

ORIGINAL

IN THE SUPREME COURT OF OHIO

BOONE COLEMAN CONSTRUCTION
CO., INC.

Plaintiff-Appellee

vs.

THE VILLAGE OF PIKETON, OH

Defendant-Appellant

Case No. 14-0978

On Appeal from the Pike
County Court of Appeals,
Fourth Appellate District

Court of Appeals
Case No. 13CA836

**PLAINTIFF-APPELLEE'S MEMORANDUM CONTRA
TO THE DEFENDANT-APPELLANT'S
MOTION FOR STAY**

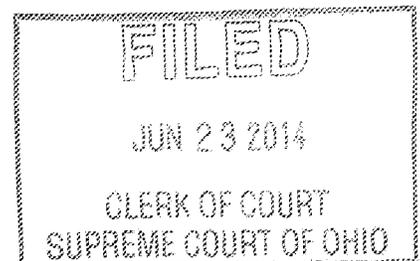
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This matter comes before the Supreme Court of Ohio on a Notice of Appeal filed by the Village of Piketon from a Decision and Judgment of the Court of Appeals of the Fourth Appellate District filed on May 22, 2014, reversing the judgment of the Pike County Court of Common Pleas granting the Village a judgment in its favor and against the Plaintiff-Appellee, Boone Coleman Construction Company, in the amount of \$130,423. In addition to filing its Notice of Appeal with this Court, the Appellant has asked that this Court stay the decision of the Court of Appeals which if granted will result in the Appellee being required to maintain its supersedeas bond filed with the Common Pleas Court in the amount of \$155,000.

The parties to this appeal are also parties to a construction contract entered into on July 27, 2007. This contract had as its subject matter a two phased construction project at the intersection of Shyville Road and U.S. 23 in Piketon, Ohio. The two phases were as follows: the remediation and reinforcement of the hillside where Shyville Road meets U.S. 23; and the construction of a traffic signal at the same intersection. The repair of Shyville Road was completed on time, however, the installation of the traffic signal was approximately a year late in being completed. As a consequence, when the Appellee sued the Appellant for the balance due on the contract the Appellant claimed it was due liquidated damages as an offset calculated at the rate of \$700 per day. The Appellee that the liquidated damages provision of the contract did not apply and if it did the amount constituted a penalty. The trial court agreed with the Appellant and disagreed with the Appellee thereby rendering judgment against the Appellee in the amount of \$130,423. This amount represented the difference between the total liquidated damages (\$277,900) and the balance due the Appellee under the contract (\$147,471).

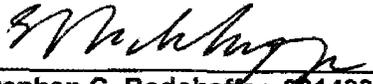
The Fourth District Court of Appeals unanimously found that the liquidated damages provision of this contract as applied to the facts in this case constituted a penalty. With this finding the judgment of the trial court is effectively nullified and the Appellant will now owe the Appellee \$147,471 plus interest. The Appellant requests a stay of this decision which will require that the \$155,000 supersedeas bond posted by the Appellee remain in place. The

Appellee vigorously opposes any stay the terms of which will require the continuation of the supersedeas bond. The reasons for this opposition are as follows:

First is the fact that of the four judges that have considered this matter three have decided the issues in the Appellee's favor. Second, to require that the Appellee to bear the cost of maintaining this bond under these circumstances without the Appellant making a compelling argument that this Court will both accept the case for consideration and rule in the Appellant's favor is contrary to law and justice. Third, the Appellee is a construction company whose bonding capacity is important to it. That bonding capacity is reduced by the number of outstanding bonds. Thus the continuation of the bond at issue in this case operates as a double penalty inasmuch as the Appellee is being required to maintain a bond for a judgment that no longer exists, and the Appellee is being limited in the number of construction contracts it can enter into.

For the foregoing reasons, the Appellee opposes any stay that would be issued by this Court that requires the Appellee to maintain the bond filed in the trial.

Respectfully submitted,


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CERTIFICATE OF SERVICE

Copy of the foregoing served upon Eric B. Travers and Timothy A. Kelley, Attorneys for Defendant-Appellee, 65 East State Street, Suite 1800, Columbus, Ohio 43215, by regular U.S. Mail, this 23rd day of June, 2014.


Stephen C. Rodeheffer, 0014992