

No.

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO
CASE No. 2013-P-0091

KENT STATE UNIVERSITY,
Plaintiff-Appellee,

v.

GENE A. FORD,
Defendant-Appellant.

APPELLANT GENE A. FORD'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. Explanation of why this is a case of public or great general interest

This appeal presents the Court with an opportunity to clear up confusion among Ohio's appellate districts on an issue of critical importance to contracting parties: When no attempt is made to estimate anticipated damages at the time of contracting, is a liquidated-damages provision unenforceable if the stipulated damages are disproportionate to the actual damages sustained or the value of the contract as a whole? The split decision below allows this Court to provide crucial guidance on this issue by answering the following questions:

- This Court's test for the enforceability of liquidated-damages provisions presupposes that contracting parties attempted to estimate "stipulated" damages when the contract was made. *See Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894 (1925); *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984); *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993). Does that test apply when the parties did *not* attempt to estimate damages at the time of contracting?
- If it does, the second prong of the test requires considering whether the contract as a whole is so manifestly unconscionable, unreasonable, and disproportionate in amount to justify the conclusion that it does not express the true intent of the parties. *See Jones*, 112 Ohio St. 43, paragraph two of the syllabus. Is a liquidated-damages provision unenforceable if the stipulated damages are disproportionate to the actual damages sustained by the nonbreaching party or the value of the contract as a whole?

Here, a 2-1 majority of the Eleventh District Court of Appeals upheld a \$1.2 million award based on a liquidated-damages provision in a coaching contract between Appellee Kent State University and Appellant Gene A. Ford that paid Ford \$300,000 per year for a five-year term. *See* 1/13/15 Op. at ¶ 1, 7, 47, Appx. 1-2, 3,

15, 20. Elevating freedom of contract over the principle of compensation, the majority took a prospective approach, emphasizing at argument and in opinion that Ford agreed to the liquidated-damages provision. *Id.* at ¶ 12, 28, 36, Appx. 5, 9, 12.¹ The majority reached this conclusion even though it acknowledged Kent State made no attempt to estimate actual damages at the time of contracting, and even though the \$1.2 million award—representing four years’ salary—is (1) nearly equal to the total value of the coaching contract (\$1.5 million), and (b) over 600 times the actual damages Kent State sustained (less than \$2,000). *See* 1/13/15 Op. at ¶ 14, Appx. 5; *see also id.* at ¶ 53, Appx. 14 (Cannon, J., dissenting). Instead of looking retrospectively at the minimal actual damages sustained, the majority looked to Ford’s “market value” at the time of breach and relied on after-the-fact speculation by the university’s former Athletic Director that “it would cost about *a year’s* salary to cover damages.” (Emphasis added.) *Id.* at ¶ 38, 39, Appx. 12-13.

The majority’s approach perpetuates confusion among Ohio appellate courts about the role actual damages plays in analyzing the enforceability of liquidated-damages provisions. The confusion stems from conflicting signals in this Court’s

¹ To support its prospective approach, the Eleventh District relied on *Vanderbilt v. DiNardo*, 174 F.3d 751(6th Cir.1999)—a Sixth Circuit case construing Tennessee law—and *Physicians Anesthesia*, 1st Dist. Hamilton No. C-60761, 2007-Ohio-6871—a case relying on Tennessee law. *See* 1/13/15 Op. at ¶ 29, Appx. 9-10 (noting that the *DiNardo* provision, like the one at issue here, “was the result of negotiations by both parties”); *see also id.* at ¶ 37, Appx. 12 (noting that actual damages need not be proven). But, contrary to Ohio law under *Lake Ridge Academy*, Tennessee follows a prospective-only approach to liquidated-damages provisions. *See Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 98-100 (Tenn.1999).

jurisprudence on the relevance of “actual damages” and the absence of any guidance about how to assess reasonableness and proportionality when parties do not estimate anticipated damages before the contract is made. On the one hand, this Court has said that “courts must step back and examine [the liquidated-damages provision] in light of what the parties knew at the time the contract was formed and in light of an estimate of actual damages caused by the breach.” *Lake Ridge Academy*, 66 Ohio St.3d at 382. On the other hand, this Court has focused on actual damages when analyzing whether the contract is manifestly unreasonable and the stipulated damages disproportionate in amount. *Id.* at 383-84; *Jones*, 112 Ohio St. at 53-54.

The focus on actual damages flows from this Court’s teaching in *Lake Ridge Academy* that a liquidated-damages provision is enforceable “as long as the provision does not disregard the principle of compensation.” *Lake Ridge Academy*, 66 Ohio St.3d at 381, quoting 3 Restatement of the Law 2d, Contracts, Section 356, Comment a, at 157 (1981). The principle that stipulated damages must be compensatory in nature limits freedom of contract: “parties to a contract are not free to provide a penalty for its breach.” 3 Restatement of the Law 2d, Contracts, Section 356, Comment a, at 157.

A minority of appellate courts since *Lake Ridge Academy* have taken a prospective, “look-forward” approach and focus on what the parties knew at the time of contracting, regardless of whether any estimate of anticipated actual damages was made or whether any actual damages were sustained. *See, e.g., B & G*

Prop. Ltd. Partnership v. Office Max, 2013-Ohio-5255, 3 N.E.3d 774, ¶ 33 (8th Dist.) (adhering to a pure freedom-of-contract approach and finding liquidated-damages provision reasonable); *Physicians Anesthesia Serv., Inc. v. Burt*, 1st Dist. Hamilton No. C-60761, 2007-Ohio-6871, ¶ 20 (relying on Tennessee law, which follows a prospective-only approach, and finding any comparison of stipulated damages to actual damages unnecessary).

A majority of appellate courts since then, however, permit a retrospective, “look-back” approach and compare stipulated damages to the actual damages the nonbreaching party sustained. These courts make this comparison when determining reasonableness and proportionality, without regard to whether the parties made any attempt to estimate the actual damages. *See, e.g., Boone Coleman Constr., Inc. v. Piketon*, 2014-Ohio-2377, 13 N.E.3d 1190 (4th Dist.), *appeal accepted*, 140 Ohio St.3d 1451, 2014-Ohio-4414 (finding provision unenforceable where disproportionate to overall contract price and actual damages sustained); *Harmon v. Haehn*, 7th Dist. Mahoning No. 10 MA 177, 2011-Ohio-6449, ¶ 54-58 (finding provision unenforceable where there was a “substantial disparity” between actual damages and stipulated damages); *Courtad v. Winner*, 9th Dist. Summit No. 20630, 2002-Ohio-2094, ¶ 25 (“Stipulated damages in the amount of \$40,000 on a \$45,000 note is an amount disproportionate to the actual damages that resulted from failing to make an installment payment of \$11,250.”); *Smith v. Huber Invest. Corp.*, 2d Dist.

Montgomery No. 16030, 1997 WL 189471, at *2-3 (Apr. 18, 1997) (finding stipulated damages disproportionate to actual damages sustained).

And at least one appellate panel found a liquidated-damages provision unenforceable as a matter of law where there was no evidence that the parties attempted to estimate anticipated actual damages. *Wright v. Basinger*, 7th Dist. Mahoning No. 01CA81, 2003-Ohio-2377, ¶ 20.

Ford respectfully submits that the majority approach is inconsistent with the principle of compensation that is prevalent in this Court's liquidated-damages jurisprudence—at least when, as here, the parties make no attempt to estimate damages at the time of contracting. This Court should accept jurisdiction and reject the stilted, “look-forward” approach taken by the Eleventh District, which fails to ensure that a liquidated-damages provision serves compensatory (as opposed to punitive) purpose. Although the Court has already accepted review over *Boone Coleman Constr., Inc. v. Piketon*, 2014-Ohio-2377, 13 N.E.3d 1190 (4th Dist.), *appeal accepted*, 140 Ohio St.3d 1451, 2014-Ohio-4414, to address whether enforceability turns, in part, on the total amount of damages awarded under a “per diem liquidated damages for delay” provision, this appeal here warrants full briefing and argument because it presents the Court with an ideal vehicle to provide broader guidance on the role “actual damages” plays in the analysis of reasonableness and proportionality. At a minimum, however, this case should be accepted and held for decision in *Boone Coleman*.

Liquidated-damages provisions are a staple in contracts of all kinds: employment contracts, construction contracts, and personal-service contracts, among others. Until the analysis under *Lake Ridge Academy* is clarified by this Court, courts will continue to enforce them in an inconsistent, and often unfair, manner throughout the state of Ohio. This Court should accept jurisdiction and provide the necessary guidance.

II. Statement of the case and facts

A. Gene Ford becomes Kent State's Men's Head Basketball Coach in 2008 and signs a new five-year contract in 2010.

At the time Ford was hired as Kent State's Men's Head Basketball Coach in 2008, he was under a four-year contract that provided a total annual salary of \$200,000, plus incentives for team-related achievements, and contained a straight, remaining-term, liquidated-damages provision based on his annual salary. Two years into that contract, Kent State wanted a longer term contract with Ford. Identical to his 2008 contract in all respects except salary and term, the new contract provided a total annual salary of \$300,000, plus the same type of incentives for team-related achievements contained in the previous contract. The new contract would extend until March 31, 2015, and had a total value of \$1.5 million. Except for the term, it contained the same liquidated-damages provision as before.

GENE A. FORD recognizes that his promise to work for the UNIVERSITY for the entire term of this five (5) year Contract is of the essence of this Contract with the UNIVERSITY. GENE A. FORD also recognizes that the UNIVERSITY is making a highly valuable investment in his

continued employment by entering into this Contract and its investment would be lost were he to resign or otherwise terminate his employment with the UNIVERSITY prior to the expiration of this Contract. Accordingly, he will pay to the UNIVERSITY as liquidated damages an amount equal to his base and supplemental salary, multiplied by the number of years (or portions(s) thereof) remaining on the Contract.

Like the 2008 contract, this contract does not define “investment” or explain how that investment would be lost especially where the liquidated damages are greatest when the consideration paid by Kent State is the least. In fact, Kent State uses this same liquidated-damages provision in all of its coaching contracts, without regard to the sport or individual coach, and without having conducted any analysis at the time of contracting to estimate the anticipated actual damages it may sustain in the event of breach. Indeed, former Kent State Athletic Director Laing Kennedy testified unequivocally that Kent State conducted *no* financial analysis at the time of contracting to estimate its damages in the event of Ford’s early departure.

Q. What process did you go through to determine that that amount of money as an amount of liquidated damages was a reasonable estimation of the damages that Kent State would suffer if Coach Ford were to leave after one year of a five-year contract?

A. Base – using the base salary as a foundation for it.

* * *

Q. So are you saying that you actually went through an analysis that if Coach Ford left after one year, Kent State would suffer 1.2 million dollars['] worth of damage?

* * *

A. The – and you look at the standard in the industry, too, looking at how do you do this sort of thing. We’ve done – did we do a financial analysis, no?

* * *

Q. But you did not do a financial analysis?

A. No.

Instead, as former Kent State President Lester Lefton testified, Kent State uses liquidated-damages provisions in its coaching contracts as a mechanism “to deter someone from leaving because they would owe you some money.” Reinforcing their punitive nature, Kent State’s successor Athletic Director Joel Nielsen explained that they operate to maintain “coaching continuity.” Executive Associate Athletic Director Thomas Kleinlein testified similarly—i.e., that the clause’s purpose was “to ensure that the coach fulfills his obligations for the term of the contract.”

And even though Lefton testified that the clause also operates to give the university “some cash” for the losses incurred in ticket sales, advertising, and recruiting, the record contains no evidence of any such losses. Indeed, Kent State admitted in deposition that coaching transitions, historically, have shown no adverse effects upon donor contributions, ticket sales, or recruiting. Nielsen, for example, testified that there were no adverse effects during coaching transitions that occurred when other coaches left before the terms of the their contracts. And Kennedy admitted that predictions of damage to the basketball program after departures of predecessor coaches were incorrect and that there were no losses in donations from the early departures of these coaches.

B. Ford leaves Kent State in March 2011 to become Bradley University's Head Coach; Kent State hires a replacement coach shortly thereafter, incurring minimal costs.

After the basketball season ended in 2011, Ford met with Bradley University's Athletic Director. He ultimately accepted the Men's Head Basketball Coach position there at an annual salary of \$700,000, plus various incentives.

Within a week or so after Ford's departure, Kent State offered the Men's Head Basketball Coach position to Robert Senderoff, who accepted the position and started ten days after Ford left. Senderoff's annual salary was \$250,000—\$50,000 less than that paid to Ford. As Kent State testified in deposition, it expended less than \$2,000 in seeking Ford's replacement. *See* 1/13/15 Op. at ¶ 53, Appx. 17 (Cannon, J., dissenting).

Kent State rejected Ford's good-faith attempt to discuss the liquidated-damages provision to see if an agreement could be reached. Instead, it demanded that Ford pay the liquidated damages under of the coaching contract—a total \$1.2 million. Moreover, it did so even though it readily replaced Ford with Senderoff at a substantially lower annual cost, incurred minimal expenses in doing so, and sustained no identifiable damages as a result of the coaching change, including no loss of ticket sales, players, or donations.

C. Kent State sues Ford and Bradley University; the trial court awards Kent State \$1.2 million in stipulated damages.

In April 2011, Kent State sued both Ford and Bradley University, asserting claims for breach of contract and breach of fiduciary duty against Ford, and tortious

interference with contract against Bradley University. As relevant here, the trial court granted Ford summary judgment on Kent State’s breach-of-fiduciary claim and granted Kent State summary judgment on its breach-of-contract claim. *See* 7/12/13 Order, Appx. 36; 7/12/13 Order, Appx. 50. It thereafter entered judgment against Ford in the amount of \$1.2 million—more than 75% of the \$1.5 million overall contract price and over 600 times Kent State’s actual damages. *See* 10/11/13 Final J. Entry, Appx. 21-22.

D. In a divided decision, the Eleventh Appellate District affirms.

Acknowledging that Kent State conducted no analysis at the time of contracting to estimate its anticipated actual damages in the event of Ford’s early departure, the majority nonetheless found the liquidated-damages provision enforceable and affirmed. *See* 1/13/15 Op. at ¶ 14, 43, 47 Appx. 5-6, 14, 15. Although supplied as supplemental authority, it indirectly rejected the Fourth Appellate District’s analysis for reasonableness and proportionality in *Boone Coleman*. And it otherwise rejected Ford’s argument that the minimal actual damages sustained did not justify \$1.2 million in stipulated damages when the total contract price was \$1.5 million, and Kent State admitted it made no attempt at the time of contracting to estimate its anticipated actual damages. Instead, relying on a Sixth Circuit case applying Tennessee law and stressing the “parties agreed on an amount of damages,” the majority found the \$1.2 million in stipulated damages reasonable and proportional because they were proportional to Ford’s “market

value”—i.e., his new salary at Bradley University—an admitted unknown at the time of contracting. *Id.* at ¶ 29, 38, Appx. 9, 12-13; *but see id.* at ¶ 54, Appx. 18 (“It is hard to imagine a circumstance under which the increase in the value of the coach would be a measure of damages in a breach of contract case, and it should not be considered a factor in assessing whether the stipulated liquidated damages clause is reasonable.”) (Cannon, J., dissenting).

Because the majority’s opinion results in rules of law that conflict with the rules of law in *Boone Coleman*, *Harmon*, and *Wright*, Ford requested the court to certify its decision as being in conflict with these cases. The motion remains pending before the Eleventh District.

III. Argument

Proposition of Law

When stipulated damages are not ascertained by estimation and adjustment at the time of contracting, a liquidated-damages provision is unreasonable and unenforceable under the second prong of the *Samson Sales* test if the stipulated sum is disproportionate to the actual damages sustained and/or the overall contract price (*Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993), construed).

A. Ohio law recognizes the principle of compensation as a limitation on the freedom of contract.

In 1984, this Court adopted the following test for determining the enforceability of a liquidated-damages provision:

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.

Samson Sales, Inc. v. Honeywell, Inc., 12 Ohio St.3d 27, 28, 465 N.E.2d 392 (1984), syllabus, following *Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894 (1925), paragraph two of the syllabus. The *Samson Sales* court emphasized that the purpose of a liquidated-damages provision is to serve as “reasonable compensation for actual damages.” *Samson Sales*, 12 Ohio St.3d at 28.

Nine years later, this Court revisited the *Samson Sales* test in *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993). This time it expanded the analysis for courts to consider two additional principles when determining whether a provision is punitive or liquidated. First, a court must look to the entire contract and compare the stipulated sum “not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach * * * in light of the particular facts surround the making and execution of the contract.” *Id.* at 382, quoting *Jones*, 112 Ohio St. 43, paragraph one of the syllabus. This principle lends support for a prospective approach and comparing the stipulated sum to the overall contract price.

Second, it adopted 3 Restatement of Law 2d, Contracts, Section 356(1) (1981), and that section’s Comment a, which explicitly states that while contracting parties “may provide in advance for damages to be paid in the event of breach” they cannot “disregard the principle of compensation.” *Id.* at 381, quoting 3 Restatement of Law 2d, Contracts, Section 356, Comment a, at 157; *see also id.* at 382 (adopting Section 356(1). The principle of compensation operates to uphold “the sole purpose” of contract damages as a mechanism “to compensate the nonbreaching party for losses suffered as a result of a breach.” *Lake Ridge Academy*, 66 Ohio St.3d at 381, quoting 3 Restatement of Law 2d, Contracts, Section 355, at 154.

B. The compensation principle supports a retrospective, “look back” approach.

Favoring the principle of compensation over the freedom of contract derives directly from Section 356 itself. This section provides:

§ 356. Liquidated Damages and Penalties

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated *or* actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages in unenforceable on grounds of public policy as a penalty.

* * *

(Emphasis added.) 3 Restatement of Law, Contracts, Section 356(1).

In adopting this section, the Court authorized a prospective, “look forward” approach by assessing reasonableness “in light of the anticipated * * * loss,” which anticipates that the parties will make an attempt to anticipate actual damages at the

time of contracting. This conclusion makes sense from the Court's time-of-contracting language.

Thus, when a stipulated 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.

(Emphasis added.) *Lake Ridge Academy*, 66 Ohio St.3d at 382.

But, in adopting Section 356(1), the Lake Ridge court also authorized a retrospective, "look back" approach for determining reasonableness "in light of the anticipated *or* actual loss." Common sense suggests that a court must consider the actual damages sustained when *no attempt* is made at the time of contracting to anticipate actual damages. This approach, too, is supported by *Lake Ridge Academy*, even though it modified the disjunctive "or" to the conjunctive "and":

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.

(Emphasis added.) *Lake Ridge Academy*, 66 Ohio St.3d at 382.

A fair reading of *Lake Ridge Academy* shows at least three things. First, that Ohio recognizes the principle of compensation as a limitation on the freedom of contract. Second, that Ohio follows a dual prospective/retrospective approach in determining whether a liquidated-damages provision is reasonable and proportional, but not at the expense of the principle of compensation. Under that approach, a court properly considers both the actual damages sustained as well as

the overall contract price. And third, Ohio does not follow a stilted, prospective approach that rests solely on the freedom of contract.

IV. Conclusion

Despite the confusion *Lake Ridge Academy* has engendered, what is clear is that a liquidated-damages provision cannot operate to punish a promisor for breaking his promise. *Lake Ridge Academy*, 66 Ohio St.3d at 381. The Eleventh District ignored this fundamental point and bestowed a \$1.2 million windfall on Kent State when the total contract was worth only \$1.5 million, and Kent State sustained less than \$2,000 in actual damages. This cannot be the law.

This Court should accept jurisdiction and reverse the judgment of the Eleventh District, and direct entry of judgment in Ford's favor as a matter of law.

Respectfully submitted,

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FILED
COURT OF APPEALS

JAN 13 2015

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IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

KENT STATE UNIVERSITY, : OPINION
 :
 Plaintiff-Appellee, :
 : CASE NO. 2013-P-0091
 - vs - :
 :
 GENE A. FORD, et al., :
 :
 Defendant-Appellant. :

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2011 CV 00511.

Judgment: Affirmed.

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DIANE V. GRENDALL, J.

{¶1} Defendant-appellant, Gene A. Ford, appeals from the judgments of the Portage County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, Kent State University, on its claim for breach of contract, and awarding damages against Ford in the amount of \$1.2 million. The issues to be determined in this case are whether a contract with a liquidated damages clause is unenforceable when it requires a breaching university coach to pay his salary for each

year remaining under the contract, when there is limited evidence of actual damages, and whether damages in such a case can include only the salary of a replacement coach. For the following reasons, we affirm the decision of the lower court.

{¶2} On April 26, 2011, Kent State filed a Complaint against Ford and Bradley University, asserting that Ford, the former head coach of the men's basketball team at Kent State, breached his contract by terminating his employment with Kent State four years before the contract's expiration and commencing employment with Bradley University. Count One raised a claim for Breach of Contract, based on Ford's unilateral termination of the agreement. Count Two claimed Breach of Fiduciary Duty, based on alleged duties owed by Ford to Kent State. Count Three raised a claim for Tortious Interference with a Contract against Bradley University, for inducing Ford to breach his employment contract.

{¶3} Ford filed his Answer on May 27, 2011. Bradley University filed its Answer on the same date.¹

{¶4} The following facts giving rise to the filing of the Complaint were presented through deposition testimony and affidavits:

{¶5} In April of 2008, Ford and Kent State executed an Employment Contract, employing Ford as Kent State's head men's basketball coach for a period of four years, with an option for a fifth year. The Contract included his salary, supplemental salary, and various incentives based on performance. It also contained the following provision:

1. Subsequent to the filing of its Complaint, Kent State made multiple requests to amend it, adding another claim and party, Parker Executive Search. An Order and Journal Entry was later filed, based on the parties' agreement, dismissing the claims against Parker, the Civil Conspiracy claim against Bradley, and the First and Second Amended Complaints. The original Complaint and responses were deemed refiled.

GENE A. FORD recognizes that his promise to work for the UNIVERSITY for the entire term of this four (4) year Contract is of the essence of this Contract with the UNIVERSITY. GENE A. FORD also recognizes that the UNIVERSITY is making a highly valuable investment in his continued employment by entering into this Contract and its investment would be lost were he to resign or otherwise terminate his employment with the UNIVERSITY prior to the expiration of this Contract. Accordingly, he will pay to the UNIVERSITY as liquidated damages an amount equal to his base and supplemental salary, multiplied by the number of years (or portion(s) thereof) remaining on the Contract.

{¶6} Further, the contract provided that if Ford terminated his employment prior to the contract's expiration, "and is employed or performing services for a person or institution other than the UNIVERSITY," he "shall pay * * * an amount equal to the balance of the then-current total annual salary due for the remaining amount of the term of this Contract."

{¶7} In April 2010, Ford and Kent State renegotiated and executed a new Employment Contract, lasting for a term of five years, which increased his salary and supplemental salary by a total of \$100,000, for a total salary of \$300,000. This contract contained the same liquidated damages provision as above, changing only the number of years under the contract.

{¶8} Joel Nielsen, the Kent State athletic director, testified that in early 2011, he received a phone call from Ford's agent, requesting permission for Ford to speak to other schools regarding employment. Nielsen granted such permission following the

conclusion of the basketball season. On March 26, 2011, Ford made Nielsen aware of his conversations with Bradley University and expressed his possible interest in taking a coaching position there. At that time, Nielsen reminded Ford of the liquidated damages provision in the Contract. Soon thereafter, Ford accepted the position at Bradley University, at an annual salary of \$700,000. Nielsen hired Coach Robert Senderoff in early April 2011 to replace Ford.

{¶9} Nielsen testified that the liquidated damages clause was included to protect the University by providing coaching continuity, which aids in recruiting players. Nielsen did not know of any players who left the program or of any specific recruits that may have decided not to attend Kent State because of Ford's departure, although he believed it would impact some potential future recruits. Nielsen explained the cost associated with conducting a coaching search to replace Ford, including time and travel for interviews. He outlined as potential damages the "loss of investment" in Ford, including "equity" built up with fans and donors. He conceded that, when coaches left in the past, the team continued to perform well.

{¶10} Thomas Kleinlein, Kent State's executive associate athletic director, testified that Ford had difficulty deciding whether to go to Bradley, and was concerned about having to pay the liquidated damages clause. Regarding potential damages resulting from Ford's departure, season ticket sales and advance ticket sales were "behind." Kleinlein also noted that there are often large "staff transitional costs" when a head coach leaves.

{¶11} Dr. Lester Lefton, president of Kent State University, testified that liquidated damages "make up some of the differences" from the loss in ticket sales, advertising, recruiting and "having to start all over again" when a coach leaves

prematurely. He believed that such damages "deter" individuals from leaving early. Dr. Lefton explained that when a coach leaves prior to the expiration of the contract, "the program suffers, recruiting suffers, ticket sales suffer, alumni and fan support suffers, [and] donations suffer." He testified that the liquidated damages clause contained in Ford's contract was similar to those currently used for head basketball and football coaches at Kent State and it was consistent with past policy.

{¶12} Dr. Lefton opined that, at the time the second contract was signed by Ford, he "fully understood what liquidated damages were because he was trying to have them removed." He believed, from conversations with presidents from other universities, that they included similar liquidated damages clauses in their contracts.

{¶13} Liang Kennedy, Kent State's athletic director until June of 2010, offered Ford his first head coaching contract at Kent State in April 2008. Kennedy asserted that the liquidated damages clause protects the coach and the institution's investment in the coach and the program. At the time the second contract was negotiated, Ford wanted the liquidated damages clause to be changed and asked for a "graduated reduction," i.e., the damages would decrease as the contract became closer to expiring. Ford eventually agreed to accept the liquidated damages clause as it had been previously and signed the new contract.

{¶14} Kennedy testified that the base salary was used as the foundation to determine the amount of liquidated damages. He noted that if Ford left, consequences to the program would include decreased revenue, fundraising, and community outreach, which they "established * * * would cost about a year's salary per year." He explained that Kent State did not do a "financial analysis" prior to establishing the liquidated damages clause in Ford's contract.

{¶15} Regarding damages that occurred after Ford's departure, Kennedy noted that he was disappointed with the results of a recent basketball outing. Kennedy explained that the goodwill of the program and the community outreach would suffer without Ford, since Ford was able to achieve high levels of attendance at community events. He also pointed to the loss of an effective director of basketball operations.

{¶16} Ford filed a Motion for Summary Judgment on January 17, 2012. He argued that Kent State suffered no damages as a result of his departure. He asserted that the liquidated damages clause was defective, since its objective was "punitive deterrence of breach," and the amount was disproportionate to any anticipated or actual damages. On the same date, Bradley University filed a Motion for Summary Judgment.

{¶17} Kent State filed its Motions for Partial Summary Judgment against Bradley University and Ford on the same date, arguing that the liquidated damages clause was valid and enforceable against Ford.

{¶18} On July 12, 2013, the court filed an Order and Journal Entry. The court concluded that Ford breached his employment contract and that the liquidated damages provision was enforceable. The court denied Ford's request for summary judgment for Breach of Contract but granted his request on the claim for Breach of Fiduciary Duty. In a separate Order and Journal Entry on the same date, the court granted Kent State's Partial Motion for Summary Judgment for Breach of Contract, finding that, pursuant to the valid liquidated damages clause, Kent State was entitled to the damages specified in the contract.

{¶19} On July 12 and 24, 2013, the court filed two additional Orders and Journal Entries, granting summary judgment in favor of Kent State and denying Bradley's Motion for Summary Judgment, on the claim for Tortious Interference, but required that

damages be proven at trial. On September 25, 2013, Kent State filed a Notice of Dismissal against Bradley University.

{¶20} On October 11, 2013, the trial court filed a Final Judgment Entry, finding that, pursuant to the stipulation of the parties, \$1.2 million was due to Kent State under the liquidated damages clause of the contract and awarded damages in that amount.

{¶21} Ford timely appeals and raises the following assignment of error:

{¶22} "The trial court erred when it entered final judgment in favor of Plaintiff-Appellee Kent State University and awarded Kent State \$1.2 million in liquidated damages after granting Kent State's cross-motion for summary judgment on its claim for breach of contract and denying Defendant-Appellant Gene A. Ford's motion for summary judgment on the same claim."

{¶23} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision." (Citation omitted.) *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶ 27.

{¶24} Ford argues that the liquidated damages clause in his employment contract was an unenforceable penalty and does not comply with the factors contained in *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984).

{¶25} Liquidated damages are “an agreed upon amount of money to be paid in lieu of actual damages in the event of a breach of contract.” (Citation omitted.) *Windsor v. Riback*, 11th Dist. Geauga Nos. 2007-G-2775 and 2007-G-2781, 2008-Ohio-2005, ¶ 53. “Liquidated damages * * * which are consistent with the principle of compensation * * * are permitted.” *Cleveland Constr., Inc. v. Gatlin Plumbing & Heating, Inc.*, 11th Dist. Lake No. 99-L-050, 2000 Ohio App. LEXIS 3215, 5 (July 14, 2000).

{¶26} When a party challenges a liquidated damages provision, 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.” *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 382, 613 N.E.2d 183 (1993); *Village Station Assocs. v. Geauga Co.*, 84 Ohio App.3d 448, 451, 616 N.E.2d 1201 (11th Dist.1992) (“liquidated damages must have some relation to actual damages”).

{¶27} In *Samson*, the Supreme Court of Ohio set forth the test for determining whether a liquidated damages provision should be upheld:

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.

12 Ohio St.3d 27, 465 N.E.2d 392, at the syllabus.

{¶28} The application of *Samson* to the facts of this case supports a conclusion that the liquidated damages provision was properly enforced by the lower court. The parties agreed on an amount of damages, stated in clear terms in Ford's second employment contract. Regarding the first factor, the difficulty of ascertaining the damages resulting from Ford's breach, it is apparent that such damages were difficult, if not impossible, to determine. Based on the testimony presented, the departure of a university's head basketball coach may result in a decrease in ticket sales, impact the ability to successfully recruit players and community support for the team, and require a search for both a new coach and additional coaching staff. Many of these damages cannot be easily measured or proven. This is especially true given the nature of how such factors may change over the course of different coaches' tenures with a sports program or team.

{¶29} A similar conclusion regarding the difficulty of ascertaining damages from a university coach's breach was reached in *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751 (6th Cir.1999), one of the few cases related to liquidated damages in a university coaching scenario. The *DiNardo* Court cited the district court's opinion, which found that damages from losing a head football coach are uncertain and "[i]t is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc. * * * [T]o require a precise formula for

calculating damages resulting from the breach of contract by a college head football coach would be tantamount to barring the parties from stipulating to liquidated damages evidence in advance.” *Id.* at 756. The Court held that the university’s head football coach was hired “for a unique and specialized position,” with the parties understanding that damages could not be easily ascertained if a breach occurred, especially given that the provision was reciprocal and was the result of negotiations by both parties, which is the case in the present matter as well. *Id.* at 757.

{¶30} Ford argues that his duty was to coach the team and the only damages that would result from his breach were from hiring a replacement coach, damages which are easily measurable. The court in *DiNardo* rejected this exact argument, holding that “[t]he potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach.” *Id.* at 756. As he notes in his brief, Ford also had supplemental duties, such as fundraising and marketing. The contractual requirement that he perform these duties when requested represents the inherent importance and value in a basketball coach participating in activities benefitting the basketball program. Factors such as the potential loss of recruits and revenue that could result if a coach’s early departure impacted the team’s results are directly tied to his duties as a coach.

{¶31} In this case, the contract stated that the liquidated damages clause was based on Kent State’s “investment in [Ford’s] continued employment.” This is similar to *DiNardo*, where language was included regarding the importance of the “long-term commitment” and stability of the program. *Id.* at 756. The desire for Ford’s continued employment, the renegotiation of his contract prior to its expiration, and Kennedy’s statements to Ford that the contract would be renegotiated within a few years, made it clear that Kent State desired Ford to have long-term employment, which was necessary

to establish the stability in the program that would benefit recruitment, retention of assistant coaching staff, and community participation and involvement. The breach of the contract impacted all of these areas.

{¶32} Ford cites *Fleming v. Kent State Univ.*, Ct. of Cl. No. 2011-09365 (Oct. 4, 2013), noting that Kent State advanced, and prevailed on, the opposite position in that case, i.e., that a liquidated damages clause was unenforceable because damages were not uncertain. *Fleming*, however, has recently been reversed by the Tenth District in *Fleming v. Kent State Univ.*, 10th Dist. Franklin No. 13AP-942, 2014-Ohio-3471. Although *Fleming* involved the opposite scenario, i.e., where the coach's employment was terminated by the university, similar to the present case, the court held that damages were uncertain, due to the nature of the coach's employment and the difficulty in estimating potential lost business opportunities. *Id.* at ¶ 30-31.

{¶33} Ford argues that the lack of certainty prong also does not apply because there were no historic adverse effects on ticket sales, recruiting, or donor contributions when past coaches left Kent State. Even if this was the case, it has little bearing on the fact that damages to Kent State were uncertain at the time the contract was executed. Furthermore, Ford's unique abilities, such as his skill in connecting with the community and success in obtaining donations, were noted in the testimony.

{¶34} In the second factor, we must evaluate whether the contract was unconscionable and disproportionate in amount, such that it does not express the parties' intent.

{¶35} Ford argues that the liquidated damages provision is unenforceable because it is disproportionate to the foreseeable possible damage. He asserts that

Kent State failed to estimate its damages prior to including the liquidated damages clause and instead chose an arbitrary amount.

{¶36} As an initial matter, we note that there appears to be nothing unconscionable about the liquidated damages clause. "A contract is unconscionable if it did not result 'from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion.'" (Citations omitted.) *Lake Ridge*, 66 Ohio St.3d at 383, 613 N.E.2d 183. Ford was not an unsophisticated party and testimony indicated that he had consulted with an attorney and/or agent prior to signing the second employment contract. There is no evidence to show that he did not make an informed choice, especially given that he clearly negotiated in an attempt to remove the liquidated damages clause.

{¶37} Regarding the alleged unreasonableness of the damages, Ford takes issue with the fact that actual damages were not proven by Kent State. 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., L.L.C.*, 10th Dist. Franklin No. 10AP-1099, 2011-Ohio-6726, ¶ 41.

{¶38} While some evidence of the value of the actual damages helps to determine the reasonableness of the liquidated damages, based on the record, we find that the damages were reasonable. Even if the damages to Kent State were based solely on hiring a replacement coach, finding a coach of a similar skill and experience

level as Ford, which was gained based partially on the investment of Kent State in his development, would have an increased cost. This is evident from the fact that Ford was able to more than double his yearly salary when hired by Bradley University. See *Burt* at ¶ 20 (upholding a liquidated damages clause based on the high market cost of obtaining a replacement employee). The salary Ford earned at Bradley shows the loss of market value in coaching experienced by Kent State, \$400,000 per year, for four years. Although this may not have been known at the time the contract was executed, it could have been anticipated, and was presumably why Kent State wanted to renegotiate the contract and establish a new five-year coaching term. As noted above, there was also an asserted decrease in ticket sales, costs associated with the trip for the coaching search, and additional potential sums that may be expended.

{¶39} Regarding Ford's contention that the liquidated damages contained in his employment contract were not properly estimated beforehand, as required under the *Samson* test, but were merely an arbitrary number, it has been noted by several courts that estimation by exacting standards cannot be achieved in every scenario. See *DiNardo*, 174 F.3d at 755-757 (allowing salary to be used for liquidated damages since future damages were unquantifiable); *Burt* at ¶ 20 (given the unpredictable market rate at the time of the breach, liquidated damages tied to an employee's salary were a reasonable prediction). Kennedy also testified that the base salary was used for the liquidated damages, based on considerations such as potential fundraising and revenue losses, and a review of the industry standard, resulting in the conclusion that it would cost about a year's salary to cover damages.

{¶40} In the third factor, the court is to consider whether the contract is consistent with the fact that the parties intended that the damages follow the breach.

The provision itself in this case is not ambiguous and it is clear that it would apply if the contract was breached by either party. Testimony was presented that such clauses, although they differ from contract to contract, are common for university coaches. Nothing indicated that the clause did not represent the parties' intent, especially given that testimony demonstrated Ford was aware of the provision and even attempted to change it during negotiations prior to signing the second contract.

{¶41} Finally, Ford argues that the liquidated damages clause is unenforceable because it acted as a penalty to punish him for breaking his promise.

{¶42} "Whether the subject provision constitutes an illegal penalty provision or a liquidated damages provision depends on the facts and circumstances of each case." *Brunswick Ltd. Partnership v. Feudo*, 171 Ohio App.3d 369, 2007-Ohio-2163, 870 N.E.2d 804, ¶ 11 (11th Dist.).

{¶43} As discussed extensively above, there was justification for seeking liquidated damages to compensate for Kent State's losses, and, thus, there was a valid compensatory purpose for including the clause. While there was some testimony the clause would deter Ford from leaving, this would be true of liquidated damages clauses in almost every contract, since an award of damages deters a breach. It appears that at least some losses were contemplated prior to the inclusion of this provision in the contract. Given all of the circumstances and facts in this case, and the consideration of the factors above, we cannot find that the liquidated damages clause was a penalty.

{¶44} In his second issue, Ford argues that the liquidated damages clause is unenforceable since a party cannot recover for a breach of contract when there is no proof of damages.

{¶45} As discussed above, when a liquidated damages clause is included, it is not required that actual damages be proven. The cases cited by Ford within this argument do not include a liquidated damages clause. To the extent that they address the issue of whether an employee's breach of an employment contract is compensable only by damages for his replacement, this has been thoroughly addressed above and fails to take into consideration the value of the unique services provided by a university athletic coach.

{¶46} The sole assignment of error is without merit.

{¶47} For the foregoing reasons, the judgments of the Portage County Court of Common Pleas are affirmed. Costs to be taxed against the appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with a Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting.

{¶48} This case was resolved on the parties' cross-motions for summary judgment. On appeal, Ford's sole assignment of error asserts the trial court erred by granting Kent State's motion for summary judgment on its claim for breach of contract and denying Ford's motion for summary judgment on the same claim. This case was not submitted to the trial court on stipulations or otherwise tried in any way on the merits. As a result, the case must be analyzed based on the standard set forth in Civ.R. 56. In a summary judgment exercise, the moving party must submit sufficient

evidentiary material to establish that it is entitled to judgment, i.e., that there are no genuine issues of material fact to be resolved in the case. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0038, 2013-Ohio-2838, ¶12. If the moving party meets this burden, the burden shifts to the non-moving party to produce sufficient evidentiary material that establishes there are genuine issues to be litigated, pursuant to Civ.R. 56(E). *Id.* The evidence submitted must be construed *in a light most favorable to the non-moving party*. *Id.* at ¶13.

{¶49} The test developed in Ohio to judge a stipulated damages provision was set forth by the Ohio Supreme Court in *Samson Sales, Inc. v. Honeywell, Inc.*:

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.

12 Ohio St.3d 27 (1984), syllabus, citing *Jones v. Stevens*, 112 Ohio St. 43 (1925), paragraph two of the syllabus.

{¶50} A challenge to a stipulated damages provision requires the court to “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.” *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 382 (1993), citing 3 Restatement of the Law 2d, Contracts, Section 356(1), at 157 (1981) (emphasis added).

{¶51} Here, the formula utilized in the Contract does not, with any reasonable clarity, demonstrate an approximation of anticipated, actualized damages; rather, it rotely requires the breaching party to pay the sum of the salary remaining to be paid on the Contract, irrespective of any other variables germane to a damages calculation. This formula neither suggests any reasonable estimate of Kent State's probable losses nor describes in any way the specific areas of damage to be included in the estimate.

{¶52} The formula utilized in the Contract, i.e., the number of years left on the Contract multiplied by Ford's yearly salary, produces a higher valuation of damages if the Contract is breached in the early years of the Contract rather than the last. Yet, such a disparity in valuation bears no reasonable relationship to the actual damages sustained. It is apparent the damages incurred by Kent State are essentially the same if the Contract is breached at any point during the Contract term. This formula may be the appropriate measure of damages if Kent State breached the Contract, as Ford's salary and the duration of the Contract is fixed. But to suggest the same measure of damages is appropriate in the event of a breach by Ford is absurd; there is no way the potential measure of damage to both parties would be remotely the same. When viewing the evidence submitted in a light most favorable to Ford, this lends itself to the suggestion that it was meant to penalize Ford, not compensate Kent State.

{¶53} Further, it is difficult to assess the actual damages that might be sustained by Kent State in the event of a breach by Ford. In construing the evidence in a light most favorable to Ford, a question of fact remains as to whether the parties intended Section 7 of the Contract to be a "reasonable estimate" of damages. Unlike *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 757 (6th Cir.1999), where the liquidated damages were "in line with Vanderbilt's estimate of its actual damages," Kent State provided evidence

of only minimal damages (less than \$2,000) that were actually incurred as a result of Ford breaching the Contract and accepting the coaching position at Bradley University. Additionally, although Kent State asserted the possibility of various consequential losses, inter alia, adverse effects on alumni relations, decreased ticket sales, and loss of public support, Kent State failed to support this contention with any evidentiary material that such losses transpired, or how the potential losses in these areas could have approached the significant stipulated damages figure. More significantly, it appears that all parties are in agreement that *no attempt was ever made* by Kent State to conduct an assessment of what the losses might be, or what items of damages should be included in the assessment, *prior to inclusion* of the clause in the Contract.

{¶54} The trial court and the majority herein cite to Kent State's contention that it lost a coach whose value increased by \$400,000 since the signing of the Contract. However, assessment of damages in a liquidated damages case must be based on *recoverable* damages for breach. See *Lake Ridge, supra*, at 383. It is hard to imagine a circumstance under which the increase in the value of the coach would be a measure of damages in a breach of contract case, and it should not be considered a factor in assessing whether the stipulated liquidated damages clause is reasonable.

{¶55} In his brief, Ford cites to *Lake Ridge* for the proposition that whether a stipulation is for liquidated damages or a penalty is a question of law for the court. See *Lake Ridge, supra*, at 380. To support this statement of law, the Supreme Court of Ohio cited to a case from the U.S. Court of Appeals for the Fifth Circuit, applying Florida state law. *Id.*, quoting *Ruckelshaus v. Broward Cty. School Bd.*, 494 F.2d 1164, 1165 (5th Cir.1974). As recognized by the majority, however, the Supreme Court stated in *Samson Sales*: "Whether a particular sum specified in a contract is intended as a

penalty or as liquidated damages depends upon the operative facts and circumstances surrounding each particular case * * *." *Samson Sales, supra*, at 28-29. Often, the determination of whether it is a penalty or liquidated damages clause involves factual questions that cannot be resolved as a matter of law. See *Developers Diversified, Ltd. v. Graves*, 4th Dist. Ross No. 1131, 1985 Ohio App. LEXIS 8079, *4 (June 18, 1985) ("establishing whether liquidated damages are reasonable or a penalty is often a question of fact") and *Brunswick Ltd. Partnership v. Feudo*, 171 Ohio App.3d 369, 2007-Ohio-2163, ¶11 (11th Dist.).

{¶56} In this case, without stipulations, submission of evidence to a fact finder, and an assessment of the credibility of the relevant evidence, I believe it is impossible to determine whether the stipulated damages clause is reasonable and proportionate. Thus, it is inappropriate to conclude, as a matter of law, that there are no genuine issues of fact to be resolved, and the stipulated damages provision in the Contract is to be construed as liquidated damages and not a penalty clause. There is significant evidence that Kent State did not make an effort, prior to or at the time of contracting, to identify either the types of damages or the amount of damages it would incur following a breach. There is evidence, however, that the damages sustained by Kent State as a result of a breach would be the same if a breach occurred in the last year of the Contract or in the second year of the Contract. As the evidence must be construed in a light most favorable to the non-moving party, the escalation clause contained in the Contract could be considered a penalty. As a result, there remain genuine issues of material fact to be litigated on this dispositive issue.

{¶57} For the foregoing reasons, I respectfully dissent from the opinion of the majority.

FILED
COURT OF APPEALS

JAN 13 2015

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

STATE OF OHIO)

COUNTY OF PORTAGE)

)SS.

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

KENT STATE UNIVERSITY,

Plaintiff-Appellee,

- vs -

GENE A. FORD, et al.,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2013-P-0091

For the reasons stated in the Opinion of this court, the sole assignment of error is without merit. The order of this court is that the judgment of the Portage County Court of Common Pleas is affirmed. Costs to be taxed against appellant.



JUDGE DIANE V. GRENDELL

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with a Dissenting Opinion.

OCT 11 2013

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

**IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO**

KENT STATE UNIVERSITY,)	CASE NO. 2011 CV 00511
)	
Plaintiff,)	JUDGE JOHN A. ENLOW
)	
-vs-)	
)	
GENE A. FORD, et al.,)	<u>FINAL JUDGMENT ENTRY</u>
)	
Defendants.)	

This comes before the Court upon the stipulation of the parties, Kent State University and Gene Ford, that:

1. The total amount due Kent State University arising out of Paragraph 7.a. of the contract between Kent State University and Gene Ford executed on or about April 1, 2010, as of March 28, 2011 was One Million Two Hundred Thousand Dollars (\$1,200,000.00); and

2. That no amounts were to be deducted or withheld from Gene Ford's salary for employee contributions to the state retirement system or a state approved alternative retirement system upon Gene Ford's departure from Kent State University on March 28, 2011.

Accordingly, pursuant to the Court's Order and Journal Entry dated July 12, 2013, granting summary judgment in favor of Plaintiff, Kent State University, and against Defendant, Gene Ford ("Ford") the Court finds that the resulting damages to be awarded

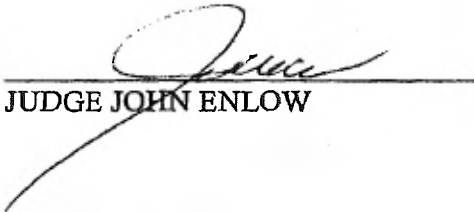
Kent State University on its claim for breach of contract is in the amount of One Million Two Hundred Thousand Dollars (\$1,200,000.00).

WHEREFORE, the Court hereby enters judgment in favor of Plaintiff, Kent State University, and against Defendant, Gene Ford, in the amount of One Million Two Hundred Thousand Dollars (\$1,200,000.00), plus prejudgment interest accruing from March 28, 2011 at the statutory rate and post-judgment interest from the date of this Judgment at the statutory rate.

The Court's finding on damages to Kent State University on its breach of contract claim constitutes the sole matter pending before the Court as all remaining claims have been adjudicated. There is no just reason for delay.

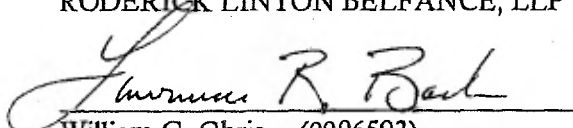
Costs to Defendant.

IT IS SO ORDERED.


JUDGE JOHN ENLOW

Approved:

RODERICK LINTON BELFANCE, LLP


William G. Chris (0006593)

Lawrence R. Bach (0021205)

Rodd A. Sanders (0063835)

Attorneys for Plaintiff

Kent State University

Reviewed for Form but Not Approved

/s/ Fritz Byers
Fritz Byers (0002337)
Attorney for Defendant
Gene Ford

NO. 688 P. 2/14
FILED
COURT OF COMMON PLEAS
JUL 12 2013
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

KENT STATE UNIVERSITY,)	CASE NO. 2011 CV 0511
)	
Plaintiff,)	
v.)	JUDGE JOHN A. ENLOW
)	
)	
GENE A. FORD, et al.,)	<u>ORDER AND JOURNAL ENTRY</u>
)	
Defendants.)	

I. INTRODUCTION AND STANDARD OF REVIEW

This matter is before the Court upon motion of Defendant Gene A. Ford ("Coach Ford") for summary judgment on the claims of Plaintiff Kent State University ("KSU") for breach of contract, breach of fiduciary duty, and damages.

The parties have agreed that the operative pleadings are KSU's complaint filed April 26, 2011, and Coach Ford's answer filed May 26, 2011.

At this stage of the proceedings, the granting of judgment is only proper where no genuine issue of material fact remains for determination, the evidence being construed most strongly in favor of the defending party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327. Initially, the movant has the burden of demonstrating to the court that there is no genuine issue of material fact. "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * If the moving party

fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. After the movant has met that burden, the defending party cannot rest on his pleadings, but must produce some credible evidence on those issues upon which he bears the burden of proof at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, at paragraph three of the syllabus.

II. SUMMARY JUDGMENT EVIDENCE

In April 2008, KSU promoted Coach Ford to the position of head men's basketball coach. KSU offered Coach Ford a four year employment contract with an option for one additional year and annual compensation with supplemental salary amounting to \$200,000 and other incentives. KSU's athletic director, Laing Kennedy, had discussed with Coach Ford the terms of the contract, particularly the compensation and damage clauses, and again just before the contract was signed. The employment contract was executed by the KSU President Lester Lefton, Mr. Kennedy, and Coach Ford.

The contract's liquidated damage clause applied to both KSU and Coach Ford. In the event KSU terminated Coach Ford without just cause, he would be entitled to liquidated damages from KSU totaling the balance of his annual salary due for the remaining amount of the contract term. On the other hand, if Coach Ford resigned or terminated his employment before the contract term and was employed by others, KSU would be entitled to damages from Coach Ford in the same manner.

The contract also included a provision which limited Coach Ford from seeking potential job prospects or accepting employment within the Mid-American Conference or other basketball programs during the contract term. But the provision also provided that, with the athletic director's permission, Coach Ford could respond to inquiries from programs outside the Mid-American Conference, conditioned on the inquiring program's prior agreement to pay Coach Ford's termination costs of liquidated damages.

After two good years of basketball Mr. Kennedy approached Coach Ford about extending his employment contract and increasing his annual salary. Mr. Kennedy and Coach Ford agreed to additional compensation of \$300,000 and an extension for two more years, which would include the 2014-2015 season ending on March 31, 2015. Except for the two additional years and significantly increased compensation, the extension contract was identical to the first contract. The liquidated damage provision was retained. The new employment contract was executed by President Lefton, Mr. Kennedy, and Coach Ford on April 1, 2010. Coach Ford became the highest paid basketball coach in the Mid-American Conference.

The pertinent terms of the 2010 employment agreement are as follows:

"7. GENE A. FORD recognizes that his promise to work for the UNIVERSITY for the entire term of this five (5) year Contract is of the essence of this Contract with the UNIVERSITY. GENE A. FORD also recognizes that the UNIVERSITY is making a highly valuable investment in his continued employment by entering into this Contract and its investment would be lost were he to resign or otherwise terminate his

employment with the UNIVERSITY prior to the expiration of this Contract. Accordingly, he will pay to the UNIVERSITY as liquidated damages an amount equal to his base and supplemental salary, multiplied by the number of years (or portions(s) thereof) remaining on the Contract.

- "a. Accordingly, subject to GENE A. FORD's continuing compliance with NCAA and UNIVERSITY rules and regulations * * * GENE A. FORD agrees that in the event he resigns or otherwise terminates his employment prior to March 31, 2015, and is employed or performing services for a person or institution other than the UNIVERSITY or the University terminates GENE A. FORD prior to that date then the initiating party shall pay to the other an amount equal to the balance of the then-current total annual salary due for the remaining amount of the term of this Contract, less amounts that would otherwise be deducted or withheld from his salary for employee contributions to the state retirement system or a state approved alternative retirement system.
- "b. In addition, GENE A. FORD agrees that he will neither seek potential job prospects nor accept a position within the MAC [Mid-American Conference] nor will he seek job prospects with any other program during the term of this agreement.
- "c. If, however, he is sought for a job prospect outside of the MAC [Mid-American Conference], GENE A. FORD will not respond to such inquiries without the permission of the [Athletic] Director, with such permission not to be unreasonably withheld. It is understood that denying such requests for permission after May 1 of any given year, except in extraordinary circumstances about which GENE A. FORD will advise the [Athletic] Director, shall not be deemed unreasonable. Nor shall it be deemed unreasonable to deny permission at any time prior to April 1, 2011.
- "d. Permission pursuant to paragraph 7c above shall be

conditioned upon the requestor agreeing, prior to the granting of such permission, to pay such termination costs described in paragraph 7a above to the UNIVERSITY should GENE A. FORD accept a position with the requestor and should GENE A. FORD agrees that if he accepts such a position, he shall forfeit any bonuses earned during that termination year." (Emphasis sic).

In March 2011, Coach Ford's sports agent, Richard Giles, called KSU's new athletic director, Joel Nielsen, to allow Coach Ford to talk with institutions interested in the coach. Consistent with provision 7.c., Mr. Nielsen gave permission to Coach Ford to talk with other institutions after the basketball season was over.

Two days after the end of the season, on Friday, March 25, 2011, Coach Ford met with representatives of Defendant Bradley University ("Bradley U") and negotiated through the weekend. On Saturday morning and through the day, Coach Ford and Mr. Nielsen discussed by telephone, among other things, the employment contract, the liquidate damage clause, and a potential offer from Bradley U. Coach Ford wanted to reduce the liquidated damage provision to \$400,000. Mr. Nielsen suggested \$600,000, and he would put it before President Lefton for decision.

That same morning Bradley U's athletic director, Michael Cross, also telephoned Mr. Nielsen about Coach Ford's abilities as head coach. Mr. Nielsen made it very clear that Coach Ford's contract included a liquidate damage clause involving \$1.2 million. Dr. Cross responded that the issue of damages was between Coach Ford and KSU.

Later that day Coach Ford signed a memorandum of understanding

with Bradley U to become Bradley U's head basketball coach effective Sunday, March 27.

On Sunday, President Lefton decided that the liquidated damages specified in the employment contract must be paid. Mr. Nielson immediately communicated that decision to Coach Ford.

Bradley U's contract upped Coach Ford's annual base salary to \$700,000 and offered to pay \$400,000 (called a "buy out" in Bradley U's memorandum of understanding) toward Coach Ford's liquidated damages to KSU. Bradley U's contract included a provision similar in purpose and nature to liquidated damages amounting to \$1.4 million, if Coach Ford resigned within the first two years of his tenure.

Coach Ford never returned to KSU.

III. DECISION

A. Coach Ford's Summary Judgment Motion

Coach Ford seeks summary judgment on KSU's claims of breach of contract, breach of fiduciary duty, and damages.

(1) Breach of Contract

Coach Ford asserts that KSU's claim of breach of contract cannot be supported.

The elements of breach of contract include: (1) existence of a contract; (2) performance by plaintiff; (3) breach by defendant; and (4) damage or loss to plaintiff. *Am. Sales, Inc. v. Boffo*, 71 Ohio App.3d 168, 175 (1991).

In construing the terms of any contract, the principal objective is to determine the intention of the parties. When the terms included in the contract are clear and unambiguous, a court cannot create a new contract by finding an intent not expressed in the clear and unambiguous language of the written contract. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Co.*, 86 Ohio St.3d 270, 273 (1999).

Coach Ford admits entering the employment contract with KSU and admits that KSU performed its obligations under the contract. He maintains, however, that he did not breach the contract, and KSU is not entitled to damages. The summary judgment evidence, construed most favorably for KSU, tends to establish that Coach Ford breached his employment contract, and KSU is entitled to damages.

Coach Ford was under an employment contract with KSU through the 2014-2015 season ending on March 31, 2015. The terms of the contract included Coach Ford's promise to work for KSU for the entire term of his five year contract. In addition, Coach Ford agreed that he would not seek job prospects with any other program during the term of this agreement.

Coach Ford was contacted by Bradley U. On March 25, 2011, two days after the end of the 2011 basketball season, Coach Ford met with representatives of Bradley U. The next day Coach Ford signed a memorandum of understanding with Bradley U that he would be the head men's basketball program. The contract was to be effective on March 27.

Although his contract with KSU extended through March 31, 2015,

Coach Ford never returned to KSU.

Construing the summary judgment evidence most favorably for KSU, the evidence tends to establish that Coach Ford breached his employment contract with KSU.

(2) Damages

Coach Ford also maintains that KSU is not entitled to damages because KSU suffered no loss.

KSU claims two types of damages against Coach Ford; liquidated damages and monetary damages.

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. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 28 (1984), citing *Jones v. Stevens*, 112 Ohio St. 43 (1925), paragraph two of the syllabus.

When, as here, the liquidated damage provision is challenged, the evidence must be examined in light of what the parties knew at

the time the contract was formed and in light of the estimate of the actual damages caused by the breach. *Samson Sales, Inc.*, at 382.

The liquidated damage clause in the parties' 2010 employment contract, found at Section 7, provided that "[Coach Ford] will pay to [KSU] as liquidated damages an amount equal to his base and supplemental salary, multiplied by the number of years (or portion(s) thereof) remaining on the Contract.

"a. Accordingly * * * GENE A. FORD agrees that in the event he resigns or otherwise terminates his employment prior to March 31, 2015, and is employed or performing services for a person or institution other than [KSU] * * * then the initiating party shall pay to the other an amount equal to the balance of the then-current total annual salary due for the remaining amount of the term of this Contract, less amounts that would otherwise be deducted or withheld from his salary for employee contributions to the state retirement system or a state approved alternative retirement system."

KSU's basketball program was very successful during the three years Coach Ford was head basketball coach. His interaction with alumni, donors, and especially his players, whose achievements could draw the cream of the available prospects, began to grow the KSU program. It was impossible, however, to determine with any specificity how the program would continue to grow. But if Coach Ford left for another program, KSU's investment would be lost for those seasons. The amount of loss was uncertain and difficult to prove.

Construing the summary judgment evidence, most favorably for

KSU, it cannot be concluded that Coach Ford's breach of the employment contract did not result in damages to KSU.

The second issue is whether 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. Coach Ford had experience in employment contracts during his coaching career, was highly educated and fully understood the terms, content, and ramifications presented by the 2010 contract. He also had retained a knowledgeable sports agent to assist him. Over the term of the contract Coach Ford was assured to receive no less than \$1.5 million of compensation. The damage provision applied equally to the parties. Construing the summary judgment evidence, most favorably for KSU, it cannot be concluded that the damage provision was unconscionable, unreasonable, or disproportionate.

As for the intention of the parties, it cannot be concluded that the employment contract was other than plain and unambiguous. The parties understood that specified damages should follow the breach.

(3) Breach of Fiduciary Duty

Coach Ford also seeks summary judgment on KSU's claim of breach of fiduciary duty. KSU claims that Coach Ford breached his fiduciary duty to KSU by breaching his contract.

A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there

is a resulting position of superiority or influence, acquired by virtue of this special trust. *Stone v. Davis*, 66 Ohio St.2d 74, 78 (1981). The fiduciary is under a duty to act for the benefit of the other on matters within the scope of the relationship, such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client. *Black's Law Dictionary* (7th Ed., 1999). The relationship is one of special trust or confidence, and both parties must understand that a fiduciary relationship exists between them. *Lee v. Cuyahoga Cty. Court of Common Pleas*, 76 Ohio St.3d 620, 623 (1991). Not all employer/employee relationships are fiduciary.

Here, Coach Ford was a contract employee of KSU responsible for the men's basketball program. Nothing in the employment contract would indicate to Coach Ford that a fiduciary relationship had been created between himself and KSU. There is no evidence that Coach Ford knew of any such fiduciary relationship. Certainly, Coach Ford had a significant responsibility to both the basketball program and the young men who participated, but that responsibility was not a fiduciary one.

As Coach Ford was not in a position of fiduciary responsibility, KSU's claim for breach of fiduciary duty must fail.

V. SUMMARY

The summary judgment evidence does not support Coach Ford's assertion that there was no breach of the parties' employment contract. Although Coach Ford admits entering into the employment contract with

KSU and admits that KSU performed its obligation under the contract, the summary judgment evidence tends to establish that Coach Ford breached the employment contract, and KSU was damaged by the breach.

As for KSU's claim of breach of fiduciary duty on the part of Coach Ford, the law regarding fiduciaries does not apply to the contractual relationship between KSU and Coach Ford.

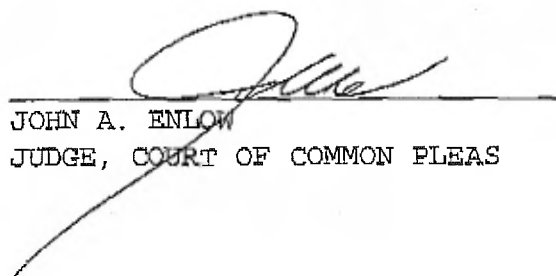
Upon review and consideration of the motions, pleadings, depositions, exhibits, and portions of affidavits filed herein, and construing the evidence most strongly in favor of KSU, the Court finds that there exist genuine issues of material fact on the claim of breach of contract, and that Coach Ford is not entitled to judgment as a matter of law on that claim.

Applying that same review and consideration, the Court finds that there exists no genuine issue of material fact on the claim of breach of fiduciary duty, and that Coach Ford is entitled to judgment as a matter of law on that claim.

IT IS THEREFORE ORDERED that the motion of Defendant Gene A. Ford for summary judgment on Plaintiff Kent State University's claim for breach of contract be and hereby is denied.

IT IS FURTHER ORDERED that the motion of Defendant Gene A. Ford for summary judgment on Plaintiff Kent State University's claim for breach of fiduciary duty be and hereby is granted, and said claim is hereby dismissed.

SO ORDERED.



JOHN A. ENLOW
JUDGE, COURT OF COMMON PLEAS

cc: William G. Chris, Attorney for KSU
Lawrence R. Bach, Attorney for KSU
Frederick Byers, Attorney for Coach Ford
Kevin M. Young, Attorney for Bradley U
William R. Kohlhase, Attorney for Bradley U

NO. 687 P. 2/15
FILED
COURT OF COMMON PLEAS
JUL 12 2013
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

KENT STATE UNIVERSITY,)	CASE NO. 2011 CV 0511
)	
Plaintiff,)	
v.)	JUDGE JOHN A. ENLOW
)	
)	
GENE A. FORD, et al.,)	<u>ORDER AND JOURNAL ENTRY</u>
)	
Defendants.)	

I. INTRODUCTION AND STANDARD OF REVIEW

This matter is before the Court upon motion of Plaintiff Kent State University ("KSU") requesting partial summary judgment for breach of contract and damages against Defendant Gene A. Ford ("Coach Ford").

The parties have agreed that the operative pleadings are KSU's complaint filed April 26, 2011, and Coach Ford's answer filed May 26, 2011.

At this stage of the proceedings, the granting of judgment is only proper where no genuine issue of material fact remains for determination, the evidence being construed most strongly in favor of the defending party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327. Initially, the movant has the burden of demonstrating to the court that there is no genuine issue of material fact. "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * If the moving party

fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. After the movant has met that burden, the defending party cannot rest on his pleadings, but must produce some credible evidence on those issues upon which he bears the burden of proof at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, at paragraph three of the syllabus.

II. SUMMARY JUDGMENT EVIDENCE

In April 2008, KSU promoted Coach Ford to the position of head men's basketball coach. KSU offered Coach Ford a four year employment contract with an option for one additional year and annual compensation with supplemental salary amounting to \$200,000, with other incentives. KSU's athletic director, Laing Kennedy, had discussed with Coach Ford the terms of the contract, particularly the compensation and damage clauses, and again just before the contract was signed. The employment contract was executed by the KSU President, Mr. Kennedy, and Coach Ford.

The contract's liquidated damage clause applied to both KSU and Coach Ford. In the event KSU terminated Coach Ford without just cause, he would be entitled to liquidated damages from KSU totaling the balance of his annual salary due for the remaining amount of the contract term. On the other hand, if Coach Ford resigned or terminated his employment before the contract term and was employed by others, KSU would be entitled to damages from Coach Ford in the same manner.

The contract also included a provision which limited Coach Ford from seeking potential job prospects or accepting employment within the Mid-American Conference or other basketball programs during the contract term. But the provision also provided that, with the athletic director's permission, Coach Ford could respond to inquiries from programs outside the Mid-American Conference, conditioned on the inquiring program's prior agreement to pay Coach Ford's termination costs of liquidated damages.

After two good years of basketball Mr. Kennedy approached Coach Ford about extending his employment contract and increasing his annual salary. Mr. Kennedy and Coach Ford agreed to additional compensation of \$300,000 and an extension for two more years, which would include the 2014-2015 season ending on March 31, 2015. Except for the two additional years and significantly increased compensation, the extension contract was identical to the first contract. The liquidated damage provision was retained. The new employment contract was executed by KSU President Lester Lefton, Mr. Kennedy, and Coach Ford on April 1, 2010. Coach Ford became the highest paid basketball coach in the Mid-American Conference.

The pertinent terms of the 2010 employment agreement are as follows:

"7. GENE A. FORD recognizes that his promise to work for the UNIVERSITY for the entire term of this five (5) year Contract is of the essence of this Contract with the UNIVERSITY. GENE A. FORD also recognizes that the UNIVERSITY is making a highly valuable investment in his continued employment by entering into this Contract and its investment would be lost were he to resign or otherwise terminate his

employment with the UNIVERSITY prior to the expiration of this Contract. Accordingly, he will pay to the UNIVERSITY as liquidated damages an amount equal to his base and supplemental salary, multiplied by the number of years (or portions(s) thereof) remaining on the Contract.

- "a. Accordingly, subject to GENE A. FORD's continuing compliance with NCAA and UNIVERSITY rules and regulations * * * GENE A. FORD agrees that in the event he resigns or otherwise terminates his employment prior to March 31, 2015, and is employed or performing services for a person or institution other than the UNIVERSITY or the University terminates GENE A. FORD prior to that date then the initiating party shall pay to the other an amount equal to the balance of the then-current total annual salary due for the remaining amount of the term of this Contract, less amounts that would otherwise be deducted or withheld from his salary for employee contributions to the state retirement system or a state approved alternative retirement system.
- "b. In addition, GENE A. FORD agrees that he will neither seek potential job prospects nor accept a position within the MAC [Mid-American Conference] nor will he seek job prospects with any other program during the term of this agreement.
- "c. If, however, he is sought for a job prospect outside of the MAC [Mid-American Conference], GENE A. FORD will not respond to such inquiries without the permission of the [Athletic] Director, with such permission not to be unreasonably withheld. It is understood that denying such requests for permission after May 1 of any given year, except in extraordinary circumstances about which GENE A. FORD will advise the [Athletic] Director, shall not be deemed unreasonable. Nor shall it be deemed unreasonable to deny permission at any time prior to April 1, 2011.
- "d. Permission pursuant to paragraph 7c above shall be

conditioned upon the requestor agreeing, prior to the granting of such permission, to pay such termination costs described in paragraph 7a above to the UNIVERSITY should GENE A. FORD accept a position with the requestor and should GENE A. FORD agrees that if he accepts such a position, he shall forfeit any bonuses earned during that termination year." (Emphasis sic).

In March 2011, Coach Ford's sports agent, Richard Giles, called KSU's new athletic director, Joel Nielsen, to allow Coach Ford to talk with institutions interested in the coach. Consistent with provision 7.c., Mr. Nielsen gave permission to Coach Ford to talk with other institutions after the basketball season was over.

Two days after the end of the season, on Friday, March 25, 2011, Coach Ford met with representatives of Defendant Bradley University ("Bradley U") and negotiated through the weekend. On Saturday morning and through the day, Coach Ford and Mr. Nielsen discussed by telephone, among other things, the employment contract, the liquidate damage clause, and a potential offer from Bradley U. Coach Ford wanted to reduce the liquidated damage provision to \$400,000. Mr. Nielsen suggested \$600,000, and he would put it before President Lefton for decision.

That same morning Bradley U's athletic director, Michael Cross, also telephoned Mr. Nielsen about Coach Ford's abilities as head coach. Mr. Nielsen made it very clear that Coach Ford's contract included a liquidate damage clause involving \$1.2 million. Dr. Cross stated that the issue of damages was between Coach Ford and KSU.

Later that day Coach Ford signed a memorandum of understanding

with Bradley U to become its head basketball coach effective Sunday, March 27.

On Sunday, President Lefton decided that the liquidated damages specified in the employment contract must be paid. Mr. Nielson immediately communicated that decision to Coach Ford.

Bradley U's contract upped Coach Ford's annual base salary to \$700,000 and offered to pay \$400,000 (called a "buy out" in Bradley U's memorandum of understanding) toward Coach Ford's liquidated damages to KSU. Bradley U's contract included a provision similar in purpose and nature to liquidated damages amounting to \$1.4 million, if Coach Ford resigned within the first two years of his tenure.

Coach Ford never returned to KSU.

III. DECISION

A. KSU's Summary Judgment Motion

(1) Breach of Contract

KSU seeks summary judgment for breach of contract against Coach Ford.

Coach Ford admits entering the employment contract with KSU and admits that KSU performed its obligations under the contract. He maintains, however, that he did not breach the contract.

The elements of breach of contract include: (1) existence of a contract; (2) performance by plaintiff; (3) breach by defendant; and (4) damage or loss to plaintiff. *Am. Sales, Inc. v. Boffo*, 71 Ohio App.3d 168, 175 (1991).

In construing the terms of any contract, the principal objective is to determine the intention of the parties. Generally, contracts should be construed in a manner to give effect to the intentions of the parties. The Court must apply these basic principles to determine the intent of the parties in order to establish the terms of the parties' agreement. When the terms included in the contract are clear and unambiguous, a court cannot create a new contract by finding an intent not expressed in the clear and unambiguous language of the written contract. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Co.*, 86 Ohio St.3d 270, 273 (1999).

The intention of the parties was made clear in the employment contract. There was no ambiguity.

To KSU, the essence of the employment contract was to retain a winning coach and provide long term continuity to the basketball program. Coach Ford's intentions were to gain a substantial increase in compensation and a stable, long term position as head men's basketball coach.

Coach Ford was under an employment contract with KSU through the 2014-2015 season ending on March 31, 2015. Its terms included his promise to work for KSU for the entire five year contract. The contract also provided, at 7.b., that Coach Ford would not seek potential job prospects with any other program during the term of the contract.

Coach Ford was sought out by Bradley U, and two days after the end of the 2011 basketball season, Coach Ford met with representatives

of Bradley U. The next day Coach Ford signed a memorandum of understanding to become Bradley U's men's head basketball coach. The contract was to be effective on March 27. Although his contract with KSU extended through March 31, 2015, Coach Ford never returned to KSU.

Coach Ford initiated the breach of the employment contract by leaving KSU and joining Bradley U's program. That breach was material.

The summary judgment evidence clearly establishes that Coach Ford breached his employment contract with KSU.

(2) Damages

KSU also seeks summary judgment against Coach Ford for liquidated damages amounting to \$1.2 million, less retirement deductions.

"It is virtually the unanimous rule of all jurisdictions that whether a stipulation is for liquidated damages or a penalty is a question of law for the court." *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380 (1993), citing *Ruckelshaus v. Broward Cty. School Bd.* 494 F.2d 1164, 1165 (C.A. 5, 1974).

In determining whether stipulated damages are punitive or liquidated, it is necessary to look to the whole instrument, its subject-matter, the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of

the particular facts surrounding the making and execution of the contract. *Lake Ridge Academy, supra*, at 381-382, citing *Jones v. Stevens*, 112 Ohio St. 43 (1925), paragraph one of the syllabus.

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. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 28 (1984), citing *Jones v. Stevens, supra*, paragraph two of the syllabus.

When, as here, the liquidated damage provision is challenged, the evidence must be examined in light of what the parties knew at the time the contract was formed and in light of the estimate of the actual damages caused by the breach. *Samson Sales, Inc.*, at 382.

The liquidated damage clause in the parties' 2010 employment contract provides:

"[Coach Ford] will pay to [KSU] as liquidated damages an amount equal to his base and supplemental salary, multiplied by the number of years (or portion(s) thereof) remaining on the Contract.

"a. Accordingly * * * GENE A. FORD agrees that in the event he resigns or otherwise terminates his employment prior to March 31, 2015, and is employed or performing services for a person or institution other than the UNIVERSITY or the University terminates GENE A. FORD prior to that date then the initiating party shall pay to the other an amount equal to the balance of the then-current total annual salary due for the remaining amount of the term of this Contract, less amounts that would otherwise be deducted or withheld from his salary for employee contributions to the state retirement system or a state approved alternative retirement system." (Emphasis sic).

Both parties agreed to the written provision of the damage clause contained in the employment agreement. It was and is clear and unambiguous. There is no uncertainty or vagueness of terms or intentions.

(i) Difficulty of proof.

The first issue is the uncertainty of the amount and difficulty of proof of damages.

With the 2010 contract, KSU was making a highly valuable investment in Coach Ford's continued employment. KSU, and especially Mr. Kennedy, knew that Coach Ford was a winner. The program was very successful and was included in post-season play. Coach Ford's interaction with alumni, donors, and especially his players, whose achievements could draw the cream of the available prospects, began to grow the KSU program. It was impossible, however, to determine

with any specificity how the program would continue to grow. But if Coach Ford left for another program, KSU's investment would be lost for those seasons, and the amount of loss was unknowable.

(ii) Unconscionable.

The second issue is whether 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.

Coach Ford had experience in employment contracts during his coaching career. He was highly educated and fully understood the terms, content, and ramifications presented by the 2010 contract. He also retained a knowledgeable sports agent. Two or three years were left in the 2008 contract, so there was no compulsion to sign the 2010 contract. The contract was not unconscionable.

Over the term of the contract Coach Ford was assured to receive no less than \$1.5 million of compensation. The damage provision annually reduced the damages over the five year term of the contract. It applied equally to each party. Both had the same responsibility to each other. If the contract was breached, the non-breaching party would be properly compensated. Thus, the contract was not unreasonable.

Finally, the damages provided in the employment contract were not disproportionate. Early loss of an outstanding coach could potentially cause substantial damage to KSU's program. Effective

coaches in college sports programs are liberally compensated. Coach Ford received a \$100,000 raise in the 2010 contract, which would tally \$1.5 million over the contract term. Replacement of an equivalently talented coach would certainly be costly. Bradley U believed that Coach Ford was so valuable to a basketball program, that he was offered \$700,000 a year for five years. The parties' damage clause was not disproportionate.

(iii) Intention of the parties.

The third issue is whether it was the intention of the parties that the specified damages should follow the breach.

The employment contract is plain and unambiguous. Both KSU and Coach Ford had the same intentions. The provision applied equally to each party, and if the contract was breached, the non-breaching party would be properly compensated. There can be no reasonable dispute that the parties' specified damages were intended.

As Coach Ford was the "initiating party" to the breach of the employment contract, KSU is entitled to damages established in the contract. The summary judgment evidence establishes that KSU is entitled to the damages specified in the employment contract amounting to \$1.2 million, less retirement deductions.

(3) Coach Ford's Objections.

Coach Ford raises waive, estoppel, and penalty as objections to

KSU's motion for summary judgment.

A liquidated damage provision is to compensate the non-breaching party for losses suffered, but not to penalize the breaching party. Summary judgment for liquidated damages may be avoided, if material facts exist showing that the damages claimed are a penalty. After examining in detail the applicable law and summary judgment evidence as construed most favorably for Coach Ford, the evidence establishes that the employment contract's damage provision is liquidated damages; not a penalty.

As for waiver or estoppel, neither applies here. When Coach Ford was granted permission to respond to Bradley U, KSU was following Section 7.c. of the parties' employment contract. That provision of the employment contract simply allowed Coach Ford to discuss with other programs which sought him out. Consent to interview was not a consent to breach the employment contract. KSU did not acquiesce to Coach Ford's abandonment of their mutual contract.

V. SUMMARY

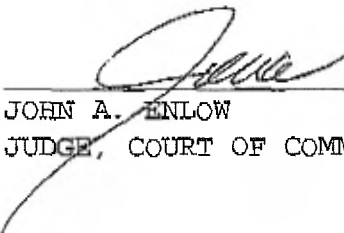
The summary judgment evidence establishes that Coach Ford was the "initiating party" to the breach of the employment contract. The parties agreed to a provision for liquidated damages, and finding that the provision was not a penalty, KSU is entitled to the damages specified in their employment contract amounting to \$1.2 million, less retirement deductions.

Upon review and consideration of the motions, pleadings,

depositions, exhibits, and portions of affidavits filed herein, and construing the evidence most strongly in favor of Coach Ford, the Court finds that there exists no genuine issue of material fact, and that KSU is entitled to judgment as a matter of law on its claim for breach of contract and resulting liquidated damages.

IT IS THEREFORE ORDERED that the motion of Plaintiff Kent State University for partial summary judgment against Defendant Gene A. Ford be and hereby is granted, and KSU is hereby granted judgment for breach of contract and liquidated damages against Coach Ford.

SO ORDERED.



JOHN A. ENLOW
JUDGE, COURT OF COMMON PLEAS

cc: William G. Chris, Attorney for KSU
Lawrence R. Bach, Attorney for KSU
Frederick Byers, Attorney for Coach Ford
Kevin M. Young, Attorney for Bradley U
William R. Kohlhase, Attorney for Bradley U