

COACHING FREE AGENCY HAS A PRICE: LIQUIDATED DAMAGES UPHELD IN THE GENO FORD / KENT STATE CASE

By

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I. INTRODUCTION

Gene “Geno” A. Ford (Ford) was named Ohio's "Mr. Basketball" in 1993 and was a standout at Cambridge High School in Cambridge, Ohio, where he played for his father, Gene Ford.¹ He played collegiately at Ohio University (Ohio).² After his years in college, he immediately went into coaching taking a job as an Ohio assistant coach.³ In 2007-2008 he was appointed as an assistant coach at Kent State University (Kent State) and became the head basketball coach of Kent State in 2008.⁴

On or about April 1, 2008, Ford and Kent State entered into their initial Employment Contract which was for a four year term with an option for a fifth year by mutual agreement of the parties.⁵

On or about April 1, 2010, Ford and Kent State entered into Ford's most recent Employment Contract.⁶ In that Employment Contract, Ford agreed to serve as the head coach of the men's basketball team at Kent State for a term of five years, with an expiration date of March 31, 2015.⁷

¹ Geno Ford, http://en.wikipedia.org/w/index.php?title=Geno_Ford&oldid=555251102 (last visited Nov. 6, 2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Gene Ford 2010 Employment Contract with Kent State University.

⁶ Gene Ford 2012 Employment Contract with Kent State University.

⁷ *Id.* at ¶ 1.

Ford was paid a base salary of \$250,000 per year for coaching duties, and a supplemental salary of \$50,000, for a total annual salary of \$300,000, which made him the highest paid head basketball coach in the Mid American Conference (MAC).⁸

Paragraph 7 of Ford's Employment Contract addresses the issue of other job opportunities during the term of the Employment Contract and terminating the Employment Contract early. Paragraph 7 states as follows:

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.⁹

a. Accordingly, subject to Gene A. Ford's continuing compliance with NCAA and University rules and regulations including but not limited to cause as defined in Rule 3342-6-05(D)(2) of the Administrative Code as contained in the University Policy Register: 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.¹⁰

b. In addition, Gene A. Ford agrees that he will neither seek potential job prospects nor accept a position within the MAC nor will he seek job prospects with any other program during the term of this agreement.¹¹

⁸ *Id.* at ¶ 2.

⁹ *Id.* at ¶ 7.

¹⁰ *Id.* at ¶ 7(a).

¹¹ *Id.* at ¶ 7(b).

c. If, however, he is sought for a job prospect outside of the MAC, Gene A. Ford will not respond to such inquiries without the permission of the 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 as extraordinary circumstances about which Gene A. Ford will advise the Director, shall not be deemed unreasonable. Nor shall it be deemed unreasonable to deny permission at any time prior to April 1, 2011.¹²

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 Gene A. Ford agrees that if he accepts such a position, he shall forfeit any bonuses earned during that termination year.¹³

Paragraph 7 has some interesting features. Ford agrees that he will neither seek potential job prospects nor accept a position within the MAC. In order to seek potential job prospects outside of the MAC, Ford is required to obtain the permission of the athletic director, which permission will not be unreasonably withheld. However, "permission," according to the definition as contained in paragraph 7c of the Employment Contract, is conditioned upon the requestor agreeing prior to the granting of such permission to pay such termination costs described in paragraph 7a to the university should Ford accept a position with the requestor.

At Kent State, Ford compiled an overall record of 68 wins and 37 losses and a record of 35-13 in the MAC, and in his last two years went to the NIT.¹⁴ In March of 2011, Ford's agent, Richard Giles, called Kent State's athletic director, Joel Nielsen (Nielsen), to request permission for Ford to talk with institutions interested in his

¹² *Id.* at ¶ 7(c).

¹³ *Id.* at ¶ 7(d).

¹⁴ Geno Ford, *supra* note 1.

coaching abilities.¹⁵ Consistent with the provisions of paragraph 7c of the Employment Contract, Nielsen gave permission to Ford to talk with other programs after the basketball season ended.

Two days after the end of the season, on Friday, March 25, 2011, Ford met with representatives of Bradley University (Bradley) and negotiated an employment agreement throughout the weekend.¹⁶ Evidently discussions ensued between Kent State athletic director Nielsen and Bradley's athletic director Michael Cross (Cross), wherein Nielsen made it clear that Ford's Employment Contract included a liquidated damage clause involving \$1.2 million; Cross responded that the issue of damages was between Ford and Kent State.¹⁷

Later that day, March 26, 2011, Ford signed an MOU with Bradley to become Bradley's head basketball coach effective March 27, 2011.¹⁸ Bradley's employment agreement increased Ford's annual base salary to \$700,000 and offered to pay \$400,000 towards Ford's liquidated damages to Kent State.¹⁹

II. KENT STATE LAWSUIT

After failing to pay the liquidated damages required under the Kent State Employment Contract, Kent State commenced on April 26, 2011, a lawsuit against Ford and Bradley in the Court of Common Pleas, Portage County, Ohio.²⁰

Kent State brought three separate claims against Ford and Bradley for their combined actions that resulted in the termination of the Ford Employment Contract.

¹⁵ Order Granting Mo. Summ. J., Kent State Univ. v. Ford, No. 2011 CV 00511, July 24, 2013.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Kent State Univ. v. Ford, No. 2011 CV 00511(Oh. Apr. 26, 2011)

Kent State's first cause of action was for breach of Employment Contract.²¹ Because Ford unilaterally terminated the Employment Contract without the express permission of Kent State, and accepted the position at Bradley, Kent State claimed that there was a breach of the Employment Contract by Ford.²² Further, Kent State claimed that it had substantially performed its duties as outlined in the Employment Contract leaving Ford as the sole party to breach.²³ Kent State alleged that as a result of Ford's breach of the Employment Contract, Kent State sustained damages in an amount not less than \$1,200,000.²⁴

Kent State's second cause of action was for breach of fiduciary duty. Kent State alleged that Ford breached his fiduciary duty by unilaterally terminating the Employment Contract.²⁵ Kent State further claimed that by reason of an employer-employee and/or agency relationship between Kent State and Ford, Ford owed a fiduciary duty to Kent State.²⁶ As a result of the alleged breach of fiduciary duty, Kent State claimed that it had sustained damages in excess of \$25,000.²⁷

In response to the different causes of action brought against him by Kent State, Ford denied the allegations and pled multiple affirmative defenses, including waiver, estoppel, failure to mitigate and the doctrine of consent, to name a few.²⁸ In addition, Ford affirmatively alleged that the Employment Contract between him and Kent State

²¹ Complaint, Kent State Univ. v. Ford & Bradley Univ., No. 2011 CV 00511 (Oh. Apr. 26, 2011).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Answer of Defendant Gene Ford, Kent State Univ. v. Ford & Bradley Univ., No. 2011 CV 00511 (May 27, 2011).

was not enforceable because its damage provisions are unconscionable.²⁹ In other words, the liquidated damage provision was a penalty.

Kent State's third cause of action against Bradley was for tortious interference with a contract.³⁰ Kent State claimed that Bradley, through its agents, employees, or servants, was aware of the existence and terms of the Employment Contract. Also, Kent State alleged that Bradley intentionally induced Ford to breach the Employment Contract by prematurely terminating his employment with Kent State in order to accept the head coach position at Bradley and not pay the early departure fee as required in the Employment Contract.³¹ Kent State claimed that as a result of the tortious interference with a contract by Bradley, it had sustained damages in excess of \$25,000.³²

Bradley denied Kent State's complaint and affirmatively alleged that Kent State unconditionally consented to Ford interviewing to fill the open position of head coach of Bradley's men's basketball team and therefore cannot seek damages and collect from Bradley as a result of Bradley hiring Ford for the position.³³

Bradley further alleged that the amount of liquidated damages sought by Kent State is completely unreasonable based upon their anticipated and actual damages suffered by any breach of the Employment Contract by Ford, and thereby constitutes an unenforceable penalty.³⁴

²⁹ *Id.*

³⁰ Complaint, *supra* note 21.

³¹ *Id.*

³² *Id.*

³³ Defendant Bradley Univ.'s Answer to Plaintiffs Compl., Kent State Univ. v. Ford & Bradley Univ., No. 2011 CV 00511 (May 27, 2011).

³⁴ *Id.*

With respect to the lawsuit, Ford issued a statement regarding the litigation and stated, "During the process, everything was handled professionally and appropriately. It is unfortunate this has turned into a legal matter. I look forward to a quick resolution."³⁵ Cross also issued a statement and said, "Bradley University is respectful of employer-employee relationships, including those involving current and former employees, and has acted accordingly. As testament to that, Bradley and coach Ford handled the hiring process in a straightforward and professional manner with the clear consent of Kent State University."³⁶ Kevin Young, attorney for Bradley University said, "(KSU) unconditionally consented to (Ford) interviewing to fill the open position of head coach of Bradley's men's basketball team, and, therefore, cannot seek damages in tort from Bradley."³⁷ Young also stated that the amount of damages sought by Kent State is "completely unreasonable."³⁸

III. BREACH OF CONTRACT ACTION - COURT OPINION

On July 12, 2013, Judge John A. Enlow (Enlow) rendered a partial summary judgment for breach of contract and damages against Defendant Ford.³⁹ Judge Enlow opined that Ford breached his Employment Contract with Kent State and stated that:

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.

³⁵ Elton Alexander, *Kent State Files Suit Against Former Men's Basketball Coach Geno Ford to Recover \$1.2 million Buyout*, http://www.cleveland.com/sports/college/index.ssf/2011/05/kent_state_files_suit_against.html (last updated May 13, 2011).

³⁶ *Id.*

³⁷ Dave Reynolds, *Bradley Coach Seeks Dismissal of Lawsuit*, <http://www.pjstar.com/x530606626/Bradley-coach-seeks-dismissal-of-lawsuit> (June 02, 2013).

³⁸ *Id.*

³⁹ Order, *supra* note 15.

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.⁴⁰

Kent State also sought summary judgment against Ford for liquidated damages amounting to \$1.2 million less retirement deductions.⁴¹ The court also found that:

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 Ride 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.* 16 381-382, 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

⁴⁰ *Id.*

⁴¹ *Id.*

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.⁴²

The court went on to determine that the liquidated damage provision was proper by virtue of the uncertainty of the amount and difficulty of proof of damages.⁴³ The Court determined that the amount of loss was unknowable.⁴⁴

The court then looked at the issue of unreasonableness or unconcionability of the liquidated damages and determined that:

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

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

to a basketball program, that he was offered \$700,000 a year for five years. The parties' damage clause was not disproportionate.⁴⁵

The final issue that the court analyzed was whether it was the intention of the parties that specified damages should follow the breach, and the court determined that:

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.

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.⁴⁶

In summary, Judge Enlow reached the conclusion that Ford was the initiating party to the breach of the Employment Contract. The parties agreed to a provision for liquidated damages, the provision was not a penalty, and Kent State is entitled to the

⁴⁵ *Id.*

⁴⁶ *Id.*

damages specified in the Employment Contract amounting to \$1.2 million, less retirement deductions. He therefore granted the motion for summary judgment.

IV. ISSUE OF LIQUIDATED DAMAGES

The Kent State - Ford case is not the first case to address the issue of liquidated damages. The case of Vanderbilt University (Vanderbilt) v. DiNardo (DiNardo) directly addressed enforceability of the liquidated damage provision in DiNardo's contract.⁴⁷

On December 3, 1990, Vanderbilt and DiNardo executed an Employment Contract hiring DiNardo to be Vanderbilt's head football coach.⁴⁸ Section One of the Employment Contract provided:

The University hereby agrees to hire Mr. DiNardo for a period of five (5) years from the date hereof with Mr. DiNardo's assurance that he will serve the entire term of this Contract, a long-term commitment by Mr. DiNardo being important to the University's desire for a stable intercollegiate football program.⁴⁹

The Employment Contract also contained reciprocal liquidated damage provisions whereby Vanderbilt agreed to pay DiNardo his remaining salary should Vanderbilt prematurely terminate him as head football coach, and DiNardo agreed to reimburse Vanderbilt should he leave before his contract expired.⁵⁰ Section eight of the Employment Contract stated:

Mr. DiNardo recognizes that his promise to work for the University for the entire term of this 5-year Contract is of the essence of this Contract to the University. Mr. DiNardo 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 as Head Football Coach with the University prior to the expiration of this Contract. Accordingly, Mr.

⁴⁷ Vanderbilt Univ. v. DiNardo, 174 F. 3d 751 (6th Cir. 1999).

⁴⁸ *Id.* at 753.

⁴⁹ *Id.*

⁵⁰ *Id.*

DiNardo agrees that in the event he resigns or otherwise terminates his employment as Head Football Coach (as opposed to his resignation or termination from another position at the University to which he may have been reassigned), prior to the expiration of this Contract, and is employed or performing services for a person or institution other than the University, he will pay to the University as liquidated damages an amount equal to his Base Salary, less amounts that would otherwise be deducted or withheld from his Base Salary for income and social security tax purposes, multiplied by the number of years (or portion(s) thereof) remaining on the Contract.⁵¹

During the contract negotiations, section eight was further modified at DiNardo's request so that damages would be calculated based upon net, rather than gross, salary.⁵²

In November 1994, Louisiana State University (L.S.U.) contacted Vanderbilt in hopes of speaking with DiNardo about becoming the head football coach for L.S.U. Athletic Director Paul Hoolahan gave DiNardo permission to speak to L.S.U. about the position.⁵³ On December 12, 1994, DiNardo announced that he was accepting the L.S.U. position as head football coach.⁵⁴

Vanderbilt sent a demand letter to DiNardo seeking payment of liquidated damages under section eight of the Employment Contract. Vanderbilt believed that DiNardo was liable for three years of his net salary: one year under the original contract and two years under a subsequently executed Addendum. DiNardo did not respond to Vanderbilt's demand for payment.⁵⁵

⁵¹ *Id.* at 753-754.

⁵² *Id.*

⁵³ *Id.* at 755

⁵⁴ *Id.*

⁵⁵ *Id.*

Vanderbilt brought an action against DiNardo for breach of contract.⁵⁶ DiNardo removed the action to federal court, and both parties filed motions for summary judgment. The district court held that section eight was an enforceable liquidated damages provision, not an unlawful penalty, and that the damages provided under section eight were reasonable.⁵⁷ The court also held that Vanderbilt did not waive its contractual rights under section eight when it granted DiNardo permission to talk to L.S.U. and that the Addendum was enforceable and extended the contract for two years.⁵⁸ The court entered judgment against DiNardo for \$281,886.43.⁵⁹

DiNardo argued that section eight of the Employment Contract was an unenforceable penalty under Tennessee Law. DiNardo further claimed that the provision was not a liquidated damage provision but a “thinly disguised, overly broad non-compete provision,” unenforceable under Tennessee law.⁶⁰

The court in upholding the liquidated damage clause stated that:

We review the district court's summary judgment de novo, using the same standard as used by the district court. See *Birgel v. Bd. of Comm'rs.*, 125 F.3d 948, 950 (6th Cir.1997), cert. denied, 522 U.S. 1109, 118 S.Ct. 1038, 140 L.Ed.2d 104 (1998). We view the evidence in the light most favorable to the non-moving party to determine whether there is a genuine issue as to any material fact. See *id.* Summary judgment is proper if the record shows that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c).

Contracting parties may agree to the payment of liquidated damages in the event of a breach. See *Beasley v. Horrell*, 864 S.W.2d 45, 48.(Tenn.Ct.App.1993). The term “liquidated damages” refers to an amount determined by the parties to be just compensation for damages

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

should a breach occur. Courts will not enforce such a provision, however, if the stipulated amount constitutes a penalty. See *id.* A penalty is designed to coerce performance by punishing default. See *id.* In Tennessee, a provision will be considered one for liquidated damages, rather than a penalty, if it is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages. See *id.* See *Beasley*, 864 S.W.2d at 48; *Kimbrough & Co. v. Schmitt*, 939 S.W.2d 105, 108 (Tenn.Ct.App.1996). When these conditions are met, particularly the first, the parties probably intended the provision to be for liquidated damages. However, any doubt as to the character of the contract provision will be resolved in favor of finding it a penalty. See *Beasley*, 864 S.W.2d at 48.

The district court held that the use of a formula based on DiNardo's salary to calculate liquidated damages was reasonable "given the nature of the unquantifiable damages in the case." 974 F.Supp. at 642. The court held that parties to a contract may include consequential damages and even damages not usually awarded by law in a liquidated damage provision provided that they were contemplated by the parties. *Id.* at 643. The court explained:

The potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach. It is this uncertain potentiality that the parties sought to address by providing for a sum certain to apply towards anticipated expenses and losses. It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc. As such, to 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 642.⁶¹

DiNardo further contended that there was no evidence that the parties contemplated that the potential damage from DiNardo's resignation would go beyond the cost of hiring a replacement coach.⁶² He argued that his salary has no relationship

⁶¹ *Id.* at 755-756.

⁶² *Id.*

to Vanderbilt's damages and that the liquidated damage amount is unreasonable and showed that the parties did not intend the provision to be for liquidated damages.⁶³

The court indicated, however, that:

DiNardo's theory of the parties' intent, however, does not square with the record. The contract language establishes that Vanderbilt wanted the five-year contract because "a long-term commitment" by DiNardo was "important to the University's desire for a stable intercollegiate football program," and that this commitment was of "essence" to the contract. Vanderbilt offered the two-year contract extension to DiNardo well over a year before his original contract expired. Both parties understood that the extension was to provide stability to the program, which helped in recruiting players and retaining assistant coaches. Thus, undisputed evidence, and reasonable inferences therefrom, establish that both parties understood and agreed that DiNardo's resignation would result in Vanderbilt suffering damage beyond the cost of hiring a replacement coach.

This evidence also refutes DiNardo's argument that the district court erred in presuming that DiNardo's resignation would necessarily cause damage to the University. That the University may actually benefit from a coaching change (as DiNardo suggests) matters little, as we measure the reasonableness of the liquidated damage provision at the time the parties entered the contract, not when the breach occurred, *Kimbrough & Co.*, 939 S.W.2d at 108, and we hardly think the parties entered the contract anticipating that DiNardo's resignation would benefit Vanderbilt.⁶⁴

The court finally concluded that:

The stipulated damage amount is reasonable in relation to the amount of damages that could be expected to result from the breach. As we stated, the parties understood that Vanderbilt would suffer damage should DiNardo prematurely terminate his contract, and that these actual damages would be difficult to measure. See *Kimrough & Co.*, 939 S.W.2d at 108.

Our conclusion is consistent with a decision by the Tennessee Court of Appeals in *Smith v. American General Corporation*, No 87-79-II, 1987 WL 15144 (Tenn.Ct.App. Aug.5, 1987). In that case, an individual sued his former employer for breach of an employment contract. *Id.* at *1. The employee had a three-year contract, and the contract provided for a single

⁶³ *Id.*

⁶⁴ *Id.*

lump sum payment of all remaining compensation in the event of a breach by the employer. *Id.* at *1-2. When the employer reduced the employee's duties, he quit, and sued seeking to enforce the liquidated damage provision. The employer argued the provision was a penalty, and that the employee should only be able to recover his total salary under the contract reduced by the employee's earnings in his new job. The Tennessee court rejected these arguments, concluding that even though the usual measure of damage is the difference between an employee's old and new salaries, here, the parties reasonably contemplated "special damage," including the intangible damage to the employee's prestige and career. *Id.* at *6. The court found that the parties expressly recognized the importance to the employee of the continuation of his employment, and it was "clearly within the contemplation of the parties that, if [the employee] should not be retained in his position, he would suffer unliquidated damages which would be difficult of proof." *Id.* at *7.

Our reasoning follows that of *Smith*. Vanderbilt hired DiNardo for a unique and specialized position, and the parties understood that the amount of damages could not be easily ascertained should a breach occur. Contrary to DiNardo's suggestion, Vanderbilt did not need to undertake an analysis to determine actual damages, and using the number of years left on the contract multiplied by the salary per year was a reasonable way to calculate damages considering the difficulty of ascertaining damages with certainty. See *Kimbrough & Co.*, 939 S.W.2d at 108. The fact that liquidated damages declined each year DiNardo remained under contract, is directly tied to the parties' express understanding of the importance of a long-term commitment from DiNardo. Furthermore, the liquidated damages provision was reciprocal and the result of negotiations between two parties, each of whom was represented by counsel.

We also reject DiNardo's argument that a question of fact remains as to whether the parties intended section eight to be a "reasonable estimate" of damages. The liquidated damages are in line with Vanderbilt's estimate of its actual damages. See *Kimrough & Vanderbilt Co.*, 939 S.W.2d at 108-09. Vanderbilt presented evidence that it incurred expenses associated with recruiting a new head coach of \$27,000.00; moving expenses for the new coaching staff of \$86,840; and a compensation difference between the coaching staffs of \$184,311. The stipulated damages clause is reasonable under the circumstances, and we affirm the district court's conclusion that the liquidated damages clause is enforceable under Tennessee law.⁶⁵

⁶⁵ *Id.*

V. TORTIOUS INTERFERENCE - COURT OPINION

On July 24, 2013, Judge Enlow entered a decision for summary judgment against Bradley for tortious interference with contract.⁶⁶ Judge Enlow spelled out the applicable elements of tortious interference:

(1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) the lack of justification; and (5) resulting damages. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3rd 415 (1995), paragraph two of the syllabus.

"One who intentionally and *improperly* interferes with the performance of a contract * * * between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." (Emphasis added.) *Kenty*, at 418-419, quoting 4 Restatement of the Law, 2d, Torts (1979), Section 766.⁶⁷

Judge Enlow then applied the facts of the case to the law and concluded that:

The first and second elements of tortious interference with contract, the existence of the employment contract and Bradley U's knowledge of the contract, are not in question.

The third element, intentional procurement of the contract's breach, Bradley U asserts that there was no breach of the employment contract between KSU and Coach Ford. Bradley U largely bases its case on KSU allowing Coach Ford to have discussions with other basketball programs.

Consistent with provision 7.c., Coach Ford was given permission to talk with Bradley U, which was seeking a new head basketball coach. Coach Ford met with Bradley U and negotiated over a weekend. On Saturday, Bradley U and Coach Ford signed a memorandum of understanding that Coach Ford would become Bradley U's head basketball coach effective the next day. Coach Ford was KSU's head basketball coach for just one year of a five year contract.

⁶⁶ Order Granting Mo. Summ. J. Against Bradley Univ., Kent State Univ. v. Ford & Bradley Univ., No. 2011 CV 00511, July 24, 2013.

⁶⁷ *Id.*

But consent to interview is not consent to hire. Paragraph 7 of Coach Ford's contract with ISU stated that: "GENE A. FORD recognizes that his promise to work for the UNIVERSITY for the entire term of this five (5) year contract * * *." Provision 7.c. simply allowed Coach Ford to talk with programs which had sought him out. But that provision did not void or take priority over the five year term of the contract and specified damages for a breach.

In this third element, and construing the summary judgment evidence most strongly in favor of Bradley U, it is apparent that Bradley U intentionally interfered with and procured the breach of KSU's employment contract with Coach Ford.

The more thorny issue is the fourth element; Bradley U's lack of justification in breaching the employment contract between KSU and Coach Ford.

"[L]ack of justification requires proof that the defendant's interference with another's contract was improper." *Fred Siegel Co., L.P.A., v. Arter & Hadden*, 85 Ohio St.3rd 171, 176 (1999).

4 Restatement of the Law 2d, Torts (1979), Section 767, includes a list of factors to be considered in determining whether a defendant has acted improperly. These are: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. *Fred Siegel Co.*, at 178-179.

Considering these factors most favorably for Bradley U, the nature of Bradley U's conduct was to acquire a new basketball coach. Its motive was to wrest a winning coach away from KSU. KSU's interest was to retain its basketball coach for the four remaining years of the employment contract. Bradley U's interest was to improve its basketball program. The legal interest and expectation of society was that promises should be kept and not broken. Bradley U was both the initiator and cause of the breach of KSU's contract with Coach Ford. As for the relations between the three parties, KSU had a close, supportive relationship with Coach Ford, and their five year contract had four more years before completion. Apparently, Bradley U had no relationship with KSU and Coach Ford before Coach Ford's visit.

As for the fourth issue, the summary judgment evidence establishes that Bradley U's conduct was improper and lacked justification in breaching the employment contract between KSU and Coach Ford.

In the fifth element, resulting damages, Bradley U claims that KSU did not incur damages which followed upon the breach. Bradley U's motion for summary judgment against KSU detailed some of the costs KSU had to expend in finding a replacement for Coach Ford. In its current motion, KSU pointed to that same need to seek and hire replacements in the basketball program after Coach Ford left. But KSU's loss of its winning coach had financial ramifications well beyond the hiring of another coach. Construing the summary judgment evidence most favorably for Bradley U, it is apparent that some damages followed the breach of KSU's contract.

In summary, considering these factors most favorably for Bradley U, the Civ.R. 56 (C) evidence establishes all the elements of proof required to confirm that Bradley U tortiously interfered with KSU's employment contract with Coach Ford.⁶⁸

With respect to the issue of damages, Judge Enlow determined in his

Opinion that:

KSU demands an award of damages amounting to \$1.6 million.

In Bradley U's summary judgment against KSU, this Court ruled that KSU did not establish actual malice on the part of Bradley U, and thus, Bradley U was granted judgment on KSU's punitive damage issue. Thus, KSU cannot seek punitive damages from Bradley U.

Further, Bradley U is not subject to liquidated damages. A provision in the employment contract between KSU and Coach Ford, at 7.d., required that any program obtaining permission to talk with Coach Ford would have to pay KSU's liquidated damages should Coach Ford accept a position. At the time of the breach, the amount of liquidated damages as \$1.2 million. But Bradley U was not a party to the employment contract and never agreed to the 7.d. provision.

Finally, KSU has not established that Bradley U's conduct caused damages of \$1.6 million to KSU.

⁶⁸ *Id.*

Construing the summary judgment evidence most favorably for Bradley U, KSU's demand for \$1.6 million damages cannot be granted. KSU's damages must be proven at trial.⁶⁹

In regard to Judge Enlow's decision, Ohio Attorney General Mike DeWine said, "We have a duty to protect our public colleges and universities from third parties that try to undermine or interfere with their contracts. When a university disregards those contracts and knowingly poaches another school's coach, that university must be held accountable."⁷⁰

VI. POST-OPINION ACTIVITY

A trial had been set for October 7, 2014, wherein a Portage County jury would have determined the actual amount of damages Bradley caused to Kent State. Court documents show that Kent State had requested \$1.6 in damages from Bradley.

On September 25, 2013, Kent State dismissed the pending lawsuit against Bradley. Bradley Attorney Bill Kohlhasse said:

It is not clear why Kent State used taxpayer dollars to pursue this case against Bradley and then withdraw it less than two weeks before trial. In my experience, however, plaintiffs do not dismiss a case if they believe they would receive a damage award by going to trial. As a result of the dismissal, it is as if the case against Bradley never was filed.⁷¹

Bradley released a statement saying that it has "consistently maintained that Kent State consented on multiple occasions to Ford interviewing for the Braves head coaching position."⁷²

⁶⁹ *Id.*

⁷⁰ Jessica White, *Bradley University Violated Kent State's Contract With Former Coach*, <http://kentwired.com/bradley-violated-kent-state-s-contract-with-former-coach-judge-rules>.

⁷¹ *Kent State Drops Bradley Lawsuit, Ford Still in Litigation*, The Bradley Scout, <http://www.bradleyscout.com/news/geno/>.

⁷² *Id.*

Michael Cross, Bradley's athletic director, said in the statement, "Our actions during the hiring of Coach Ford, just like the hiring of all our staff members, were ethical, legal and transparent. President (Joanne) Glasser and all of us associated with the issue have always been confident that the hiring of Coach Ford was completely appropriate. We are very pleased that Bradley University's position is effectively supported by this dismissal."⁷³

Evidently Kent State can refile the case within one year if it so desires.

Emily Vincent, director of media relations for Kent State, issued an email statement that acknowledged the dismissal of the lawsuit against Bradley. Kent State said the action "means it will proceed to enforce its contractual rights against Ford. This next step is based upon the Portage County Common Pleas decision. Further, the voluntary dismissal of Bradley University preserves the ability to seek recovery versus Bradley in the event Ford is unable to satisfy judgment. In the event that Kent State needs to reassert its claims against Bradley, there is already an established record through sworn statements, witness testimony and other evidence. Based upon that record and the facts of this case, the court determined that Bradley University intentionally interfered with the contract between Kent State University and Geno Ford and that such interference was not justified."⁷⁴

On October 11, 2013, Judge Enlow issued a final judgment against Ford for the breach of contract action. Ford was expected to appeal the court's decision. Ford had

⁷³ *Id.*

⁷⁴ *Id.*

30 days after the entry of the final order to perfect the appeal,⁷⁵ and did so on November 12, 2013.⁷⁶

VII. LESSONS TO BE LEARNED

1. Dirty laundry in college athletics now gets hung out in the courtroom.

Resolution of disputes in college athletics in the back room may be a thing of the past.

2. Kent State had experienced departures -- Gary Waters, Stan Heath, and Jim Christian. However, a check from either the coach or the new school arrived within a week or two. Not in Ford's case. Universities left at the altar will sue: West Virginia v. Rodriguez, Marist v. Brady, Vanderbilt v. DiNardio, and, of course, Kent State v. Ford.

3. The Kent State case has given a boost to the proposition that liquidated damages are fully recognized by the court as a form of stipulated and contractual damages and not a penalty, and if so agreed to, may be completely reasonable and not unconscionable.

4. Consent to interview does not mean consent to hire.

5. If the university gives a coach consent to interview, any university that requests the right to interview the coach should be put on written notice of the contractual obligation of liquidated damages and the payment of the liquidated damages as a condition precedent to being hired by another university.

6. Universities might even consider making the university who obtains consent to interview, jointly and severally liable with the coach for the buyout fee through some form of agreement executed at the time of granting the right to interview.

⁷⁵ Ohio Revised Code, §2505: Procedure on Appeal, §2505.07 (Time for perfecting appeal).

⁷⁶ Notice of Appeal; Kent State University vs. Ford, Court of Common Pleas, Portage County, Ohio, Court of Appeals No. 2013PA00091, Nov. 12, 2013..

7. Liquidated damages provide little or no deterrence to departure. Loyalty today to a home town or a college is fleeting.

8. Liquidated damages are revenue generating clauses that do nothing more than to help offset coaching free agency.

9. In the Ford case, the University would have been obligated if the University would have prematurely fired Ford without cause. There was total symmetry between the liquidated damage clause and the early termination without cause provisions by the University in the Kent State Ford contract.

10. Liquidated damage payments are merely a cost of doing business. The source of payment is not only the jumping Coach, but recipient universities, booster groups, Foundations and rich alumni.

11. An exit payment or liquidated damages is part of the business of college athletics and merely a form of compensation for the risk of hiring.

12. The indentured servant rule, an unconscionable penalty, damages that do not even get close to measuring actual damages from the coach's breach all sound good but do not resonate with the courts.

13. There are other retention and exit methodology that might be considered, including "dream job" provisions, performance based exit provisions, and retention bonuses, i.e. reward a coach for staying rather than punishing a coach for leaving.

14. The suit brought by Kent State against Bradley for tortious interference with contract is somewhat unprecedented in the world of college athletics.

15. Tortious interference does have a life as a defense weapon for a university who has lost a departed coach, especially if the hiring university is aware of

the liquidated damage provision and the coach fails to pay the amount specified in the contract.

16. Kent State will change the procedure and the contractual requirements with respect to the consent to interview and hiring away another university's coach.

17. As a condition precedent to any hiring, a check for the liquidated damage amount must be delivered before the coach can depart.

18. Administrators, lawyers and fans should probably get used to the proposition that there is virtual free agency in college coaching and that the college coaching carousel will forever continue to spin.

19. While interest will continue to accrue on the judgment and the potential for some form of settlement is still there, ultimately Kent State on appeal will be successful.

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