Supreme Court of Ohio Clerk of Court - Filed September 17, 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.*

## APPELLEE KENT STATE UNIVERSITY'S MEMORANDUM IN RESPONSE TO MOTION FOR RECONSIDERATION

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## I. INTRODUCTION

The standard for a reconsideration by the Ohio Supreme Court is well settled. Pursuant S.Ct.Prac.R. 18.02, the Court's reconsideration authority is justified only to "correct decisions which, upon reflection, are deemed to have been made in error." The Court has made it abundantly clear, however, that reconsideration is not allowed when a movant seeks merely to reargue the case at hand. S.Ct.Prac.R. 18.02(B). *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940. While the Appellant acknowledges this limitation in his brief, he cavalierly ignores it. The issue relating to the impact of the appellate court decision in *Boone Coleman Constr., Inc. v. Piketon*, 2014-Ohio-2377, 13 N.E.3d 1190 (4th Dist.) *appeal accepted*, 140 Ohio St.3d1451, 2014-Ohio-4414 and its possible reversal was central to the Appellant's Memorandum in Support of Jurisdiction. Appellant's Motion for Reconsideration application does nothing other than rehash arguments already made, and as such, it should be denied.

### A. The facts in this case bear no relation to the facts before the Court in *Boone Coleman*.

At the time of this appeal, Gene Ford was one of 347 National Collegiate Athletic Association ("NCAA") Division One Men's Basketball Head Coaches. Only thirteen such positions exist in the State of Ohio. As a result, the precedential value of this case is for a limited audience of actors who possess unique skills pertaining to revenue generating sporting activity. The issue raised in *Boone Coleman* arises out of the per-diem liquidated damage provision contained in a public works construction contract form widely used in the State of Ohio. The Appellant's position in *Boone Coleman* was supported by the amicus brief filed on behalf of the *amici curiea*, the County Commissioners Association of Ohio, the Ohio Municipal League, the

Ohio School Boards Association and the Ohio Township Association, all of whom have a vested interest in the matter.

The decision of the Eleventh Appellate District Appellant seeks to reverse was based on sound Ohio precedent. The Eleventh District properly applied this Court's pronouncements in *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984) and *Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376, 613 N.E.2d 183 (1993). These cases stress that the enforceability of liquidated damages clauses requires a case-sensitive inquiry which depends upon the operative facts and circumstances surrounding each particular case. Although the Court in *Lake Ridge* did compare actual damages to the stipulated damages in addressing proportionality in upholding the liquidated damages clause at issue, it did not alter the *Sampson Sales* test to *require* such an analysis. The Court in *Lake Ridge* continued to stress that liquidated damages clauses should be considered on a case-specific basis and that the second prong of the *Sampson Sales* test focuses on the "true intent" of the parties. In this matter, there was no difficulty in finding the true intent of Kent State and the Appellant. This was the second contract Mr. Ford had signed with Kent State, both of which contained the identical language relating to early termination.

The Appellant's assertion that the decision of the Sixth Circuit Court of Appeals in *Vanderbilt Univ. v. DiNardo,* 174 F3d 751 (6th Cir. 1999) was based upon a prospective-only approach used in Tennessee to review liquidated damage clauses in contracts is unfounded. The court in *DiNardo* could not have made such a determination since the Tennessee Supreme Court

did not settle the issue in Tennessee until it issued its decision in *Guilano v. Cleo,* 995 S.W.2d 88 (Tenn. 1999), more than two months **after** the *DiNardo* decision was issued.[1]

**B. Final decisions of the reviewing courts consistently hold that the liquidated damages provision used by Kent State and the Appellant in his employment contract is valid and enforceable under the *Sampson Sales* test.**

The Appellant continues to misstate the actual damages suffered by Kent State due to Mr. Ford's early departure from Kent State in violation of the contract he signed less than one year earlier. The Appellant asserts that Kent State actual damages were valued at less than $2,000 to support his claim that the $1.2 million early termination fee was grossly disproportionate. In doing so the Appellant casually brushes aside the appellate court's determination that Kent State's actual damages flowing from the loss of the benefit of its bargain amounted to $1.6 million.

The Court of Claims in *Fleming v. Kent State Univ.*, Ct. of Cl. No.2011-09365, 2015 WL 1956660 ***upholds the enforceability of the same liquidated damages provision considered below*** in favor of a terminated Kent State assistant football coach. The Court of Claims' decision on remand in *Fleming* causes no tension among Ohio courts on the issue of whether the liquidated damages provision employed by Appellant and Kent State is valid and enforceable. The latest decision in *Fleming* certainly lends no support to the contention that the liquidated damages provision is "as a whole so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intent of the parties." At bottom, the Appellant is asking this Court to remove all flexibility given to the lower courts in applying the *Sampson Sales* test in favor of an approach requiring a trial court to determine that actual damages suffered by a non-breaching party ultimately match the damages

[1] The *DiNardo* decision was published on April 14, 1999; the decision in *Guilano* was released on June 28, 1999.

as stipulated. Such a requirement, however, would nullify the essential purpose of liquidated damages, which are meant to avoid such costly and difficult tail-end litigation on damages, and which is employed by contracting parties in situations where damages for a breach are "uncertain in amount and difficult of proof."

## II. CONCLUSION

As demonstrated, the Appellant simply fails to show that this case is one of great public or general interest warranting review by this Court. The lower court decisions comport with both Ohio law and the industry practices. The courts required Appellant to honor the terms of his contract in an amount consistent with the actual damages his breach caused to Kent State University. This Court should turn away the Appellant's attempt to reargue his case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to Supreme Court Practice R. 3.11, a true copy of the foregoing was served electronically and by regular U.S. Mail, postage prepaid and via email, on September 17, 2015:

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