breach of the agreement. See, particularly, *American Financial Leasing Co. v. Miller* (1974), 41 Ohio App.2d 69 [70 O.O.2d 64]. Surely, Samson, which apparently had some business experience, did not pay \$10,500 for the mere possibility of recouping \$50 if Honeywell provided no service at all under the terms of the contract. Characteristically, therefore, and by way of analysis, the nominal amount set forth in the contract between Samson and Honeywell has the nature and appearance of a penalty.

Samson Sales, supra, at 29. (Emphasis added.)

The instant case was remanded to this Court to determine whether the stipulated damages clause satisfies the second and third parts of the *Samson Sales, Inc.* test and to award damages consistent with its determination. *Fleming v. Kent State University*, 2014-Ohio-3471, at ¶¶34-35.¹ Mr. Fleming contends that the stipulated damages provision satisfies the second and third parts of *Samson Sales, Inc.* test.

¹ The Tenth District Court of Appeals held that the stipulated damages clause satisfied the first part of the *Samson Sales, Inc.* test.

1. The stipulated damages clause satisfies the second part of the *Samson Sales, Inc.* test.

Contrary to the argument advanced by KSU on remand, *Samson Sales, Inc.* supports Mr. Fleming's contention that the stipulated damage clause is not an unenforceable penalty. In *Samson Sales, Inc.* the Ohio Supreme Court examined the liquidated damages clause as of the time the parties entered into the agreement. Mr. Fleming and KSU determined the measure of damages due either party upon a breach of the Contract would be based upon Mr. Fleming's base salary. The Contract included incentive clauses based upon the performance of the KSU football team. At the time the parties entered into the Contract, there was no means to determine whether the team would perform in such a manner so as to afford Mr. Fleming the incentive payments. Further there was no way to determine the business opportunities that may have been available to Mr. Fleming had the team performed well during the two year term of his contract. Unlike the nominal amount of \$50.00 payable under the liquidated damages clause in *Samson Sales, Inc.*, the negotiations of KSU and Mr. Fleming, both sophisticated parties who had entered into such contracts in the past, along with the drafting of the Contract by KSU's legal staff evince a conscious intention of the parties to consider and estimate, the damages that might reasonably flow from a breach of the Contract. Clearly, the stipulated damages were not manifestly disproportionate to the possible damage that reasonably could be foreseen from KSU's breach. In fact, the stipulated damages were based upon the base salary due Fleming for the remainder of the term of the contract. See *Samson Sales, Inc.* at 28-29; *Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376, 382 (1993).

KSU does not argue that the Contract is unconscionable or unreasonable. There is no evidence the Contract is unconscionable. In *O'Brien v. Ohio State University*, 2007-Ohio-4833

(10th District 2007) the Tenth District Court of Appeals, under a similar fact pattern, addressed the issue of unconscionability:

Unconscionability is typically characterized by absence of one party's "meaningful choice" or opportunity to negotiate the terms of a contract, which invariably results in terms substantially favoring the other party. See, e.g., *Eva v. Midwest Natl. Mtge. Bank, Inc.* (N.D. Ohio 2001), 143 F.Supp.2d 862, 895 (A "contract is unconscionable if it did not result from real bargaining between the parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion"). *Lake Ridge*, at 383. Invariably, an unconscionable contract will have terms favoring the drafting party.

Id., at ¶95.

KSU drafted the Contract and the Athletic Director, Laing Kennedy negotiated the agreement. There is simply no evidence of unconscionability. With regard to whether the stipulated damages provision expressed the true intent of the parties, again KSU cannot now argue that it did not intend the liquidated damages provision to be in full force and effect upon its no cause termination of the Contract.

2. The stipulated damages clause satisfies the third part of the *Samson Sales, Inc.*

KSU's argument that the Contract is not consistent with the conclusion that it was the intention of KSU and Mr. Fleming the damages set forth in the stipulated damages clause should follow the breach of the Contract is simply not supported by any evidence. KSU has sought to enforce similar clauses in coaching contracts against coaches. See e.g., *Kent State University v. Gene A. Ford*, 2015-Ohio-41, No. 2013-P-0091 (11th District Court of Appeals).

Again, parties of equal sophistication negotiated the Contract. It is simply beyond comprehension that KSU would knowingly enter into a contract it drafted that it did not intend to honor. Laing Kennedy, KSU Athletic Director, testified that upon a no fault termination by KSU, the balance due should be paid to the coach. T at 22-23. This was the practice of KSU under these terms in other coaching contracts. T at 23. There is no evidence in the record that it was not

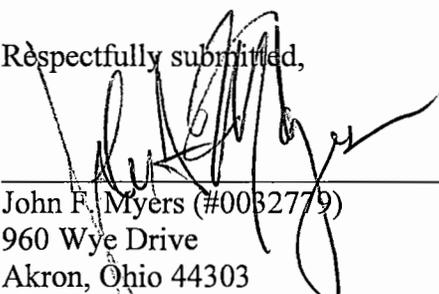
the intent of KSU to pay damages under the stipulated damages clause if it breached the Contract.

Finally, it is beyond comprehension that KSU would in one breath seek enforce a stipulated damages clause against a coach who breached a coaching contract and in the same breath argue that it should not be held to pay under a stipulated damages clause when it breached a contract with a coach.

II. CONCLUSION

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,



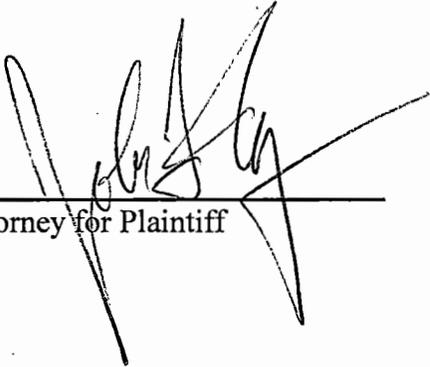
John F. Myers (#0032779)
960 Wye Drive
Akron, Ohio 44303
330-535-0850
330-819-3695 (cell)
johnmyerscolpa@gmail.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

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

on Remand was served this 4th day of March 2015 by regular US mail:

Randall W. Knutti, Esq.
Christopher P. Conomy, Esq.
Ohio Attorney General's Office
Court of Claims Defense Section
150 East Gay Street, 18th Floor
Columbus, Ohio 43215
Randall.Knutti@OhioAttorneyGeneral.gov
Christopher.Conomy@OhioAttorneyGeneral.gov
Attorneys for Defendant



Attorney for Plaintiff

JOHN F. MYERS
ATTORNEY AT LAW

960 WYE DRIVE
AKRON, OHIO 44303

TEL (330) 535-0850
CELL (330)-819-3695

John F. Myers
johnmyerscolpa@gmail.com

March 4, 2015

Mark H. Reed
Clerk of the Court
Ohio Court of Claims
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215

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

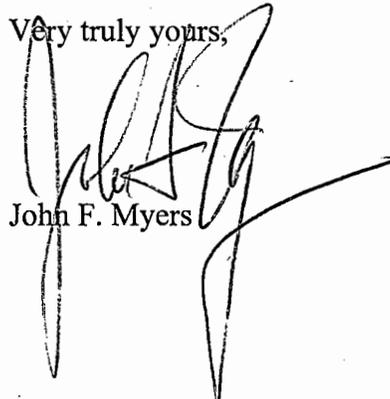
Dear Sir:

Enclosed for filing please find Plaintiff's Damages Phase Reply 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.