

IN THE SUPREME COURT OF OHIO

ORIGINAL

BOONE COLEMAN
CONSTRUCTION CO., INC.,

Plaintiff-Appellee,

vs.

VILLAGE OF PIKETON, OH,

Defendant-Appellant.

Case No. 2014-0978

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

Court of Appeals
No. 13CA000836

MEMORANDUM IN RESPONSE OF
APPELLEE BOONE-COLEMAN CONSTRUCTION CO., INC.

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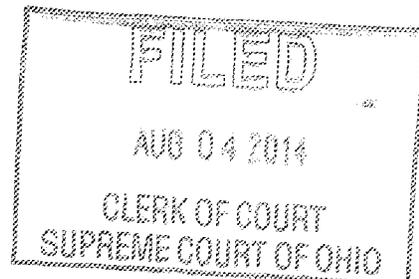


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MEMORANDUM IN RESPONSE

1. THIS CASE IS NOT A MATTER OF PUBLIC OR GREAT GENERAL INTEREST WARRANTING REVIEW BY THIS COURT.

Boone Coleman Construction Co., Inc. contracted with the Village in 2007 to perform work on and along side Market Street in Piketon, Ohio. The project has been commonly referred to as the Pike Hill Project (the "Project"). The Project contract price was \$683,300 and involved two separate and distinct endeavors: (1) the excavation of the hillside along Market Street, the rebuilding of that road, and the construction of a retaining wall; and (2) the installation of a traffic signal at the intersection of U.S. Route 23 and Market Street in Piketon, Ohio. According to the bid submitted by Coleman, the roadwork was to cost \$559,750 (roughly 82% of the contract price), and the traffic signal was to cost \$123,550 (roughly 18% of the total contract price).¹ The hillside portion of the project was completed on time, but the traffic signal portion of the project was delayed 397 days beyond the Project completion date.

The parties agreed to a per diem rate of liquidated damages of \$700.00 for the entire Project. The parties understood, at the time of the contract's inception, that there would be significant disturbance to the traveling public during the roadway excavation, including, the inconvenience to the public in not being able to use the roadway and the parties having to contract and coordinate with third parties for alternate public travel routes. The continuation of these inconveniences beyond the Project's completion date would have been significant and the damage resulting from the same could not have been easily calculated the time of the contract's inception. On the other hand, the only anticipated inconvenience during the traffic signal portion of the Project was that the Village would not have a traffic signal in the proposed location until the Project was complete. By the Project's deadline, the traffic flowed along the roadway portion

¹ *Def's Ans.* (Mar. 8, 2010), at ¶ 5, 16.

² *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984).

of the Project as it did before the Project began. However, the traffic signal was not operational until 397 days beyond the Project's deadline. The Village now seeks to recover liquidated damages from Coleman by multiplying the entire per diem rate of liquidated damages by the number of days that only the traffic signal portion of the Project remained incomplete. This is not a matter of great public concern. The Village is only hoping for one more bite at the apple to obtain a windfall in the form of monetary damages more than two times the original cost of the traffic signal portion of the Project.

Despite Appellant's argument to the contrary, the ruling of the Fourth Appellate District in this matter will not have "grave implications" for public contracting across the State of Ohio. The appellate court's ruling in this matter has not opened the floodgates to a wave of challenges to all liquidated damages provisions in public works in government improvement contracts. Based upon the facts of this case, the appellate court decided that the liquidated damages provision operated as a penalty. The appellate court's decision is not a rogue outlier amongst other decisions in this state analyzing the validity of liquidated damages provisions in contracts. The appellate court applied the test as set forth in this Court's decision in *Samson*² and did not establish a bright line rule invalidating all liquidated damages provisions for new construction projects as the Village would have you believe.

This case involves significant factual issues that led the appellate court to determine that the liquidated damages provision of the contract operated as a penalty. It is a factual issue, not a legal one justifying clarification by this Court. Therefore, based upon the foregoing, Appellee submits that this matter is not a matter of public or great general concern justifying review by the Court.

² *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984).

2. APPELLANT'S PROPOSITIONS OF LAW WOULD HINDER THE TRUE PURPOSE OF CONTRACT DAMAGES AND SHOULD NOT BE ACCEPTED BY THIS COURT.

A. *A purely prospective analysis of liquidated damages provisions would not allow judicial review of contract damages to account for the actual damages that flow from the breach thereof and in turn would allow for non-breaching parties to more easily impose penalties upon breaching parties and obtain windfalls.*

A purely prospective analysis of liquidated damages provisions would not allow judicial review of contract damages to account for the actual damages that flow from the breach thereof and, consequently, allow non-breaching parties to obtain a windfall. Any law increasing the likelihood that a non-breaching party will obtain a windfall under a contract is a clear deviation from the basic contract principle that non-breaching parties should be compensated for actual loss.

Freedom to contract is a fundamental legal principle in our society. However, the freedom to enter into contracts that contain provisions apportioning damages in the event of default³ is not without limitation. Particularly, this freedom may be limited for public policy reasons when stipulated damages constitute a penalty.⁴ The sole purpose of contract damages is to compensate the non-breaching party for losses suffered as a result of a breach. “[P]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”⁵ Thus, when the principle of compensation for a loss suffered is disregarded, the provision seeking to allocate liquidated damages should be deemed void.⁶

³ *O'Brien v. Ohio State Univ.*, 139 Ohio Misc. 2d 36, 2006-Ohio-4346, 859 N.E.2d 607 (2006) (parties are free to enter into contracts apportioning damages in the event of default); *see also Samson Sales, Inc. v. Honeywell, Inc.* 12 Ohio St.3d 27, 465 N.E.2d 183 (1984).

⁴ *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993)

⁵ *Lake Ridge Academy*, *supra*, citing 3 RESTATEMENT OF THE LAW 2D, CONTRACTS (1981) 154, Section 355

⁶ *Id.*, citing 3 RESTATEMENT OF THE LAW 2D, CONTRACTS (1981) 154, Section 355

A punitive remedy is one that subjects the breaching party to a liability “disproportionate to the damage which could have been anticipated from breach of the contract...”⁷ The characteristic nature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract.⁸ A penalty is designed to coerce performance by punishing nonperformance; its principal object is *not* compensation for the losses suffered by the non-breaching party.⁹ If the parties agree to a liquidated damages provision that serves as a penalty rather than follows the principals of contractual compensation for breach, the provision should be deemed unenforceable.

Under the Appellant’s first proposition of law, a court’s ability to nullify a clearly punitive liquidated damages provision will be eliminated. If a reviewing court can only consider the intentions of the parties and the facts present at a contract’s inception, and not facts relating to whether the non-breaching party suffered any actual loss, then the very foundation upon which contract law in this state and this country will be shattered. No longer will the fundamental contract principle that a non-breaching party should be compensated for actual loss survive. Instead, penalty provisions will be prevalent in every construction and public improvement contract in the state. Appellant, by proposing their first proposition of law, would have this Court nullify a century of precedent involving the interpretation and enforcement of contracts.

Not only would Appellant’s first proposition of law have the significant negative impacts outlined above, but it would otherwise strengthen a type contract provision allocating damages without regard to any actual loss suffered. By only looking at what the parties knew at the time of the contract, and not considering the actual loss suffered by the non-breaching party, courts

⁷ *Lake Ridge Academy*, citing 5 WILLISTON ON CONTRACTS (3 Ed. 1961) 668, Section 776

⁸ *Lake Ridge Academy*, citing *Garrett v. Coast & S. Fed. S. & L. Assn.*, 511 P.2d 1197, at 1202 (Cal. 1973)

⁹ *Id.*, at 188.

would be unable to invalidate a liquidated damages provision when no loss was suffered so long as the per diem rate seemed reasonable at the time of the contract's inception. This case presents that exact issue. In the present case, the Village cannot show any actual or theoretical damage, but they nevertheless feel entitled to the sum \$276,500 merely because the contract states they are allowed the same. The windfall being sought by the windfall being sought by the Village is exactly the type of recovery that the law opposes.

However, even under a purely prospective analysis, the liquidated damages provision in this matter operates as a penalty. When viewing the contract as a whole at the time of its inception, the parties were contracting for two separate construction projects that were combined to form the Project. As mentioned above, there were significant inconveniences to the traveling public while the roadway portion of the Project was being completed. However, that portion of the Project was completed on time. The only portion of the Project that was not completed on time was the traffic signal portion. When viewing the contract between the parties at the time of the contract's inception, it is undeniable that the parties did not intend for the liquidated damages per diem rate of \$700.00 be assessed against Coleman if only the traffic signal portion of the contract remained incomplete after the Project's deadline. The per diem rate of liquidated damages for this Project was negotiated an agreed-upon while considering the contract as a whole and considering the inconvenience to the public that would be had should the roadway portion of the Project remain incomplete beyond Project deadline.

Despite Appellant's contention, the appellate court's decision in this matter will not lead to costly and time-consuming challenges to liquidated damages provisions. The appellate court did not change the test used in determining the enforceability of liquidated damages provisions, but rather applied to test as set forth by this Court. What the appellant's courts decision does do is

create a precedent in the Fourth District that the owner of a construction project will not be able to obtain a windfall in the form of liquidated damages when they cannot declare any actual or theoretical damage flowing from a contractor's breach. Appellant's position has been and remains that they are entitled to assess liquidated damages because the contract says so, despite the fact that they can show no actual or theoretical damage suffered as a result of the delay. The law should not support this type of position.

Based upon the foregoing, this Court should reject Appellant's first proposition of law because it is contrary to the foundational principle that contract damages should place the non-breaching party in the position they would have been had the contract been performed and not to provide a windfall to the non-breaching party.

B. The Fourth District's Decision in this matter did not create a precedent for the invalidation of all liquidated damages provisions in new construction contracts.

Appellant contends that the Fourth District's decision in this case results in a per se rule that all liquidated damages provisions for new construction projects will be deemed unenforceable. This is simply untrue. The appellate court based its decision upon the facts surrounding this case. The facts of this case were that the Village suffered no actual or theoretical damages.

There are situations when a new construction project's delay could cause actual and/or theoretical damage to the non-breaching party. However, such was not the case in this matter. Appellant's second proposition of law does not clarify or contribute to the current status of the law related to liquidated damages. Therefore, it should be rejected.

CONCLUSION

Based on the foregoing, this Appellee requests that this Court deny jurisdiction in this case because it does not involve a matter of public or great general interest sufficient to justify an appeal to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served via regular U.S. Mail upon Eric Travers, Attorney for Appellees, Capitol Square, Suite 1800, 65 East State Street, Columbus, Ohio 43215, and Jack R. Rosati, Counsel of Record for Amici Curiae The County Commissioners Association of Ohio, The Ohio Municipal League, The Ohio School Boards Association, and the Ohio Township Association, this 4th day of August, 2014.



John A. Gambill (0089733)