Supreme Court of Ohio Clerk of Court - Filed September 08, 2015 - Case No. 2015-0347

No. 2015-0347

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 MOTION FOR RECONSIDERATION

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Introduction

Under S.Ct.Pract.R. 18.02(B)(1), Appellant Gene A. Ford respectfully requests that this Court reconsider its 5-2 decision declining jurisdiction in this case. Two reasons support reconsidering jurisdiction. First, the issue presented in this case is the same issue as is presently before the Court in *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, and it should therefore at least be held for decision in that case. Second, since jurisdictional briefing closed in this case, the Court of Claims on remand decided *Fleming v. Kent State Univ.*, Ct. of Cl. No. 2011-09365, 2015 WL 1956660 (Apr. 24, 2015), which provides further support that lower courts are split on how to analyze for proportionality under *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993), and *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), and that they continue to construe these cases differently with varying and inconsistent results.

A. The same "actual damages" issue in this case is presently before this Court in *Boone Coleman*.

The issue in *Boone Coleman*, like the issue in this case, is whether a liquidated-damages provision is unenforceable when it is disproportionate to the overall value of the contract and the actual damages sustained. In *Boone Coleman*, liquidated damages ($277,900) were nearly one third of the total contract value ($683,300), which the Fourth Appellate District found to be a penalty because it was "so unreasonably high and so disproportionate" to the overall value of the contract

and unsupported by any evidence "to credibly support the relationship between the damages specified and the actual damages that would be incurred." *Boone Coleman*, 2014-Ohio-2377, ¶ 40, 42.

The same issue is presented in this case, but with even greater disproportionality yet an opposite result. Liquidated damages here were assessed at $1.2 million on a contract valued at $1.5 million—a full 75% of the overall contract value with less than $2,000 in actual damages. And like in *Boone Coleman*, there was no evidence to support any relationship between the liquidated damages stipulated in the contract and the actual damages that Kent State would incur. In fact, the evidence supported just the opposite: that Kent State historically had incurred minimal or no damages, as it did in this case, with each of the three prior coaching changes. Yet the Eleventh Appellate District found the liquidated-damages provision enforceable because it was proportionate, not to the overall value of the contract and actual damages sustained, but to Coach Ford's market value at the time of breach—a never-before measure of damages in liquidated-damages jurisprudence.

That the contract in *Boone Coleman* is a contract for construction services and not a contract for coaching services is immaterial. Whether a liquidated-damages provision is disproportionate because it bears no relationship to the actual damages sustained or to the overall contract value is at issue in both cases, and is the issue that courts below wrestle with when applying *Lake Ridge Academy* and *Samson Sales*—with varying and inconsistent results. This case, like *Boone Coleman*,

provides the opportunity to construe *Lake Ridge Academy* and *Samson Sales* and clarify this standard.

And even if the *type* of contract matters—and it does not because the same analysis for enforceability applies—the law of coaching contracts is not "settled" as Kent State, relying on *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751 (6th Cir.1999), posits. This Sixth Circuit case, which construed Tennessee law under a prospective-only approach,[1] has been cited only 11 times and none involved coaching contracts or even any Ohio case until the Eleventh Appellate District majority relied on it here. This is hardly "settled."

B. The Court of Claims recent, post-jurisdictional briefing decision continues to show that courts are split when determining whether a liquidated-damages provision is proportionate.

But even more importantly, the lack of clarity flowing from the different courts' interpretation of *Lake Ridge Academy* and *Samson Sales* has allowed entities like Kent State here to blatantly take inconsistent positions when relying on liquidated-damages provisions in its contracts. Since the jurisdictional briefing in this case closed, the Court of Claims released its decision in *Fleming v. Kent State Univ.*, Ct. of Cl. No. 2011-09365, 2015 WL 1956660 (Apr. 24, 2015). Recall that the Tenth Appellate District had remanded this case to the Court of Claims to consider,

[1] It is well-settled that Tennessee follows a prospective-only approach (*see Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 98-100 (Tenn.1999)), which is not at all settled in Ohio and is what is at issue in construing *Lake Ridge Academy* in this case.

among other things, whether the liquidated-damages provision in Kent State's contract with a former football coach satisfied the test for proportionality under *Samson Sales*. *See Fleming v. Kent State Univ.*, 2014-Ohio-3471, 17 N.E.3d 620, ¶ 34 (10th Dist.). Noting that the contract was a "standard contract drafted by counsel for [Kent State]" and that Kent State was taking the opposite position in *Fleming* as it takes in this case, the *Fleming* court on remand, unlike either lower court in this case, looked to the actual damages sustained by the fired coach at the time of breach in finding the liquidated-damages provision proportionate. *Fleming*, Ct. of Cl. No. 2011-09365, 2015 WL 1956660, at *3 (Apr. 24, 2015).

The latest *Fleming* decision continues to show how courts vary in their analyses when determining whether a liquidated-damages provision is proportionate—in *Fleming*, unlike both lower courts here, taking a retrospective look at actual damages sustained at the time of breach when making that determination. Whether this retrospective approach is properly part of the proportionality analysis is the same for any type of contract, including the contract for construction services at issue in *Boone Coleman* presently pending before this Court and the contract for coaching services at issue here.

The test for proportionality under *Samson Sales* and *Lake Ridge Academy* should be consistent for all types of contracts that contain liquidated-damages provisions. Accepting this case along with *Boone Coleman* already before this Court will give clarity to that analysis and prohibit commercial entities, including entities

like Kent State that use standard contracts it drafts, from using a presently muddled analysis as both a sword and a shield. Indeed, "does not justice presume the consistent application of the law?" *State v. Lemmer*, 736 N.W.2d 650, 673 (Minn.2007), quoting *State v. Victorsen*, 627 N.W.2d 655, 662 (Minn.App.2001) (Hanson, J., dissenting).

Conclusion

Ford is mindful that a motion for reconsideration should not be used to simply reargue his case, but instead should be used to give the Court an opportunity "to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 380, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 5 (internal quotations omitted). He urges the Court here, upon further reflection, to accept jurisdiction in this case and, at the very least, hold for decision in *Boone Coleman*.

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Proof of Service

A copy of the foregoing was served on September 8, 2015 per S.Ct.Prac.R. 3.11(B) by email to:

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