Earl Holmes: A Recap of the Appellate Court Decision

By Martin J. Greenberg

I. Introduction

In January of 2018, I published an article entitled *Earl Holmes vs. FAMU: How a Contract Term can be Cut Short by University Rules and Regulations* on Greenberg's Coaching Corner. That article detailed in depth the contract of Earl Holmes (Holmes), FAMU Rules and Regulations, the basis for the termination and the following lawsuit. The Holmes case was based upon the coach's contention that he had a guaranteed contract from January 11, 2013 to January 10, 2017, or a four year contract.[1] The University, pursuant to its Rules and Regulations, cut short that contract with a sixty day notice of termination.[2] Holmes achieved 6 wins and 16 losses while head football coach for one full season, and was fired four days before homecoming on October 28, 2014 with $400,000 owed on his contract.[3]

II. Circuit Court Case

In January of 2015, Holmes commenced a lawsuit against FAMU by virtue of the early termination of his coaching contract.[4] The lawsuit recited that FAMU breached its obligation of good faith and fair dealing, acted fraudulently with respect to the inducement of the contract, made negligent misrepresentations, and breached its contract.[5] After two years of litigation, on February 8, 2017, FAMU filed a motion for summary judgment.[6] Holmes' position opposing the Order on Motion for Summary Judgment was as follows:

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[1] Martin Greenberg, *Earl Holmes vs. FAMU: How a Contract Term can be Cut Short by University Rules and Regulations*, LAW.MARQUETTE.EDU, Jan. 10, 2018, https://law.marquette.edu/assets/sports-law/Earl%20Holmes%20Article%2010.10.pdf
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

> Coach Holmes argues that he negotiated a binding, guaranteed four-year contract with the University's Athletic Director, Derek Horne. Coach Holmes maintains that the University's rules, regulations, policies and procedures cannot be incorporated into the contract by general reference in their entirety and if specific regulations are to be incorporated they must be specifically identified in the contract. Therefore, Coach Holmes argues that the regulations are not a part of the contract and the contract could not be terminated except for causes and was binding until January 20, 2017. He argues that Regulations 10.05 and 10.06 were not part of the contract because they were not specifically referenced in the contract. Coach Holmes contends that his termination was a breach of the guaranteed four-year contract that he had negotiated.[7]

A hearing on the matter was ultimately held on April 13, 2017 before the Honorable James O. Shelfer.[8] An Order on Motion for Summary Judgment was entered on May 2, 2017 and filed on May 3, 2017 in which the Court held:

> Summary Judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to a judgment as a matter of law. The interpretation of a contract, if it is unambiguous and not subject to collateral attack is a matter of law to be determined by the Court and not by a jury. The University complied with its Regulations 10.105 and 10.106 in terminating Coach Holmes. In doing so, the University complied with the clear and unambiguous terms of the coaching contract. The University did not violate the terms of this agreement with Coach Holmes when it issued the termination letter on October 28, 2014 effective January 20, 2015. The Plaintiff cannot show a *prima facie* case of breach of contract. Summary Judgment in favor of the Defendant Florida A&M University is appropriate.[9]

This order effectively ended Holmes' Circuit Court case. On June 1, 2017, Holmes filed a Notice of Appeal.[10]

FAMU basketball coach, Clemon Johnson (Johnson), had a similar case. Johnson, a former FAMU and NBA basketball player, was fired in April of 2014 after three years as the head basketball coach, and argued in his case that he had a four year guaranteed contract and the

[7] Order Granting Mo. Summ. J., *Earl Holmes v. Florida A&M University*, No. 15-CA-190, (Fla. Cir. Ct. May 2, 2017).
[8] Leon County Clerk of Court online case docket.
[9] Order Granting Mo. Summ. J., *Earl Holmes*.
[10] Leon County Clerk of Court online case docket.

University breached the contract by firing him a year early for convenience.[11] Johnson was paid $150,000 annually and amassed a 32-64 record.[12] FAMU, as they did in the Holmes case, argued that it followed University Regulations in deciding not to reappoint Johnson.[13] The two cases were consolidated, and the case was appealed to The First District Court of Appeals in the State of Florida, Judge J. Bilbrey presiding.[14]

III. Appellate Court Ruling

On November 27, 2018 the First District Court of Appeals for the State of Florida issued an opinion which held:

> 1. Where no material facts are in dispute and the "determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." *Cox v. CSX Intermodal, Inc.,* 732 So. 2d 1092 (Fla. 1st DCA 1999) (citations omitted). But the existence of an ambiguity in a contract precludes the entry of summary judgment. As this court has stated:
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> > Nevertheless, when the terms of the contract are ambiguous, susceptible to different interpretations, parol evidence is admissible to "explain, clarify or elucidate the ambiguous term." *Friedman v. Va. Metal Prods. Corp.,* 56 So. 2d 515, 517 (Fla.1952). The initial determination of whether the contract term is ambiguous is a question of law for the court, and, if the facts of the case are not in dispute, the court will also be able to resolve the ambiguity as a matter of law. *See Ellenwood v. Southern United Life Ins. Co.,* 373 So. 2d 392, 394 (Fla. 1st DCA 1979). However, "[w]here the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." *Universal Underwriters Ins. Co. v. Steve Hull Chevrolet, Inc.,* 513 So. 2d 218, 219 (Fla. 1st DCA 1987).
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> > *Strama v. Union Fidelity Life Ins. Co*., 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001).

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[11] Byron Dobson, *Appellate Court Rules in Favor of Fired FAMU Coaches Holmes, Johnson,* TALLAHASSEE DEMOCRAT, Nov. 27, 2018, https://www.tallahassee.com/story/news/2018/11/27/appellate-court-rules-favor-former-famu-coaches-holmes-johnson/2124903002/ .
[12] *Id.*
[13] *Id.*
[14] Leon County Clerk of Court online case docket.

2. "Whether a contract is ambiguous is a question of law." *Talbott v. First Bank Florida, FSB*, 59 So. 3d 243, 245 (Fla. 4th DCA 2011). "Accordingly, the issue before the Court is whether the trial court correctly determined that [Appellee] was entitled to prevail as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 131 (Fla. 2000). Our standard of review of the summary judgments for FAMU, based on the legal effect of the contracts, is de novo. *University Hous. by Dayco Corp. v. Foch*, 221 So. 3d 701, 704 (Fla. 3d DCA 2017).

   The trial court found, and we agree, that FAMU regulations 10.105 and 10.106 were sufficiently incorporated into the contracts as generally referenced throughout numerous sections *See BGT Group, Inc. v. Tradewinds Engine Servs., LLC*, 62 So. 3d 1192, 1194 (Fla. 4th DCA 2011) (discussing how a document can be incorporated into a contract); *see also Lowe v. Nissan of Brandon, Inc.*, 235 So. 3d 1021 (Fla. 2d DCA 2018). Accordingly, the provisions in the body of the contracts and the language in the incorporated regulations must be read as a whole. *See Jenkins v. Eckerd Corp.*, 913 So. 2d 43 (Fla. 1st DCA 2005). However, because the interaction of FAMU's regulations with the explicit terms of the agreements creates an ambiguity, we cannot agree with the trial court's conclusion that the legal effect of FAMU's regulations entitled FAMU to judgment as a matter of law.

3. FAMU relied on the final sentence in regulation 10.106(3) in particular for its purported authority to terminate the coaches' appointments early, without cause but upon sixty days' notice. FAMU contends that this expectation-limiting language modifies the stated end dates of these contracts, so long as FAMU provides sixty days' notice. We disagree with FAMU that this language makes the agreements unambiguous.

4. The law is well-settled that an employment contract with a specified term of duration is not terminable at will, but can only be terminated prior to its end date if provided for in the contract. See Story v. Culverhouse, 727 So. 2d 1128, 1130 (Fla. 2d DCA 1999). "[W]hen a contract for employment provides a definite duration, the employment contract is enforceable." Iniguez v. American Hotel Register Co., 820 So. 2d 953, 955 (Fla. 3d DCA 2002).

5. The law is also well-settled that courts are required "to read provisions of a contract harmoniously in order to give effect to all portions thereof." City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000); see also Speegle Const. Co. v. District Bd. of Trs. of Nw. Fla. State Coll., 75 So. 3d 360, 361 (Fla. 1st DCA 2011); Story, 727 So. 2d at 1130. A contract "should be considered as a whole, not in its isolated parts." Maines v. Davis, 491 So. 2d 1233, 1235 (Fla. 1st DCA 1986). If clauses of a contract cast doubt upon the end date and circumstances allowing early termination, "an interpretation which gives a reasonable, lawful, and effective meaning to all its terms is preferred to an interpretation which leaves a part of the contract unreasonable, unlawful or of

no effect." Raytheon Subsidiary Support Co. v. Crouch, 548 So. 2d 781, 783 (Fla. 4th DCA 1989). Finally, "ambiguities are to be construed against the drafter." Id. at 784 (quoting Maines, 548 So. 2d at 1235).

6. Reading the contract and incorporated regulations as a whole, giving meaning and effect to all provisions, and construing any ambiguities against FAMU as the drafter of both contracts and incorporated regulations, we find that FAMU was not entitled to judgment as a matter of law. The only use of the word "terminated" in FAMU regulations 10.105 and 10.106 is found in regulation 10.105(5) pertaining to probationary employees. Because neither coach was terminated during the first six months of his employment, this subsection is clearly inapplicable. FAMU's use of the terms "non-renewal," "non-reappointment," "separated from University employment," and "terminated" in separate portions of these regulations establishes that "non- renewal," "non-reappointment," and "separated" may not be synonymous with "terminated." See Paladyne Corp. v. Weindruch, 867 So. 2d 630, 633 (Fla. 5th DCA 2004) (holding that separate non-renewal and termination provisions required reading to give effect to each; separate provisions had separate meanings and consequences).

7. "As a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended." Kel Homes, LLC v. Burris, 933 So. 2d 699, 703 (Fla. 2d DCA 2006). We are uncertain whether the terms FAMU used in its regulations — "non-renewed" and "non-reappointed" — mean the absence of a renewal or reappointment upon the expiration of the stated end dates of the coaches' appointments. And considering the defined terms of the coaches' appointments in section 2, as modified by the for-cause provisions in section 5, we cannot say whether FAMU's use of the phrase "separated from University employment" in regulation 10.106(3) meant "terminated early without cause."

8. While regulation 10.105(3)(e) addresses A&P employees' lack of "expectation" of "continued employment" and regulation 10.106(3) provides "no expectation of appointment beyond a sixty (60) days' notice," these provisions regarding lack of expectation must be read in harmony with and to preserve the effect of the clearly stated end dates and for-cause provisions in these contracts. See Johnson, 760 So. 2d at 84 (holding that courts are required to read provisions of a contract harmoniously in order to give effect to all portions thereof); Speegle Constr. Co., 75 So. 3d at 361 (same). Where there is no specified duration in an employment contract, "an employee's mere expectations, however reasonable, are insufficient to create a binding term of employment." Tohma v. Spalding & Evenflo Cos., 724 So. 2d 693, 694 (Fla. 2d DCA 1999). On the other hand, where a duration of the appointment is specified and modified by various stated contingencies, the employer's right to terminate early without cause is limited. Based on the inconsistencies in the

agreements parol evidence will be necessary to determine which reading prevails.

9. Reading the contracts and regulations here as a whole rather than in isolated parts, the lack of "expectation" set out in regulations 10.105(3)(e) and 10.106(3) may not override the specified durations of the coaches' contracts in the absence of cause for termination. See Maines, 491 So. 2d at 1235. To find the appointments terminable by FAMU at will, merely upon sixty days' notice, could impermissibly render the specified end dates and provisions for early termination for cause in the contracts "virtual dead letters," that is, unnecessary and of no effect. See McArthur v. A.A. Green & Co. of Fla., 637 So. 2d 311, 312 (Fla. 3d DCA 1994). We are uncertain whether that was the parties intention in entering into the agreement. Since the contract language "is susceptible to more than one reasonable interpretation, extrinsic evidence may be considered by the court to ascertain the intent of the parties." Talbott, 59 So. 3d at 245.

10. The summary judgment as to the second count in both complaints for breach of implied covenant of good faith and fair dealing must also be reversed. "Florida contract law does recognize an implied covenant of good faith and fair dealing in every contract." QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541, 548 (Fla. 2012). In its motions for summary judgment, FAMU relied on our case Ahearn v. Mayo Clinic, 180 So. 3d 165, 170 (Fla. 1st DCA 2015), for the proposition that "a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached." This contention apparently provided the trial court's only rationale in granting summary judgment as to these counts. Since we are reversing on the grant of summary judgment as to the breach of contract counts, it is necessary to also reverse the summary judgment as to the other counts in both complaints.

11. Finally, the grant of summary judgment on the counts for fraudulent inducement and negligent misrepresentation must also be reversed. The trial court found that because the termination provisions in the employment agreements were clear, the terms of the agreements superseded any oral statements FAMU employees may have made. See Taylor Woodrow Holmes Florida, Inc. v. 4/46-A Corp., 850 So. 2d 536 (Fla. 5ht DCA 2003). Since we find that the agreements were ambiguous, we also reverse as to these counts. See D & M Jupiter, Inc. v. Friedopfer, 853 So. 2d 485, 487 (Fla. 4th DCA 2003) (holding that "[a]s a general rule, it is a matter for the jury to determine if an intentional misrepresentation has been made by" one party to another).[15]

[15] *Holmes v. FAMU*, No. 1D17-4069 (Fla. 1st DCA Nov. 27, 2018).

The conclusion of the Appellate Court's order stated:

> Because of conflicts in the express terms of both coaches' contracts, including FAMU's regulations incorporated therein, the early terminations of these employment contracts without cause merely upon sixty days' notice may have violated the specific terms of the contracts. Because of this ambiguity FAMU was not entitled to judgment as a matter of law. Accordingly, the summary judgments for FAMU and against Holmes and Johnson are reversed as to all counts, and the causes are remanded for further proceedings.
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> REVERSED and REMANDED.[16]

IV. Attorney Tim Jansen

Attorney Tim Jansen (Jansen) is a trial defense lawyer with "extensive experience in the representation of professional, collegiate, and high school athletes and coaches in criminal and university matters."[17] Jansen is a former Assistant U.S. Attorney in Tampa and Tallahassee, where he "gained valuable experience and knowledge in defending white collar/fraud and drug cases in federal court." [18] Jansen is no stranger to difficult cases. Since opening his practice in 1994, Jansen has "become the go-to lawyer for FSU football players, other local athletes and coaches in trouble."[19] Jansen is a certified NFL contract advisor.[20] It seems no one in Tallahassee knows more or fights harder than for his clients than Jansen. Former co-counsel has said of Jansen that he's "not scared of a fight" and "has a lot of passion for what he does."[21]

Upon being interviewed regarding the Appellate Court decision, Jansen, who is representing both coaches said, "[w]hat it means is that Coach Clemon Johnson and Coach Earl Holmes are going to get their day in court before a jury."[22] He continued by saying that "[w]e

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[16] *Id.*
[17] R. Timothy Jansen, Attorney Profile, https://www.jansenlawoffice.com/attorney-profile/r-timothy-jansen/.
[18] *Id.*
[19] Jennifer Portman, *The athlete's go-to attorney,* TALLAHASSEE DEMOCRAT, Dec. 16, 2013, https://www.jansenlawoffice.com/documents/The-athlete-s-go-to-attorney-.pdf.
[20] Andy Alcock, *Tallahassee Attorney Now An NFL Agent*, WCTV.TV, Dec. 20, 2014, https://www.wctv.tv/home/headlines/Tallahassee-Attorney-Now-An-NFL-Agent-286410511.html.
[21] Portman, *supra* note 18.
[22] Dobson, *supra* note 11.

adamantly believe they are entitled to compensation for the full duration of their contracts and possibly other court costs now, including attorney fees and damages."[23]

Jansen said the University had the right to fire the coaches "for cause," but that was not the case it used in dismissing the coaches.[24] Instead, it determined it could use the 60-day notice inside the contract, which would absolve the University from any settlement.[25]

Jansen said the coaches were due what they were owed for the remainder of their contracts "or you work out a settlement."[26] "You can't say you have a four-year contract and have cause in the contract and then insert this provision that says you can be terminated without cause," he said.[27] "The appellate court ruled it ambiguous."[28] Jansen said he is seeking court dates as soon as possible for the cases, which will be heard separately.[29] "If they want to offer a settlement to my clients, I will talk to my clients, but we are preparing to go to trial."[30]

V. Conclusion

In the first article I wrote about the Holmes conflict with FAMU (*How a Contract Term can be Cut Short by University Rules and Regulations*), I opined that the lesson to be learned from the circuit court decision was that a contract referring to other documents, such as university rules and regulations, may have an impact upon the terms and provisions of the contract itself. Therefore, I concluded as follows:

> The lesson to be learned from the Holmes' case is that a contract may be impacted by and/or refer to other documents, such as university rules and regulations. These references to other documents may become part of the contract even though they are not reprinted within the contract. In the case of Holmes, his appointment was a four-year term which was subject to the rules, regulations, policies, and procedures

[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

> of the Florida Board of Governors and the University as now and hereinafter promulgated.[31] As a result of the reference to University rules, regulations, policies, and procedures, what appeared to be a four-year contract was really a contract that could be terminated with sixty (60) days notice.[32] As a result, Holmes was not getting what he thought he had bargained for in the form of a four-year contract. Any lawyer who would have represented Holmes, and had not specifically told him that the four-year term was subject to a cut-short by virtue of University rules, regulations, policies, and procedures, would have potentially committed malpractice. If the bargained for term, i.e. – four years, was what was really intended by Holmes and the University, that portion of the contract that referred to University rules, regulations, policies, and procedures, should have been stricken. As for the sixty (60) day notice, Holmes should have included in his contract a written provision that he could only be terminated pursuant to the contract's written terms which were not superseded or negated by any University rules, regulations, policies, or procedures. Making any coaches' contract subject to the rules, regulations, policies, or procedures of the university are a trap for the unwary and must be closely studied and analyzed to make certain that the coach is getting what is written within the four corners of the contract and what the coach thought was bargained for.[33]

Christian Dennie, in his article entitled *Holmes v. Florida A&M University: Former Football and Men's Basketball Coaches Entitled to Trial,* concludes with particularity the findings of the Appellate Court:

> The First District Court of Appeals in Florida stated the law is well-settled that an employment contract with a specified term of duration is not terminable at will, but can only be terminated prior to its end date if provided for in the contract. Reading the employment agreements and incorporated regulations as a whole, giving meaning and effect to all provisions, and construing any ambiguities against FAMU as the drafter of both contracts and incorporated regulations, the First District Court of Appeals in Florida found that FAMU was not entitled to judgment as a matter of law. The only use of the word "terminated" in FAMU regulations 10.105 and 10.106 is found in regulation 10.105(5) pertaining to probationary employees. Because neither of the Coaches were terminated during the first six months of their employment, the referenced subsections were inapplicable. The First District Court of Appeals in Florida further stated that FAMU's use of the terms "non-renewal," "non-reappointment," "separated from University employment," and "terminated"

[31] Employment Agreement Between Florida A&M University and Earl Holmes (Feb. 7, 2013), at paragraph 5.1.
[32] *Id.*
[33] Greenberg, *supra* note 1.

> in separate portions of these regulations established that "non-renewal," "non-reappointment," and "separated" may not be synonymous with "terminated."[34]

The Appellate Court found that the terms of the contract were ambiguous and therefore the granting of an order for summary judgment was not proper. The Appellate Court so correctly stated that whether a contract is ambiguous is a question of law for the judge to determine. A contract is considered to be ambiguous if the contract is reasonably subject to more than one interpretation or meaning and that the contract isn't clear or comprehensible as to what the parties truly intended. An ambiguous contract essentially means that specific terms, words, phrases, or definitions are not clear and subject to interpretation. The Appellate Court correctly concluded that the FAMU Regulations were sufficiently and properly incorporated into the contract, but taking the contract terms itself and the FAMU Regulations as a whole created ambiguity for which the Appellate Court could not grant FAMU a judgment as a matter of law. The Appellate Court specified the reasons for its finding in that the Appellate Court is required to read provisions of the contract harmoniously in order to give effect to all portions of the contract. The Appellate Court also recognized the Latin term *Contra proferentem*, which is a common law contract principle that provides that ambiguous or uncertain terms in a contract will be construed against the party that caused the uncertainty to exist.[35] In essence then, the Appellate Court utilized the age old rule that ambiguities in the drafting of a contract are construed most strictly against the draftsman. The Appellate Court properly found that the expressed terms in both Holmes and Johnson's contracts, including FAMU's Regulations incorporated therein (i.e. - the early termination of these employment contracts without cause merely upon sixty days notice) may have violated the specific

[34] Christian Dennie, *Holmes v. Florida A&M University: Former Football and Men's Basketball Coaches Entitled to Trial,* BGSFIRM.COM, Jan. 4, 2019, https://bgsfirm.com/holmes-v-florida-am-university-former-football-and-mens-basketball-coaches-entitled-to-trial/.
[35] Legal Information Institute, https://www.law.cornell.edu/wex/contra_proferentem.

terms of their contracts. As a result, FAMU could not be entitled to a judgment as a matter of law, and the Appellate Court reversed all counts and remanded the case for further proceedings in the Circuit Court. Once sent back to the Circuit Court, the Circuit Court will have the obligation of interpreting the contract. The Circuit Court will normally look outside the four corners of the contract to determine the parties' intent. The courts also will look to the parties' negotiations, course of conduct, and customs and practices of the relevant industry. What might be critical in the Circuit Court's ultimate decision is what negotiations took place during the negotiation and drafting process, and the parties' course of conduct in the years after the execution of the contract.

Based on the reasoning of the Appellate Court, it probably is in the best interests of the Defendant to now settle this case with both coaches as had been strongly advised to the University prior to the commencement of any litigation.