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## STATEMENT OF FACTS

### **I. Factual Background: The Project and the Contract.**

This lawsuit arises out of a construction project to install a traffic signal and make related roadway improvements to the intersection of U.S. Route 23 and Market Street in Piketon, Ohio (the “Project”). (Affidavit of Mayor Billy Ray Spencer [hereinafter “Spencer Aff.,” attached to Piketon’s Motion for Summary Judgment (“Motion”) filed July 7, 2012, as Ex. 1], at ¶ 2.) Because of safety concerns, the “driving force” behind the Project was the Village’s longstanding need for a traffic light at the busy intersection where Market Street crossed U.S. Route 23. (See Decision of the Fourth District Court of Appeals [“Decision”] at ¶7; See also Deposition of Billy Spencer, filed December 12, 2011 [hereinafter “Spencer Dep.”], at 20:16-17; Spencer Aff. at ¶ 2.)

The Village put the Project out to competitive bid in the summer of 2007. The Boone Coleman Construction Company (“Boone Coleman”), a sophisticated and experienced road construction contractor, was the lowest bidder with a bid of \$683,300.00. (Spencer Aff. at ¶¶ 4 and 6.) On July 27, 2007, the Village and Boone Coleman entered into a comprehensive written Contract for the Project. (See Spencer Aff. Ex. B.) The Contract was the industry form Engineers Joint Contract Documents Committee (“EJCDC”) contract, Funding Agency Edition, and it and the contract documents incorporated therein<sup>1</sup> contained the parties’ mutual promises regarding performance. These mutual promises govern the proper outcome of this appeal.

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<sup>1</sup> As with most construction projects of any significant size the Contract consists of numerous incorporated documents, including but not limited to the Bid, the Agreement itself (the EJCDC Standard Form of Agreement between Owner and Contractor on the basis of a Stipulated Price, Funding Agency Edition), the EJCDC Standard General Conditions, Supplementary Conditions, Project Special Conditions, and Specific Drawings. (See Article 9, “Contractual Documents,” Contract at BC000650, attached as Ex. B to Spencer Aff.) For the Court’s convenience, citations to the Contract include references to the Bates number of the cited page.

In its Bid and the Contract, Boone Coleman agreed to complete the Project in 120 days for the lump sum price of \$683,300.00. For each of unexcused Project delay Boone Coleman agreed to an ODOT based rate of \$700.00 as liquidated damages as a reasonable per diem to compensate the owner for delay damages if the Project was late. (Spencer Aff. Ex. B, Contract at BC000646, ¶ 4.02; and at BC000647, ¶ 5.01.) As is typical in public and private construction contracts, the General Conditions of the Contract (here the EJCDC Standard General Conditions of the Construction Contract, Funding Agency Edition) assigned various construction-related risks between the parties' and set forth the parties agreement on the mandatory procedures to follow if the contractor encountered changes or other events that it believed warranted: (a) a change in the Contract Price; or (b) additional time (e.g., excusable delay) to complete the work. (See Contract General Conditions, at BC000711, ¶ 10.05; *see also* Ex. B to the Spencer Aff.)

The relevant Contract provisions were as follows:

- A. The parties agreed to a liquidated damages per diem of \$700 would be assessed for each day of delay if Boone Coleman failed to complete the Work within the contract time.**

Timely completion of the Project was vital to the Village. (Spencer Aff. at ¶ 9). Boone Coleman recognized this and contractually agreed that “[a]ll time limits” including “completion and readiness for final payment ... are of the essence of the Contract.” (Contract at BC000646, ¶ 4.01 [emphasis added].) Boone Coleman promised the Village that the work would be fully “completed and ready for final payment ... within **120 days** after the date when the Contract Times commence to run.” (Contract at BC000646, ¶ 4.02 [emphasis in original].) The Contract Time commenced “on the day indicated in the Notice to Proceed.” (Contract at BC000719, SC-2.03.A, attached to the Motion as Ex. 4.)

Payment of the full Contract Price was conditioned on Boone Coleman fully completing the Project within the Contract Time (including any agreed extensions). Boone Coleman agreed that the Contract Price would be reduced by \$700 for each calendar day past the completion date that the Work was not fully complete (i.e., that the traffic signal was not installed and operational) and that it would pay the Village if and to the extent any liquidated damages assessed exceeded the remaining Contract balance. The parties' understanding in this regard is plainly set forth in ¶4.03.A of the Contract, which provides that:

CONTRACTOR [Boone Coleman] and OWNER [the Village] recognize that **time is of the essence** of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the time(s) specified in paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, **instead of requiring any such proof**, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$700.00 for each day that expires after the time specified in paragraph 4.02 for Substantial Completion until the Work is substantially complete.

After Substantial Completion, if CONTRACTOR shall neglect, refuse or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by OWNER, **CONTRACTOR shall pay OWNER \$700.00 for each day that expires after the time specified in paragraph 4.02 for completion and readiness for final payment until the Work is completed and ready for final payment.**

(Contract at BC000646, ¶ 4.03.A, attached to the Motion as Ex. 3 [emphasis added])

The \$700 liquidated damages per diem was consistent with Ohio construction industry standards as it was \$60 less than the \$760 liquidated damages rate the State of Ohio then required for each day of delay to ODOT road construction contracts between \$500,000 and \$2,000,000. (See The 2005 Ohio Dept. of Transportation ["ODOT"] Construction and Material Specifications ["CMS"] table § 108.07-1, attached to the Motion as Ex. 5.)

The Contract's liquidated damage provision was not only a product of the parties' arms-length bargain, and consistent with Ohio construction industry standards, it was required by Ohio law. This is because the Project was funded by the state. (Spencer dep. at 22:15-17, funding was primarily through grants by the Ohio Public Works Commission (OPWC)) R.C. 153.19 mandates that public construction contracts paid for with any state money "shall contain [a] provision in regard to the time when the whole or any specified portion of the work contemplated therein shall be completed and that for each day it shall be delayed beyond the time so named the contractor shall forfeit to the state a sum to be fixed in the contract, which shall be deducted from any payment due or to become due to the contractor." R.C. 153.19.

On July 27, 2007, the Village issued a Notice to Proceed, commencing the 120-day Contract Time on July 30, 2007, and establishing the Project completion date of November 27, 2007. (Spencer Aff. at ¶ 10 and Ex. C attached thereto.) The parties later agreed to extend the Contract Time by 180 days to May 30, 2008. (Spencer Aff. at ¶ 11, and Ex. D attached thereto.)

Boone Coleman did not complete the Project by the (extended) Project completion date. On May 22, 2008, the Village put Boone Coleman on notice that if the work was not completed on schedule it would, per the parties' agreement "assess Liquidated Damages in the amount of \$700 per each day that expires after the time specified" for completion. (Spencer Aff. at ¶ 16, and Ex. G attached thereto.) On June 7, 2008, seven days after the Contract Time expired, the Village notified Boone Coleman and its surety that the Village was now "assessing per contract agreement mitigating damages of \$700.00/day as of 5-31-08 to Boone Coleman Construction until the Pike Hill project is complete." (Spencer Aff. at ¶ 17, and Ex. H attached thereto.)

Boone Coleman did not object to either letter from the Village. It also did not complete its Work until 397 Days after the May 30, 2008 completion date. The trial court determined at

summary judgment and the court of appeals affirmed (in a decision that Boone Coleman did not appeal) that Boone Coleman was responsible for the entire length of the delay. (Decision at ¶ 24.) The Village assessed liquidated damages in the amount of \$277,900. (Spencer Aff. at ¶ 26, and attached Ex. K; *see also* Decision at ¶ 11.)

**B. Boone Coleman was responsible for the entirety of the Project delay and waived any claims for additional time.**

By Contract, Boone Coleman agreed that “[n]o Claim for an adjustment in the ... Contract Times (or Milestones) will be valid if not submitted in accordance with paragraph 10.05.” (Contract General Conditions, at BC000711, ¶ 10.05(D) [emphasis added].) It also agreed that “[t]he Contract Times (or Milestones) may only be changed by a Change Order or by a Written Amendment. Any Claim for an adjustment in the Contract Times (or Milestones) shall be based on written notice submitted by the party making the Claim to the ENGINEER and the other party to the Contract in accordance with the provisions of paragraph 10.05.” (Decision at ¶ 12, quoting Contract General Conditions at ¶12.02(A).)<sup>2</sup>

Both the trial and appellate courts determined that the requirements of ¶10.05 are dispositive of Boone Coleman’s right to maintain its belated claims for additional money (for alleged extra work) or time (to excuse the 397 day delay). Under that paragraph, Boone Coleman agreed that it had to provide written notice of claims for time or money to both Woolpert (the Project Engineer) *and* the Village within thirty days after the start of any event it believed justified the claim. (Spencer Aff. at ¶ 18; Contract General Conditions, at BC000711, ¶10.05(A).) The provision in question specifically states that:

Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to ENGINEER and *the other party to the*

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<sup>2</sup>In ¶ 12.01 of the General Conditions, Boone Coleman agreed to similar language with respect to the necessary written notice required to preserve claims for additional money. (Decision at ¶ 12.)

*Contract* promptly (but in no event later than 30 days) after the start of the event giving rise thereto.

*Id.* [emphasis added].

The parties agreed that this notice had to be followed by a second, more detailed written notice within 60 days of the event giving rise to the claim. The second notice had to include “the amount or extent of the Claim, dispute or other matter with supporting data” and “shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim, dispute, or other matter).” (*See* Contract General Conditions, at BC00711, ¶10.05(A).)

The trial court found that Boone Coleman waived any right to additional time or money by failing to comply with the Contract’s written notice requirements. And the Fourth District affirmed this, holding that “[t]he failure of Boone Coleman to comply with the notice provisions of the contract controls the outcome” of its claims for additional time and money, and required summary judgment for the Village on those claims. (Decision at ¶20). The Fourth District added that “Boone Coleman argues that its failure to comply with the parties’ notice provisions for requests for extension of time and additional compensation is not fatal .... **Boone Coleman’s argument is meritless.**” (Decision at ¶26, (emphasis added).)

Boone Coleman has not appealed these findings.

## **II. Procedural Background: The Lawsuit and the Appeal.**

The Project was completed on July 1, 2009, 397 days after the extended completion date of May 30, 2008. In January 2010, Boone Coleman filed a Complaint in the Pike County Court of Common Pleas demanding full payment of its remaining Contract Balance without any deduction for liquidated damages for delay. It also demanded additional compensation for a

variety of extra work claims, although it had not contemporaneously provided the Village with contractual notice for those claims. The Village denied that anything additional was owed, and asserted a Counterclaim to recover liquidated damages based on the 397 days of unexcused delay multiplied by the agreed liquidated damages per diem of \$700.00.

At the close of discovery, the Village moved for summary judgment. On December 4, 2012, the Pike County Court of Common Pleas entered summary judgment for the Village. The Court denied Boone Coleman's claims for additional compensation and—finding no entitlement to additional time—the Court granted the Village's Counterclaim and awarded liquidated damages by multiplying the contractually agreed per diem rate, which it found enforceable under this Court's *Samson Sales* test, by the unexcused delay period. The Court entered Judgment for the Village for \$130,423.00 (constituting the liquidated damages award less the remaining Contract balance), plus post-judgment interest at the statutory rate.

On January 9, 2013, Boone Coleman appealed to the Fourth Appellate District. On May 22, 2014, that Court issued its Decision and Judgment Entry (the "Decision," now reported as *Boone Coleman Construction, Inc. v. Village of Piketon, Ohio*, 2014-Ohio-2377, 13 N.E.3d 1190 (4<sup>th</sup> Dist.)), and affirmed the trial court's denial of Boone Coleman's claims for additional time and money. Like the trial court, the Fourth District found several independent bases for this, including but not limited to Boone Coleman's: (1) unambiguous contractual responsibility for the alleged delays that occurred; (2) contractual waiver of its extra work claims; and (3) waiver of any claims for additional time or money by failing to comply with the Contract's straightforward written notice provisions. Decision, at 20, 24, 26.

Because Boone Coleman has not appealed these findings it is the settled law of the case that Boone Coleman was responsible for the entire Project delay. The only issue for resolution in

this appeal is the Fourth District’s reversal of the trial court’s liquidated damages assessment based on the Fourth District’s erroneous conclusion that “the liquidated damages clause here constituted an unenforceable penalty.” (Decision at ¶ 43.) In analyzing the parties’ bargained-for per-diem liquidated damages clause, the Fourth District ostensibly applied the three-prong test for the enforceability of liquidated damages set forth in *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984). However, the Fourth District materially changed the second prong of that test—under which a liquidated damages clause is enforceable where “the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate as to justify the conclusion that the liquidated damages **clause** does not express the true intention of the parties” *Samson Sales*, 12 Ohio St.3d at 29 (emphasis added)—in a way that presents monumental public policy problems likely unanticipated by the Fourth District.

The Fourth District agreed with the trial court that the clause at issue satisfied the first and third prongs of the *Samson Sales* test, finding that “the damages incurred as a result of a delay were uncertain as to amount and difficult to prove,” and “the plain and unambiguous language of the liquidated damages clause is consistent with the conclusion that the parties intended that damages in the amount of \$700 per day would follow the contractor’s breach of the project completion deadline.” (Decision at ¶¶ 38-39.)

But the Fourth District then deviated from *Samson Sales* by changing the second prong of the test. Importantly, the Fourth District did not analyze or determine whether the per diem fixed in the liquidated damages **clause**—an amount equal to 0.1% of the Contract Price and in accord with Ohio industry standards for construction contracts of comparable size—expressed the intention of the parties or was manifestly unreasonable and disproportionate compared to the Contract as a whole. Instead, the Fourth District stated that “when we view the contract as a whole

*in its application*, we conclude the **amount** of damages is so manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable” because “the clause in this matter **produced an award** nearly equal to 1/3 of the value of the contract, i.e., \$277,900 in liquidated damages on a \$683,300 total contract price....” (*Id.* at ¶¶ 40, 42 [emphasis added].) The Fourth District compounded its error by justifying its reversal of the trial court on the assertion that there was no reasonable relationship between the liquidated damages at issue and “the actual damages that would be incurred” because there was no history of accidents in the record at the intersection in question and “there was no loss of any existing traffic signal” during the extensive delay period. (*Id.*, at ¶ 42.)

By adding the words “*in its application*” to the second prong of *Samson Sales* the Fourth District added something new to this Court’s test. The language it added had never before been used by any reported decision of an Ohio court and creates a wealth of public policy problems. The Fourth District’s erroneous addition changed the forward-looking analysis of liquidated damages clauses established by *Samson Sales* (analyzing the reasonableness of the damages rate fixed in the clause at the time of contracting and compared to the whole contract) into a retrospective analysis that determines “reasonableness” only after multiplying the stipulated per diem by the length of the contractors’ inexcusable delay to see what award the clause “produced.”

To summarize the current posture of this appeal, there is no dispute that: (1) the Project was delayed for 397 days; (2) Boone Coleman was responsible for the entire delay; and (3) Boone Coleman did not preserve any claims for additional time to excuse its late performance. The Fourth District also found that the Village’s damages arising from Boone Coleman’s delay were difficult to prove and not easily quantifiable, and that the parties’ Contract clearly and unambiguously expressed their intent to provide for liquidated damages if the Project was delayed.

Nonetheless, and ignoring this Court's clear holdings on the issue now before this Court, the Fourth District improperly held that the liquidated damages per diem the parties agreed upon at the outset of the Project was unenforceable under Ohio law because *Boone Coleman delayed the Project for too long* such that, according to the Fourth District, the clause "in its application" to the facts of a 397 day delay, resulted in a total amount of liquidated damages that was just too much! This untenable result is contrary to law, the parties' Contract, and common sense.

### ARGUMENT

- I. **PROPOSITION OF LAW NO. I: When evaluating the enforceability of a liquidated damages provision in a construction contract, the court must conduct its analysis prospectively, based on the per diem amount of the liquidated damages at the time the contract is executed, and not retrospectively, based on the total liquidated damages that ultimately accrue.**

The fundamental error committed by the Fourth District was its belief that the second prong of *Samson Sales* required a backward looking (retrospective) analysis at the end of the Project rather than a forward looking analysis at the time the parties entered into the Contract. That is, the Court did not determine the reasonableness of the clause by looking at what the parties knew at the time of contracting (as *Samson Sales* commands). The Fourth District did not even purport to analyze whether the clause (a stipulated per-diem rate of \$700 for each day of delay) was reasonable for use on this road construction contract worth just under \$700,000.00. Instead, the court looked at the award that resulted "in its application" *after* the agreed upon per diem was multiplied by the length of the contractors' inexcusable delay.

In so doing, the Fourth District disregarded the express terms of the parties bargain. There is no contractual certainty in such a holding because under the Fourth District's reasoning the same liquidated damages clause could be both enforceable *and* unenforceable depending solely on the length of the contractor's delay. Indeed, if this rule of law is allowed to stand contracting parties

in Ohio cannot know in advance whether a liquidated damages clause is valid because its enforceability will hinge on an unknown variable at the time of contracting: the length, if any, of inexcusable contractor delay.

Here, presumably the Fourth District would not have found the liquidated damages clause punitive and disproportionate if Boone Coleman's delay been only 1 day (i.e., \$700), but at some point after that, as the delays stretched out to weeks, then months, and then well past a year without the promised traffic light, the same (and once enforceable) clause would become unenforceable. By this reasoning, a contractor who breaches the contract *more* (delaying a year or more) will be treated more favorably under the Fourth District's reasoning (and be permitted to challenge and nullify a liquidated damages clause it previously agreed to) than a contractor who breaches the contract nominally (delayed completion of only a day, week, or month). Such an absurd result—that a breaching party can avoid assessment of liquidated damages if it delays a Project long enough—is at odds with Ohio law and sound public policy. The opinion gives defaulting contractors a perverse incentive to deliberately slow their performance and lengthen existing delays on private and public projects in this state. On state-funded projects, the decision undermines not only contractual certainty, public policy, and long-standing law on liquidated damages, but directly contradicts the legislative command of R.C. 153.19 that public improvement contracts contain a per-diem liquidated damage clause.

The *Samson Sales* test articulated by this Court is not a get-out-of-jail free card for defaulting contractors already behind schedule on their work to nullify a previously agreed upon per-diem liquidated damage clause by delaying to the point that the resulting award is too large for a sympathetic judge to endure. Accordingly, and as argued herein and by the Amici in support, this Court should correct the Fourth District's error and affirm that under Ohio law when analyzing

a per-diem liquidated damage clause in a construction contract, Ohio courts must assess the reasonability and proportionality of the daily rate as of the time of contracting.

**A. The enforceability of stipulated damages is to be assessed by what the parties intended at the time of contracting.**

It is well-established that parties in contract may estimate and predetermine the damages that will flow from a breach. The only judicial limit to the parties' freedom to contract in this regard is when the court determines that the clause was intended as a punitive measure and the contract as a whole is manifestly disproportionate and unreasonable. The historical development of the law demonstrates that the analysis of the reasonableness of a liquidated damages clause is made based on what the parties intended at the time of contracting.

As summarized in the treatise *Murray on Contracts*, the distinction between enforceable liquidated damage clauses on one hand, and unenforceable penalty clauses on the other, emerged in the English courts of equity in the seventeenth century. 1-9 *Murray on Contracts*, § 126(A)(5<sup>th</sup> Ed. 2011). Traditionally, a debt at common law was evidenced by a conditional bond that often compelled the obligor to pay a sum much larger than the debt if the obligor failed to repay the original amount on time. The courts of common law assimilated this theory, finding *in terrorem* clauses intended to compel performance of the contract invalid. But as *Murray* noted it is:

perfectly proper for the parties to a contract to pre-estimate the probable loss in case of breach and to stipulate for the payment of the amount so determined to avoid the necessity for the assessment of damages the usual way. If this is the apparent purpose of the stipulation, the amount agreed to be paid will be called liquidated damages, as distinguished from a penalty, and the promisee will recover the stipulated amount, and only that amount, regardless of whether the actual loss suffered from a breach is greater or less than the stipulated amount.

*Id.* To make this distinction, courts assess the intention of the parties as reflected in the contract itself.

Over one hundred years ago in *Sun Printing and Publishing Ass'n v. Moore*, 183 U.S. 642, 22 S.Ct. 240, 46 L.Ed. 366 (1902) the United States Supreme Court examined and upheld a stipulated damages clause, agreeing that “[w]hen the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else.” *Id.*, 183 U.S. at 673-674 (quoting *Clement v Cash*, 21 N.Y. 253, 257 (N.Y.S 1860)).

In *Sun Printing*, a newspaper company chartered a yacht owned by Moore. The parties executed a lease contract that set forth the terms and conditions of the charter arrangement, and provided, among other things, that the newspaper would pay Moore \$75,000 to secure “any and all losses and damages which may occur to said boat or its belongings, which may be sustained by owner ....” The contract also provided that if the newspaper failed to return the yacht when promised, it would pay Moore \$500 per day for each day of detention. The yacht was then wrecked and was a total loss. Moore sued to recover the \$75,000 in damages stipulated in the contract as payable for loss and damage to the boat. The newspaper, however, argued that “the value of the yacht was a less sum than \$75,000” and that Moore’s recovery should have been limited to his actual damages. *Id.*, 183 U.S. at 659.

The trial court entered judgment for Moore for \$75,000. Both the Second Circuit and U.S. Supreme Court affirmed. The U.S. Supreme Court held in part that: (1) the contract contained a valid liquidated damage clause; and (2) the lower court was correct in refusing to consider evidence of actual damages. *Id.* at 674. The Court thoroughly reviewed the English common law cases, including *Astley v. Weldon*, 2 Bos. & Pul. 346 (Ex. Ct. 1801)(finding unenforceable a liquidated

damages clause with a stipulated sum greater than the yearly value of the contract), and observed that the authority of courts to invalidate penalty clauses was rooted in principles of equity and unconscionability. *Id.* at 661. However, the Court explained that this equitable power was limited to only the most egregious cases: “Equity declines to grant relief because of inadequacy of price, or any other inequality in the bargain; the bargain must be so unconscionable as to warrant the presumption of fraud, imposition or undue influence.” *Id.* at 661-62 (citing *Story, Eq. Jr.* §§ 244, 245). In other words, parties at contract may assess for themselves the value of the subject of their agreement, and by extension the damages of a breach thereof. The Supreme Court explained that:

The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, **it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract.** Thus, Chief Justice Marshall, in *Tayloe v. Sandiford*, 7 Wheat. 13, [5 L.Ed. 384 (1822)] although deciding that the articular contract under consideration provided for the payment of a penalty, clearly manifested that this result was **reached by an interpretation of the contract itself.**

*Id.* at 662 (emphasis added).<sup>3</sup>

*Sun Printing* also summarized the common law as follows: “when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been simply an element entering into the

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<sup>3</sup> Of relevance given the per diem clause at issue here, while in *Tayloe* Justice Marshall invalidated the “sum of money in gross” clause as a penalty, he also observed, at 18, that “the agreement to pay a specified sum weekly during the failure of the party to perform the work, partakes much more of the character of liquidated damages than the reservation of a sum in gross.”

consideration of the question of what was the *intent of the parties*, whether bona fide to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security.” *Id.* at 672-73 (emphasis added).

As the Supreme Court reaffirmed in *Priebe & Sons Inc. v. United States*, 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32 (1947), it is clear is that “[t]hese provisions are to be judged as of the time of making the contract.” *Id.* at 412. *See also* 1-9 *Murray on Contracts*, Section 126(C), at 795 (5th Ed. 2011) (“It is important to emphasize that the traditional test is applied at the time of contract formation: did the parties agreed [sic] upon an amount at the time they formed the contract which, in light of anticipated harm, was an honest and reasonable forecast of actual damages? If the forecast was reasonable **at the time of formation**, actual damages should be irrelevant. The parties, after all, are substituting their private agreement on damages for the usual judicial assessment process.”) (emphasis added); 5 *Williston on Contracts*, Section 777, at 683-85 (3d Ed. 1961) (“Probably, all that most courts mean ... is to say that the validity of the stipulation is to be judged ‘of as the time of making of the contract, not as at the time of the breach,’ and this is undoubtedly true.”); 11-58 *Corbin on Contracts*, Section 58.11 (1993) (noting the “prevailing view” as to when the enforceability of a liquidated damages clause is assessed to be at “the time of contracting”).

**B. This Court has endorsed a forward-looking analysis of the reasonableness of the stipulated sum in its test for liquidated damages.**

For more than 150 years, Ohio has followed the traditional common law test and has assessed the enforceability of liquidated damage clauses as of the time of contracting. In *Lange v. Werk*, 2 Ohio St. 519 (1853), this Court upheld a stipulated sum of \$4,000.00 for breach of a noncompetition agreement as a valid liquidated damage clause and focused its analysis on the intention of the parties as evidenced in the contract itself. *See id.* at 533-34. Specifically, the

Court found that the parties' agreement to retain consideration previously paid as liquidated damages evinced the parties' intention that the provision act as a liquidated damage clause, and not a penalty. *Id.* at 534. Therefore, the plaintiff had the "absolute right to apply *all* that might be then unpaid, although it might exceed many times the damages he had sustained, and if it did not amount to the full sum of \$4,000, it was still declared to be but *part* payment of the liability." *Id.* (emphasis in original).

In *Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894 (1925), this Court again upheld a liquidated damage clause and for the first time espoused the three-prong test that would later be memorialized in *Samson Sales*. In *Jones*, an owner of a restaurant (Jones) entered into an agreement for Stevens operate his restaurant for an annual payment of \$2,000.00. Under their contract if Stevens abandoned the restaurant and/or the restaurants' revenue fell below a certain amount during Stevens' tenure as operator, Stevens agreed to pay Jones: (1) the actual damages based on the value of the restaurant's equipment, fixtures and lease; and (2) a liquidated sum of \$5,000.00 as damages for the restaurant's loss of goodwill. *Id.* at 48. Less than one year into the contract, Stevens abandoned the restaurant, and Jones sued to recover both actual damages and the \$5,000.00 liquidated damages.

In analyzing the parties' stipulated damages clause, the *Jones* Court was mindful that "[i]t is the province of the court to uphold existing contracts, not to make new ones," and that "[i]t is not for the court to sit in judgment upon the wisdom or folly of the parties in making a contract, when their intention is clearly expressed, and there is no fraud or illegality." *Id.* at 52 (quoting *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361, 60 N.E. 563 (1901)). The Court surveyed the common law and observed that:

From the foregoing authorities it seems to be quite generally established that liquidated damages exist in a contract when (1) the damages would be uncertain as

to amount and difficult of proof; (2) when the contract as a whole is not so manifestly unreasonable and disproportionate as to justify the conclusion that it does not express the true intention of the parties; and (3) when the contract is consistent with the conclusion that it was the intention of the parties that the damages in the amount stated should follow the breach.

*Id.* at 49.

Regarding the first prong of this test, the Court found that losing business goodwill was inherently a damage “intangible and most difficult of measurement.” *Id.* at 52. Turning to the second prong, the Court found “[t]he contract as a whole does not show that the amount they fixed was so unreasonable and disproportionate as to justify the conclusion that it did not express the true intention of the parties *at the time it was made.*” *Id.* at 53 (emphasis added). Specifically, the Court pointed to Stevens’ contractual obligation to assume Jones’ rental payments of \$4,500 per year, and Jones’ agreement to pay Stevens an annual salary of \$2,000 to operate the restaurant. *Id.* at 53.

The Court did not consider Jones’ actual damages because he recovered these damages separately per the parties’ contract and, moreover, the liquidated damage clause was intended only to compensate Jones for the restaurant’s loss of goodwill, “a species of property which ... is in itself difficult of exact measurement, and accomplished usually only by those who are skilled, experienced, and expert in fixing the value thereof.” *Id.* Thus, the Court determined that the “contract is consistent with the conclusion that the amount of damages for the loss of the good will fixed by the parties was not unconscionable, and that it was the intention of the parties themselves that the damages indicated in the contract should follow as a measure of breach thereof.” *Id.* at 54-55.

In *Samson Sales*, this Court reaffirmed the tripartite test in *Jones* as the proper method to assess the enforceability of liquidated damage clauses. *Samson Sales* involved an exculpatory

clause that limited a security system company's liability to its customer for failure of an alarm at \$50. Treating the exculpatory clause as a stipulated damage, the Court observed that "reasonable compensation for actual damages is the legitimate objective of such liquidated damage provisions and where the amount specified is manifestly inequitable and unrealistic, courts will ordinarily regard it as a penalty." *Id.*, 12 Ohio St. 3d at 28. Citing the syllabus of *Jones*, the Court then confirmed the three-prong test:

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 amounts 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 damages in the amount stated should follow the breach thereof.

*Id.* at 29.

In applying the second prong of the test, this Court assessed the proportionality of the stipulated sum/rate in the contract *as of the time of contracting* compared to the Contract as a whole:

As to the second guideline recommended by this court, the **stated sum** of \$50 in the contract involved in this case is manifestly disproportionate to either *the consideration paid by Samson* or the *possible damage that reasonably could be foreseen* from the failure of Honeywell to notify that police of the burglary.

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In other words, an examination of the minute type used in the standard contract issued...as well as a fair construction of the contract provision as a whole, fails to evince a conscious intention of the parties to consider, estimate, **or adjust** the damages that might reasonably flow from the negligent breach of the agreement...Surely, Samson, which apparently had some business experience, did not pay \$10,500 for the mere possibility of recouping \$50 if Honeywell provided no service at all under the terms of the contract.

*Id.* (emphasis added). In other words, the amount stipulated in the contract (a fixed sum that did not adjust and purportedly applied to all breaches regardless of size) was not enforceable because it was not proportionate to either the consideration paid in the contract as a whole or the possible damages the contracting parties reasonably could foresee when entering into the contract, and it did not adjust the damages that could reasonably flow from a breach.

Here, the fact that the liquidated damages clause is in a public construction contract is highly relevant. In public works contracts, the damages for delayed completion are inherently difficult to determine. A liquidated damages clause thus encourages timely completion of valuable public projects while reducing immensely counterproductive disputes over actual damages. The clause at issue in this case does exactly that by stipulating a per diem rate of liquidated damages that, by virtue of its application to each day of inexcusable delay, produces an award inextricably tied to the severity of the breach. The per diem rate the parties agreed to was miniscule (0.1%) when compared to the \$683,300 consideration the Village would pay for timely completion. Moreover, because it was a per diem rate, the total liquidated damages assessed thereunder for late completion was not a fixed sum that would apply to all breaches without regard for the extent of the breach but an amount that would automatically adjust to account for the duration of inexcusable delay to the Project. Thus, there was a direct relationship between the ultimate assessment of liquidated damages in the Contract and the extent of Boone Coleman's breaches.

The *Samson Sales* test was reaffirmed in *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993). Quoting *Jones* and summarizing the Restatement of Contracts, this Court made the following observation regarding the forward-looking analysis Ohio courts are to employ when considering a liquidated damages clause:

“[I]t 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 light of the particular facts surrounding the making and execution of the contract.”...

Thus, when a stipulated damages provision is challenged, the court must step back and examine it in light of what the parties knew **at the time the contract was formed** and in light of an estimate of the actual damages caused by the breach. If the provision was reasonable **at the time of formation** and it bears a reasonable (not necessarily exact) relation to actual damages, the provision will be enforced.

*Id.* at 381-82 (emphasis added) (quoting *Jones, supra*, at paragraph one of the syllabus, and citing 3 Restatement of the Law 2d, Contracts, Section 356(1) at 157 (1981)).

Applying the second prong of the test to the liquidated damage clause at issue (a late-cancellation fee in a private school tuition contract equating to the entire year of tuition fees), this Court found the clause enforceable after parsing each of the three key concepts referenced in the second prong of *Samson Sales*: unconscionability, reasonableness, and proportionality. *Id.* at 383.

As demonstrated in this Court’s decisions, the *Samson Sales* test is not a vehicle for courts to conduct an arbitrary, *post hoc* analysis of whether the liquidated damages assessed in a particular case were “inequitable” in amount. Instead, the test—rooted in common law doctrine developed hundreds of years ago—allows a court to determine whether the clause **at the time of contracting** was a reasonable pre-estimate of damages (in light of the contract as whole with consideration of the difficulty of determining actual damages) or penal. If it is the former, courts will respect the parties’ agreement and Ohio law is clear that Courts may not rewrite a parties’ agreement to achieve a more equitable result. *See e.g., Dugan & Meyers Constr. Co. v. Ohio Dep’t of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶ 39 (citing *Ebenisterie Beaubois Lee v. Marous Bros. Constr., Inc.*, N.D. Ohio No. 02CV985, 2002 WL 32818011 (Oct. 17, 2002)).

**C. Under Ohio law, per-diem liquidated damages provisions are required for construction projects funded with state taxpayer money.**

Parties to construction contracts commonly agree to a per-diem damage-for-delay clause that sets forth a daily rate of damages for each day the contractor fails to deliver the completed improvement. Such provisions are particularly important in public construction projects, because they recognize that the owner's damages for construction delays are often difficult to calculate, thus it is more efficient for the parties to agree *in advance* on a delay per diem. As a practical matter a per diem automatically adjusts the price of a project if it is not completed when promised.

One treatise summarizes this arrangement as follows:

One of the most common uses of such a [liquidated damage] clause is found in highway construction or similar projects where government departments will include a clause for a certain amount of damages for each day of delay. These clauses are typically set forth in prefabricated terms, i.e., there will be a stated amount of liquidated damages per day and that amount may vary with the contract price—**the higher the contract price, the larger the amount of daily liquidated damages since delays on larger contracts are typically more costly to the state than delays on smaller projects. The damages are always quite difficult to ascertain.** Measurement of harm to the public where performance is delayed is extremely difficult to calculate with reasonable certainty. Courts, therefore, concentrate on the amount **in the clause** as the paramount question.

1-9 Murray on Contracts, Section 126(C), at 795 (5th Ed. 2011)(emphasis added).

*See also* Corbin on Contracts, Section 1072 (“[I]n construction contract, [proof of injury] can seldom be done, and the court should not permit the defendant to nullify a reasonable pre-estimate by inconclusive testimony.”). Further, and in contrast to “lump sum” liquidated damages that are most frequently the subject of cases where the clause is deemed a penalty for *de minimus* breaches, per-diem clauses ensure that any assessment of liquidated damages is tied to the magnitude of the breach; i.e., the longer the contractor's delay, the larger the liquidated damages amount assessed.

As the Restatement affirms, use of the “at the time of contracting” rule means that the reasonability of per-diem liquidated damage provisions must be analyzed when *the contract is*

*written*—that is, is the stipulated per-diem rate reasonable and proportionate considering the probable damages and the contract as a whole? The Restatement’s illustration conveys this principle:

A contracts to build a grandstand for B’s race track for \$1,000,000 by a specified date and to pay \$1,000 a day for every day’s delay in completing it. A delays completion for ten days. *If \$1,000 is not unreasonable in light of the anticipated loss* and the actual loss to B is difficult to prove, A’s promise is not a terms providing for a penalty and its enforcement is not precluded on grounds of public policy.

3 Restatement of the Law 2d, Contracts, § 356, comment b, illustration 3 (1981) (emphasis added).

This example illustrates that the proper approach is to assess the reasonableness of the per-diem rate, and *not* the eventual assessment of damages calculated by applying the contractor’s delay.

In Ohio, there is a reason per-diem liquidated damage clauses are commonplace in public construction projects: They are legally *required*. R.C. 153.19 mandates that all contracts to construct public improvements funded with State money “shall contain provision in regard to the time when the whole or any specified portion of the work contemplated therein shall be completed and that for each day it shall be delayed beyond the time so named the contractor shall forfeit to the state a sum to be fixed in the contract, which shall be deducted from any payment due or to become due to the contractor.”

Under this statutory authority, the Ohio Department of Transportation (“ODOT”) has for years propounded in its Construction and Materials Specifications a rate schedule of per-diem liquidated damages determined by reference to the contract price of the highway project. (*See* The 2005 Ohio Dept. of Transportation [“ODOT”] Construction & Material Specifications [“CMS”] table § 108.07-1, attached to the Motion as Ex. 5.) Here, the \$700 per-diem rate of liquidated damages for delay agreed to by Boone Coleman and the Village was consistent with (and \$60 per day *less* than) the 2005 ODOT rate for projects bid for a contract price between \$500,000.00 and

\$2,000,000.00.<sup>4</sup> It is this \$700 rate specified in the Contract that the Fourth District should have, but did not, consider under the *Samson Sales* disproportionality analysis.

**D. By modifying the second prong of the *Samson Sales* test, the Fourth District impermissibly rewrote the Contract to achieve what it perceived to be a more equitable result.**

In this case, the Fourth District has done precisely what *Dugan & Meyers, supra*, forbids: the court manipulated the second prong of *Samson Sales* to rewrite the parties' contract and grant Boone Coleman clemency because the appellate panel apparently felt that the total amount of liquidated damages—calculated by multiplying a rate in the parties' written agreement by *Boone Coleman's own extended delay*—was too large.

A close examination of the Fourth District's decision reveals the magnitude of its error. First, the Court properly found that the Contract's liquidated damage provision satisfied the first and third prongs of the *Samson Sales* test. Specifically, the court determined that “damages incurred as a result of [the] delay were uncertain as to amount and difficult to prove,” and “the plain and unambiguous language of the liquidated damages clause is consistent with the conclusion that the parties intended that damages in the amount of \$700 per day would follow the contractor's breach of the project completion deadline.” (Decision at ¶¶ 38-39.)

However, the Fourth District only got it two thirds right. It modified the second prong of the *Samson Sales* test to include the words “in its application.” In this outcome determinative approach, the Fourth District “view[ed] the contract as a whole *in its application*” in order to “conclude the **amount of damages** is so manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable.” (Decision at ¶ 40, emphasis added.) But this Court's test as

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<sup>4</sup> In the current (2013) edition of the ODOT CMS, the Table 108.07-1 Schedule of Liquidated Damages for Contracts between \$500,000 and \$2 Million is \$1,000 per calendar day.

articulated in *Samson Sales* and *Lake Ridge* does not contain the words added by the Fourth District, and a survey of Ohio case law reveals that no other court has modified the second prong of the test in this manner.

By changing the second prong of the *Samson Sales* test, the Fourth District ignored this Court's directive to "step back and examine [the Contract] in light of *what the parties knew at the time the contract was formed*" and consider "[i]f the provision was reasonable *at the time of formation.*" See *Lake Ridge, supra*, at 382 (emphasis added). Instead, the Fourth District adopted a retrospective analysis that assessed the reasonableness of the liquidated damages clause after application of Boone Coleman's inexcusable delay. By using this approach, the court ignored the Contract and made no determination that the \$700 liquidated damages per diem agreed upon at the time of contracting was unconscionable, unreasonable, or disproportionate. Rather, the Fourth District nullified the liquidated damages clause by considering a variable (the number of days Boone Coleman delayed the Project) unknown to either party *at the time of contracting*.

The impact of this error becomes more apparent on full review of the Fourth District's decision. First, the court agreed with the trial court that the Project was delayed 397 days. (Decision at ¶ 11.) Second, the Court affirmed that the entire Project delay was the responsibility of Boone Coleman and affirmed that regardless of responsibility, Boone Coleman waived any right to extra time by failing to comply with the Contract's notice procedures. (*Id.* at ¶ 22, 26, 33.) Third, the Fourth District did not find that the \$700 per diem rate of liquidated damages was punitive or disproportionate. Instead, the Court found the clause (a per diem rate equal to 1/10 of 1% of the Contract value) was "manifestly unreasonable and disproportionate," and an unenforceable penalty when "in its application" to the 397 days of inexcusable delay it "**produced an award** nearly equal to 1/3 of the value of the contract." (*Id.* at ¶¶ 40, 42.)

The deeply troubling policy implications of the Court’s analysis are clear and explained clearly in more detail in the Merit Brief submitted by the distinguished *Amici* groups who are charged with efficiently utilizing taxpayer funds.<sup>5</sup> When faced with an otherwise reasonable per diem rate of liquidated damages, the Fourth District’s decision gives contractors on public and private improvements a perverse incentive to deliberately delay their work if they fall behind. This is to the detriment of the owner (and taxpayers). The sole benefit of the Fourth District decision runs to a breaching contractor who will know that if an inexcusable delay is long enough to render a prospective liquidated damages assessment “disproportionate,” the liquidated damages will not be enforced. Similarly, public owners in Ohio who are required to include such clauses in their contracts, and who routinely bargain for a per diem rate of liquidated damages will, even if the rate is approximated upon a state’s schedule of liquidated damages (as was the case here), lose any confidence in their ability to rely upon the agreed upon rate as a reasonable estimation of the public’s damages caused by a contractor’s delay.

All this because under the Fourth District’s decision, a court can now strike a liquidated damages clause “in its application” when the *contractor’s delay* is too long. This nonsensical result reduces parties’ predictability in contracting, discounts the taxpayers’ investment in public improvements, and gives dilatory contractors a windfall for failing to meet project deadlines.

The precedent this decision creates threatens to create widespread costly and time-consuming challenges to liquidated damages provisions. It will also result in the nullification or vitiation of such common clauses, which are the traditional—indeed, *required*—method in this

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<sup>5</sup> A group of public owners directly affected by the Fourth District’s Decision, the County Commissioners Association of Ohio (“CCAO”), the Ohio Township Association (“OTA”), the Ohio School Boards Association (“OSBA”) and the Ohio Municipal League (“OML”) submitted an Amicus Brief in Support of the Petition for Review and are expected to submit a merit Brief of Amicus Curiae contemporaneous herewith.

state to estimate a public owner's damages for delayed public construction projects. This uncertainty and excess litigation can be avoided if this Court reaffirms that Ohio courts are to examine, and determine the enforceability of, the express terms of the parties' *contract*, rather than to make a *post-hoc*, as applied determination of the assessed liquidated damages.

**E. Under *Samson Sales*, the stipulated liquidated damages rate of \$700.00 per each day of delay to the Project is valid and enforceable.**

The critical inquiry under the second prong of *Samson Sales* is whether the \$683,300 Contract between Boone Coleman and the Village is, as a whole, so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that the liquidated damage rate of \$700 for each day of unexcused delay expressed the true intention of the parties? The trial court correctly found that the answer to this question is "yes."

First, the Contract as a whole is not unconscionable. Boone Coleman is a construction company well-versed in contracts like the one used here, which is a standard EJCDC industry form contract and General Conditions. Boone Coleman entered into the Contract after a competitive bid process and has never claimed it signed the Contract under coercion or duress.<sup>6</sup>

Second, the Contract as a whole is reasonable. The Contract provided that if Boone Coleman completed the work by the agreed time, it would receive the full Contract Price of \$683,300.00. There is no evidence that Boone Coleman timely objected to the liquidated damage provision or the revised Project completion date at the time of contracting.

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<sup>6</sup>Even the Court of Appeals recognized this, finding that: "Boone Coleman is an experienced contractor who was represented by counsel during the bidding process. The parties themselves best knew their expectations regarding the agreement, and those expectations were reflected in the language used in the contract, which deemed time deadlines to be 'of the essence' of their agreement." (Decision at ¶ 39.)

Third, the stipulated rate of \$700 per day is not disproportionate to either the Contract Price or the actual damages the parties could anticipate would flow from Boone Coleman's breach of the Contract. It should be self-evident that a per diem figure approximately 0.1% of the Contract Price, is not disproportionate to the \$683,300.00 consideration Boone Coleman agreed to receive in exchange if (and only if) it completed the Project on time. Moreover the expected damages that flow from the lost use of a public improvement to a public owner and the citizens it serves are very real but inherently difficult to quantify—how do you price the delayed use of safer roads?

The mandate of Ohio Revised Code 153.19 for a per diem liquidated damages provision is a practical answer to that question as a per diem will automatically adjust based on the extent of the breach. The common practice in Ohio public contracting is thus to establish a per diem rate that ties in to the overall contract value. Here the per diem in Boone Coleman's Contract with the Village is consistent with the daily rate table promulgated by ODOT in its 2005 CMS to assess a public owner's damages for delayed completion of road construction projects that, like this one, were for Projects bid between \$500,000.00 and \$2,000,000.00. (See 2005 ODOT CMS damages table § 108.07-1, attached to the Motion as Ex. 5.)

The ODOT rate schedule has never before been deemed unconscionable, unreasonable or disproportionate by any Ohio appellate court. To the contrary, in an analogous case where the source of the stipulated damages rate (i.e., the ODOT CMS schedule) was identical, the First District properly applied the *Samson Sales* test and enforced the ODOT liquidated damages per diem for the road construction at issue. In *Security Fence Group, Inc. v. City of Cincinnati*, 1st Dist. No. C-020827, 2003-Ohio-5263, the City of Cincinnati contracted to replace a bridge. *Id.* at ¶ 2. The contract contained a liquidated damages per diem of \$600 (based on the ODOT CMS schedule of liquidated damages) for each calendar day the project was not completed on time. *Id.*

The lead contractor for the project subcontracted with Security Fence, Inc. to install guardrails along the bridge. The subcontract assigned all rights under the prime contract with the City. The subcontractor did not complete its work within the contract time. As a result, the bridge and accompanying street were not opened within the contract times. *Id.* at ¶ 3. The City withheld liquidated damages at the contract rate, and Security Fence sued. *Id.* at ¶ 5. Though the trial court nullified the liquidated damages as a penalty, the First District reversed. *Id.* at ¶ 12. Applying the *Samson* test, the court held that:

[T]he trial court erred in holding that the liquidated damages clause was unenforceable... **The primary damage expected to flow from the breach of contract was inconvenience to the public, an amorphous form of damages** even if the parties had attempted to compute the inconvenience on a per-vehicle basis. Moreover, the contract was not otherwise unreasonable or unconscionable. The evidence indicated that [the Contractor] was a sophisticated party that had entered into the contract with complete awareness of the liquidated damages clause. Also, the contract clearly evinced the parties' intention that the [liquidated] damage provision would be enforced upon a breach of the agreement.

*Id.* at ¶ 9 (emphasis added).

Importantly, the First District found that the ODOT-based stipulated rate (not the total liquidated damages the rate produced 'in its application' to the delay) was reasonable, stating that "[t]he \$600 figure was not so excessive, in light of the total contract price, that it rendered the provision a penalty, and the amount was based upon regulation promulgated by the state." *Id.* at ¶ 11. The First District's rationale was sound and is directly applicable to this case.

The sole case the Fourth District relied upon as its authority to invalidate the liquidated damages clause here was *Harmon v. Haehn*, 7th Dist. No. 10 MA 177, 2011-Ohio-6449, and that case is easily distinguishable. *Harmon* did not involve a state construction contract of any type and did not involve a per-diem stipulated rate. In *Harmon*, the contract was a four-year commercial property lease with base rental payments of \$3,000 per month (total lease value of

\$144,000 over the 4 year life). *Id.* at ¶ 2. The lease contained a right of first refusal clause, which provided that if the lessor sold the property and terminated the lease within the first three years of the lease, the lessor would pay the lessee a lump sum of \$250,000.00. *Id.* at ¶ 3.

Six months into the lease (and before the lessee opened his business at the premises), the lessor received accepted an offer from a third-party to purchase its property for \$775,000.00. *Id.* at ¶ 10. The lessee, however, refused to terminate the lease unless he was paid the stipulated sum. *Id.* at ¶¶ 11-12. The trial court found in favor of the lessee regarding liability, but determined that the \$250,000.00 sum stipulated in the lease was an unenforceable penalty. *Id.* at ¶ 18.

The Seventh District found that the liquidated damages clause failed the first prong of the *Samson Sales* test because the lessee's potential "damages at the time the contract was formed were relatively certain" as the majority of such damages "could be easily calculated in the event of a breach, for example, moving, advertising and build-out costs." *Id.* at ¶51. The Seventh District then 'belt and suspended' its decision with the determination the lump sum of \$250,000 in "damages specified is manifestly unreasonable and thus the clause is a penalty pursuant to the second prong of the [*Samson Sales*] test" because the property's monthly rent never exceeded \$3,000 (\$18,000 for the six-month life of the lease at the time of breach), and the stipulated amount as damages for any breach of the lease was almost one-third of the purchase price value of the entire property. *Id.* at ¶¶ 52-54. The Seventh District added that there was no indication how the \$250,000 stipulated amount was calculated and noted the "substantial disparity" between the actual and stipulated damages. *Id.* at ¶¶ 54-58.

In contrast to the facts in *Harmon* here both the trial and appellate courts agreed that the Village's damages for delay were amorphous and difficult to prove. Thus, when the trial court correctly determined at summary judgment that the liquidated damage clause was valid and

enforceable there was no need to conduct a lengthy or complex hearing to try to determine actual damages arising out of a delay to install a necessary traffic light at that busy intersection. By their very nature virtually all late completion damages associated with public projects are difficult to prove. How does one measure the loss to the owner (and taxpayers) when a bridge, traffic light, school, or library fails to open on time?

Moreover, unlike in *Harmon* there was no question as to how the award was calculated. The per diem rate was consistent with Ohio industry standards (the ODOT schedule of damages for projects of this size) and the amount was calculated by multiplying the per diem by each day of inexcusable Project delay. In summary, the Fourth District erred by changing the applicable standard and failing to determine whether under the second prong of *Samson Sale* the per-diem in the liquidated damage clause was reasonable and proportionate at the time of contracting. When the *Samson Sales* test is properly applied on a prospective basis, the \$700 per-diem rate for this \$683,300.00 Project is neither unconscionable, unreasonable nor disproportionate to the Contract Price. Instead, it is tied to the Contract Price and tailored to reasonably adjust damages based on the magnitude of the breach. This Court should reverse the Fourth District and affirm the trial court's enforcement of the Contract's liquidated damage clause.

**II. PROPOSITION OF LAW NO. II: Liquidated damages are not a penalty simply because a project consists of new construction of an improvement that did not exist previously and no proof of actual damages is required to enforce liquidated damages pursuant to such a contract.**

Despite acknowledging earlier in its decision that “the absence of this light during the period of Boone Coleman’s lengthy delay increased the inconvenience for drivers over the roadway” (Decision at ¶ 42) the Fourth District erred when it reversed the trial court in part on the grounds that there was “no evidence in the record, for example, of a history of accidents at the intersection where the traffic signal was placed” and there was “no loss of any existing traffic

signal during construction.” (Decision at ¶42, 43). Essentially, the Fourth District’s stated reasoning in this regard boils down to the assertion that Village did not prove evidence of actual damages. In so holding the Fourth District misguidedly flipped the burden of proof on the Village and committed error with grievous public policy implications..

**A. When a liquidated damage provision is deemed enforceable under the proper prospective application of *Samson Sales*, proof of actual damages is irrelevant.**

Under existing Ohio law a challenge to a liquidated damage clause is an affirmative defense for which the party bringing the challenge bears the burden of proof. *See e.g. RLM Properties, Ltd. v. Brammer*, 2d Dist. No. 2014 CA 6, 2014-Ohio-3509, ¶ 21 (“That a provision for liquidated damages constitutes a penalty rather than a valid liquidated damages provision is an affirmative defense.” (quoting *UAP-Columbus JV326132 v. O. Valeria Stores, Inc.*, 10th Dist. Franklin No. 07AP-614, 2008-Ohio-588, ¶ 12)); *Triangle Properties, Ltd. v. Homewood Corp.*, 2013-Ohio-3926, 3 N.E.3d 241, ¶ 27 (10<sup>th</sup> Dist.); *Tremco, Inc. v. Kent*, 8<sup>th</sup> Dist.No. 70920, 1997 Ohio App. LEXIS 2367, \*26 (May 29, 1997)(“It is well-settled in Ohio that the defendant asserting an affirmative defense had the burden of proof to establish a defense.” (Citations omitted)).

The common law authorities agree. *See Murray on Contracts, supra*, at Section 126 (“The party challenging the clause has the burden of proving that it is unenforceable.”). By shifting the burden to the Village to put forward evidence of actual damages (despite having earlier found that the clause at issue was justifiable under the first prong of *Samson Sales* allowing such clauses where damages are difficult and amorphous to prove) the Fourth District contradicted well-established Ohio law that a party must prove its own affirmative defenses and instead put the onus on the Village to rebut Boone Coleman’s challenge to the express terms of the Contract. *See Dykeman v. Johnson*, 83 Ohio St. 126, 135, 93 N.E. 626 (1910).

Most important, the burden to prove actual damages does not arise unless the liquidated damage clause is found in the first instance to be unenforceable under the *Samson Sales* test. If the liquidated damage clause is reasonable in light of what the parties knew at the time the contract was formed, proof of actual loss is not relevant. See *Lake Ridge Academy*, supra, at 382, 385 (quoting from and adopting the rule set forth in *Wassenaar v. Panos*, 111 Wis.2d 518, 542, 331 N.W.2d 357 (1983)). See also *USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist. 1993) (“If the liquidated damages clause was otherwise valid, however, it is our view that Great Lakes was not required to prove that actual damages resulted from the breach. In adopting this view, we ascribe to what has been called the majority view.”); *B&G Properties Ltd. Partnership v. OfficeMax, Inc.*, 2013-Ohio-5255, 3 N.E.2d 774 ¶ 31 (8<sup>th</sup> Dist.) (actual damages have “little relevance to the validity of a liquidated damages clause”); *Physicians Anesthesia Serv. Inc. v. Burt*, 1st Dist. No. C-060761, 2007-Ohio-6871, ¶ 20 (if a liquidated damage provision is otherwise valid, “the party seeking such damages need not prove that actual damages resulted from a breach”).

This rule comports with the common sense purpose of a liquidated damage clause on a construction project. Precisely because the damages arising from a contractor’s delay in completing a road construction project are “always quite difficult to ascertain,” it is more efficient for the parties to stipulate in advance what those damages will be on a per-diem basis (See Murray on Contracts, Section 126(B)). Any rule otherwise would undermine the freedom of contract traditionally enforced in this state. It would also drag the parties, the courts, and juries into lengthy and complex disputes attempting to prove amorphous and difficult to prove actual damages as a condition to enforcing a liquidated damage provision that is only enforceable where damages are difficult to prove. If this factually-intensive exercise is necessary to assess liquidated damages for

delay, the parties will lose any incentive to bargain for a stipulated rate of damages in the first place. The same is true here: if the Village must litigate or introduce evidence to prove the public's actual damages flowing from Boone Coleman's enormous delay in erecting a functioning traffic light (damages the Fourth District agreed are difficult to prove), then for what purpose did the parties negotiate, and the legislature require, a liquidated damage clause in the Contract?

**B. The Fourth District's decision threatens to nullify every liquidated damage provision in new construction contracts.**

Finally, by justifying its holding with the statement that the Village suffered no actual loss because "there was no loss of any existing traffic signal during construction" the Fourth District decision has potentially disastrous results for contracting in Ohio. This reasoning, if not reversed, will undermine every liquidated damage clause in construction contracts for new improvements both private and public, with particularly devastating results on public construction for new buildings, schools, courthouses, buildings, roads, bridges, or any other improvement built for the public good (and not a principally economic benefit).

By definition, all new construction involves building, erecting, or installing something that did not previously exist. Both Ohio case law and the Restatement make clear that liquidated damages for delayed completion of new improvements are valid and enforceable. *See Cleveland Constr., Inc. v. Gatlin Plumbing & Heating, Inc.*, 11th Dist. No. 99-L-050, 2000 Ohio App. LEXIS 3215 (July 14, 2000) (permitting an award of damages arising out of constructing a new Wal-Mart Supercenter) 3 Restatement of the Law 2d, Contracts (1981) 159, Section 356, comment b, illustration 3 (1981) (permitting the award of liquidated damages arising out of constructing a new racetrack).

Here, the Fourth District's decision undermines the ability of owners (public and private) and their contractors to agree *in advance* on reasonable way to calculate otherwise difficult if not

impossible to quantify damages that will result from delayed construction of new improvements. Contractors will be encouraged to engage in *post hoc* challenges of liquidated damage clauses they agreed to at the time of contracting knowing that the court may either require proof of actual loss or strike the clause entirely, undermining the parties' prior agreement and greatly complicating and increasing the cost, complexity and risk of trial.

On this point, the Fourth District misguidedly attempted to distinguish the facts of *Security Fence, supra*, from the case at bar because *Security Fence* involved the repair of an existing highway as opposed to installation of a new traffic light. But this is a distinction without a difference. In making it, the Fourth District overlooked the dispositive point of *Security Fence*, which is that the First District focused on the lost use of the completed Project as the foreseeable—yet virtually impossible to quantify—harm. There, during the delay period the subcontractor installed temporary barriers instead of the permanent guardrails required by contract. On appeal, the subcontractor challenging the liquidated damage assessment made a similar argument to the one adopted by the Fourth District namely “that the city did not in fact suffer damages from the delay in the performance of the work, because the street could have been opened after the installation of the temporary barriers.” *Id.* at ¶ 10. In other words, the owner could have had access to the roadway “as it always existed.” The First Appellate District rejected this argument, stating:

We first note that, even though the evidence indicated that the road could have been opened to traffic after the installation of the temporary barriers, it did not indicate that the temporary barriers were acceptable as a substitute for the permanent barriers or constituted a completion of the project. There was no provision *in the contract* permitting [the contractor] to prevent the invocation of the liquidated-damages clause by installing temporary barriers or performing other work not specified in the contract. **The fact remained that the road project, as described in the contract, was not completed by the date of the deadline.** The City's decision to keep the road closed was occasioned by Security's failure to complete the work, and Security's argument that there were no actual damages is incorrect.

*Id.* (emphasis added).

It was irrelevant to the court that the bridge *could have* been opened to preexisting use with the installation of temporary barriers because that is not what the City bargained for. Likewise, the Village here did not bargain for a \$683,300.00 intersection “as it had always existed,” i.e., without a traffic light. The Village contracted for an intersection *with* a traffic light installed and operational by an agreed date. The Contract Price the parties agreed to was tied to timely completion by the liquidated damages provision. That clause reflected the parties’ agreement when entering the Contract that for each day of inexcusable delay the Village lost a portion of the benefit of its bargain and incurred amorphous damages for the taxpayers’ loss of a valuable stop light whether an accident occurs there or not.

The *Security Fence* analysis of lost use as the foreseeable harm is undoubtedly correct and applicable here as well: There must be foreseeable damage to the public resulting from the lost use of a safer intersection. The public benefits from a new traffic light (or any new construction) just as it would from improvement to existing infrastructure, so the resulting damage is the delay in enjoying that benefit. Apart from the safety and other intangible costs and benefits to a completed construction, any delay to a project almost necessarily prolongs and extends an owner’s costs of the work, whether that be increased administrative costs of having to extend a presence on the project for salaried or other employees, potentially increased engineers costs, etc. These types of damages are real but inherently difficult if not impossible to prove.

At the time of contracting Boone Coleman agreed with this. It represented in the Contract that “**instead of requiring any such proof** [of actual loss], the OWNER and CONTRACTOR agree that as liquidated damages for delay (**but not as a penalty**) CONTRACTOR shall pay OWNER \$700 for each day that expires after the time specified” for completion of the Work.

(Contract at BC000646, ¶ 4.03, attached to the Motion as Ex. 3 [emphasis added].) It was not until after the Project was untimely completed that Boone Coleman tried to change the bargain. When the Fourth District agreed to Boone Coleman's request, it disregarded the express agreement of the parties. In the process it not only undermined the Village's right to be compensated for its contractor's inexcusable delay with an adjustment to the Contract Price, but set aside the Contractor's express agreement to how the delay impact would be calculated.

The Fourth District decision impacts not just the Village but, indeed, the rights of *every* public owner in this State and the taxpayers they serve. To encourage timely completion, protect the taxpaying public, and recognize the inherent worth of new public construction (and the difficulties to prove the public's damages) the legislature enacted and codified a statutory scheme that requires a per-diem liquidated damages for delay clause in public contracts. To prevent courts from nullifying these provisions through judicial activism, this Court should reverse the Fourth District on the issue raised herein and reinstate the judgment of the trial court, consistent with this Court's long established precedent and sound principles of public policy.

### **CONCLUSION**

For all of the foregoing reasons, this Court should reverse that portion of the Fourth Appellate District's Decision nullifying the liquidated damage provision in the parties Contract, and affirm the trial court's Decision and Judgment in its entirety.

Respectfully submitted,

Eric B. Travers, Counsel of Record



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Eric B. Travers

COUNSEL FOR APPELLANT  
THE VILLAGE OF PIKETON, OHIO

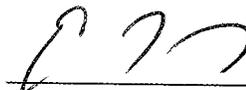
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of this MERIT BRIEF OF APPELLANT THE VILLAGE OF PIKETON was sent via ordinary U.S. mail, postage prepaid, to the following this \_\_\_ day of December, 2014:

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Boone Coleman Construction, Inc.*



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Eric B. Travers

COUNSEL FOR APPELLANT  
THE VILLAGE OF PIKETON, OHIO

IN THE SUPREME COURT OF OHIO

BOONE-COLEMAN CONSTRUCTION :  
CO., INC., :  
 :  
Plaintiff-Appellee, :  
 :  
v. :  
 :  
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

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**NOTICE OF APPEAL OF THE VILLAGE OF PIKETON, OHIO**

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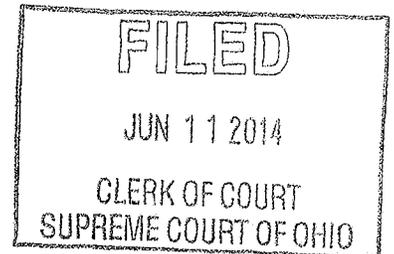
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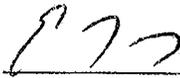


**NOTICE OF APPEAL OF APPELLANT THE VILLAGE OF PIKETON, OHIO**

Appellant the Village of Piketon, Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Pike County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 13CA836 on May 22, 2014.

This case raises a substantial question of great general interest and raises a conflict with existing Ohio law, including Supreme Court precedent.

Respectfully submitted,  
Eric B. Travers, Counsel of Record



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Eric B. Travers

COUNSEL FOR APPELLANT,  
THE VILLAGE OF PIKETON, OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, and email, to the following this 11<sup>th</sup> day of June, 2014:

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*Counsel for Plaintiff-Appellant  
Boone Coleman Construction, Inc.*



---

Eric B. Travers

COUNSEL FOR APPELLANT,  
THE VILLAGE OF PIKETON, OHIO

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
PIKE COUNTY

BOONE COLEMAN  
CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF PIKETON, OHIO,

Defendant-Appellee.

Case No. 13CA836

DECISION AND  
JUDGMENT ENTRY

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APPEARANCES:

Stephen C. Rodeheffer and John A. Gambill, Portsmouth, Ohio, for appellant.

Eric B. Travers and Timothy A. Kelley, Kegler Brown Hill & Ritter, L.P.A., Columbus, Ohio, for appellee.

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Harsha, J.

{11} Appellant, Boone Coleman Construction, Inc. ("Boone Coleman"), filed a complaint seeking the difference between what it actually received and the price stated in a construction contract between it and appellee, Village of Piketon, Ohio. Boone Coleman also sought additional compensation for work it performed to correct subsurface problems and to make revisions to a retaining wall and a traffic signal while performing the contract.

{12} Boone Coleman asserts that the trial court erred in entering summary judgment rejecting its claim for the unpaid contract amount and granting the village's counterclaim for liquidated damages because the 397-day delay in performing the work was the village's fault. However, Boone Coleman did not complete the construction contract within the time specified in the contract and it did not request an extension of time in accordance with the express terms of the agreement.

COURT OF APPEALS  
**FILED**  
MAY 22 2014

*John E. Williams*  
APPX000004 CLERK

{13} Boone Coleman also argues the liquidated damages provision constituted an unenforceable penalty. We agree because viewing the contract as a whole in its application, the amount of damages is so manifestly unreasonable and disproportionate that it plainly constitutes an unenforceable penalty. We sustain that portion of Boone Coleman's first assignment of error.

{14} Boone Coleman next contends that the trial court erred in denying its claims for additional compensation based on additional work it performed to correct subsurface problems and to revise the retaining wall and traffic signal. We reject this contention because Boone Coleman did not follow the parties' unambiguous notice provisions to claim additional compensation. And the contract explicitly precluded recovery for additional costs related to subsurface conditions encountered by Boone Coleman.

{15} Therefore, we reverse that portion of the trial court's summary judgment enforcing the liquidated damages provision and remand that portion of the case for further proceedings. We affirm the remainder of the judgment

#### I. FACTS

{16} In 2007, Piketon solicited bids for a construction project titled "Pike Hill Roadway and Related Improvements." The project was described as:

Construction of a new traffic signal at the intersection of US Route 23 and Market Street, construction of approximately 330 linear feet of steel H-pile/concrete lagging retaining wall, approximately 360 LF of full depth roadway reconstruction, miscellaneous storm drainage improvements, guard rail replacement, asphalt resurfacing of portions of Market Street and Shyville Road and other related improvements.

{17} Because of safety concerns there had been a longstanding desire for a traffic light at the intersection of U.S. Route 23 and Market Street in the village. The need for a traffic light at the intersection was the driving force behind the construction project. The project was designed by Piketon's engineer, Woolpert, Inc.

{18} Boone Coleman submitted the lowest bid, and in July 2007, the parties entered into a contract for Boone Coleman to complete the construction project for \$683,300. The contract provided that the time limits were of the essence, that work would be substantially completed within 120 days after the date when the contract time began, and that as liquidated damages for delay, the contractor would pay the owner \$700 for each day after the specified completion date until the project was substantially completed. The specific provisions of the contract stated:

#### **ARTICLE 4 – CONTRACT TIMES**

##### *4.01. Time of the Essence*

A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

##### *4.02 Days to Achieve Substantial Completion and Final Payment*

A. The Work will be substantially completed within 120 days after the date when the Contract Times commence to run as provided in paragraph 2.03 of the General Conditions, and completed and ready for final payment in accordance with paragraph 14.07 of the General Conditions within 120 days after the date when the Contract Times commence to run.

##### *4.03 Liquidated Damages*

A. CONTRACTOR and OWNER recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the time(s) specified in paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays,

expense, and difficulties involved in proving in a legal or arbitration [proceeding] the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$700.00 for each day that expires after the time specified in paragraph 4.02 for Substantial Completion until the Work is substantially complete.

{¶9} The contract time commenced on July 30, 2007, which meant that the required date of completion of the project was November 27, 2007. The parties subsequently agreed to an extension of the completion date to May 30, 2008.

{¶10} In an April 2008 letter to Woolpert, Boone Coleman requested another extension of the project completion date because its subcontractor for the installation of the traffic signal was unable to perform due to financial difficulties. In fact, the subcontractor had not ordered any of the required materials. By a letter in late May 2008, the village notified Boone Coleman that if it did not complete the project by May 30, 2008, it would begin assessing the specified liquidated damages of \$700 per day. The village notified Boone Coleman in early July 2008 that it was assessing damages of \$700 per day as of May 31, 2008 until the completion of the project.

{¶11} Boone Coleman did not complete the project by installing the traffic light and coordinating approval by the Ohio Department of Transportation ("ODOT") until July 2, 2009, which was 397 days after the agreed project completion date of May 30, 2008.

{¶12} During the project, Boone Coleman did not request extensions of time or additional compensation in accordance with the parties' contract, which set forth a specific procedure to resolve these claims:

#### 10.05 *Claims and Disputes*

A. *Notice:* Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to the

ENGINEER and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event (unless ENGINEER allows additional time for claimant to submit additional or more accurate data in support of such Claim, dispute, or other matter). A Claim for adjustment in Contract Price shall be prepared in accordance with the provisions of paragraph 12.01.B. A Claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. \* \* \*

\* \* \*

D. No Claim for an adjustment in Contract Price or Contract Times (or Milestones) will be valid if not submitted in accordance with this paragraph 10.05.

\* \* \*

#### 12.01 *Change of Contract Price*

A. The Contract Price may only be changed by a Change Order or by a Written Amendment. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the claim to the ENGINEER and the other party to the Contract in accordance with the provisions of paragraph 10.05.

\* \* \*

#### 12.02 *Change of Contract Times*

A. The Contract Times (or Milestones) may only be changed by a Change Order or by a Written Amendment. Any Claim for an adjustment in the Contract Times (or Milestones) shall be based on written notice submitted by the party making the claim to the ENGINEER and the other party to the contract in accordance with the provisions of paragraph 10.05.

{113} After the village paid Boone Coleman \$535,823 of the \$683,300 price under the construction contract, Boone Coleman filed a complaint in the Pike County Court of Common Pleas seeking to recover the remaining \$147,477 allegedly due under the contract. Boone Coleman also sought \$20,120 for additional work it performed to repair subsurface problems it allegedly uncovered after it began its work and

\$86,780.26 for revisions it made to the retaining wall and traffic signal. Piketon filed an answer in which it denied liability for any of Boone Coleman's claims and a counterclaim seeking liquidated damages for Boone Coleman's delay in completing the construction project. The village subsequently filed a motion for summary judgment, and Boone Coleman filed a memorandum in opposition.

{¶14} The trial court granted the village's motion for summary judgment and entered judgment in its favor on its counterclaim in the net amount of \$130,423 (\$277,900 in liquidated damages less the \$147,477 in the unpaid contract balance), plus interest. The trial court determined that the liquidated damages provision of the construction contract was valid and enforceable, that Boone Coleman was contractually responsible for delays in the completion of the project, and that Boone Coleman did not provide the required written notice for extensions of time or additional compensation.

{¶15} This appeal ensued.

## II. ASSIGNMENTS OF ERROR

{¶16} Boone Coleman assigns the following errors for our review:

- I. THE TRIAL COURT ERRED IN GRANTING APPELLEE-PIKETON'S MOTION FOR SUMMARY JUDGMENT AS TO PIKETON'S COUNTERCLAIM AND BRANCH ONE OF BOONE COLEMAN'S CONSTRUCTION COMPLAINT.
- II. THE TRIAL COURT ERRED IN GRANTING PIKETON'S MOTION FOR SUMMARY JUDGMENT AS TO BRANCHES TWO AND THREE OF BOONE COLEMAN CONSTRUCTION'S COMPLAINT.

## III. STANDARD OF REVIEW

{¶17} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7. Summary judgment may be granted only when (1) there is

no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Id.*; *see also* Civ.R. 56(C).

{¶18} In addition, this case involves the interpretation of the parties' construction contract, which is also a matter of law we review *de novo*. *Shafer v. Newman Ins. Agency*, 4th Dist. Highland No. 12CA11, 2013-Ohio-885, ¶ 6; *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-401, 972 N.E.2d 586, ¶ 14, quoting *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9 (" '[t]he construction of a written contract is a matter of law that we review *de novo*' "). Our role is to ascertain and give effect to the intent of the parties, which is presumed to lie in the contract language. *Arnott* at ¶ 14; *Marusa* at ¶ 8.

{¶19} Finally, the issue of whether a contract clause provides for liquidated damages or an unenforceable penalty raises a question of law that we review *de novo*. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183 (1993); *Heskett Ins. Agency, Inc. v. Braunlin*, 4th Dist. Ross No. 11CA3234, 2011-Ohio-6100, ¶ 22.

#### IV. LAW AND ANALYSIS

##### A. Failure to Comply with Notice Provisions for Extension of Time or Modification of Contract Price

{¶20} In its first assignment of error, Boone Coleman asserts the delay in completing the project was caused by matters that were not its responsibility and were attributable to the village. Therefore, it contends that the trial court erred in granting

summary judgment in favor of the village on Boone Coleman's claim for the balance due and the village's counterclaim for liquidated damages. In its second assignment of error, Boone Coleman contends that the trial court erred in granting the village's motion for summary judgment on its claims for additional compensation for its work to repair undisclosed subsurface problems and to perform revisions to the retaining wall and the traffic signal. The failure of Boone Coleman to comply with the notice provisions of the contract controls the outcome of both of these assignments of error.

{121} Notice provisions in contracts operate as conditions precedent to a party's recovery of damages for a breach when the parties expressly indicate such an intent. *See Moraine Materials Co. v. Cardinal Operating Co.*, 2d Dist. Montgomery No. CA 16782, 1998 WL 785363, \*6 (Nov. 13, 1998). Consequently, "[i]t is well established under Ohio Contract Law that a party must comply with all express conditions to be performed in case of breach before it can claim damages by reason of the breach." *Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.*, 755 F.2d 1231, 1237 (6th Cir.1985). And a "right of action requiring notice as a condition precedent cannot be enforced unless the notice provided for has been given." *Id.*

{122} Here, the parties explicitly agreed that Boone Coleman would provide written notice of the general nature of any request for extensions of time and/or adjustment to the contract price to both the village and Woolpert within 30 days "after the start of the event giving rise" to Boone Coleman's request. The parties also agreed that Boone Coleman would provide a second written notice of the amount or extent of its claim with supporting data to the village and Woolpert within 60 days of the event. Under Section 10.05(d) of the construction contract, the parties specified that "[n]o

claim" for an adjustment in either the contract time or price "will be valid" unless submitted in accordance with these provisions.

{123} In his deposition, George McClennen, Boone Coleman's designated corporate representative in this case, admitted that the company did not give the village notice of its requests for extension of the project completion date or additional compensation.

{124} To justify its 397-day delay in completing the project, Boone Coleman sent two letters requesting extensions of time, both to Woolpert. In April 2008, it requested an extension past the May 30, 2008 deadline because of its problems with its subcontractor. And in March 2009, it requested an extension of time because the railroad had not run its wires to Boone Coleman's system and that this could not occur until the village obtained a railroad permit. Neither of these letters complied with the construction contract's notice provisions because they were not sent to the village. Moreover, Boone Coleman's problems with its subcontractor would not have warranted an extension of the project completion date because the contract stated that "[d]elays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of" Boone Coleman. Furthermore, Boone Coleman's March 2009 request for an extension was untimely, i.e. they made it after the expiration of the project completion date.

{125} On its claims for additional compensation, Boone Coleman provided Woolpert with three written notices: a May 6, 2008 letter requesting \$26,219 for work to correct subsurface problems discovered upon excavation for the new pavement section of Market Street; an October 15, 2008 letter requesting the approval of \$66,069.75 in

extra costs to cover construction revisions to the retaining wall; and an October 24, 2008 letter requesting a change order to cover \$23,301.67 for revisions to the traffic signal. These letters did not comply with the contractual notice provisions because they were not sent to the village, they were not submitted within the required 30-day period, and they were not followed with a second, more detailed notice submitted within the required 60-day period.

{¶126} Boone Coleman argues that its failure to comply with the parties' notice provisions for requests for extension of time and additional compensation is not fatal because the village had actual notice of the requests through Woolpert. Boone Coleman's argument is meritless. The Supreme Court of Ohio held as much in rejecting a contractor's similar claim:

[W]e reject [the contractor's] argument that it was excused from complying with the specific change-order procedure for requesting extensions because the state had actual notice of the need for changes to the deadline, and therefore any failure to comply with procedure was harmless error. The record lacks evidence of either an affirmative or implied waiver by the department or OSU of the change-order procedures contained in the contract. [The contractor] has not convinced us that its failure to request extensions was harmless to OSU. To the contrary, [the contractor] agreed that the contract language stated that failure to provide written notice "shall constitute a waiver by the Contractor of any claim for extension of or mitigation of Liquidated Damages." The court of appeals correctly concluded that [the Contractor] "has not demonstrated that it was entitled to disregard its obligations under that part of the contract \* \* \*."

*Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶ 41.

{¶127} Under *Dugan & Meyers*, " 'something more than actual notice on the part of the state is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts.' " *J & H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Comm.*, 10th Dist. No. 12AP-588,

2013-Ohio-3827, ¶ 41, quoting *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 10th Dist. No. 10AP-298, 2010-Ohio-6397, ¶ 17. As in these cases, the record here lacks any evidence of either an affirmative or implied waiver by the village of the detailed notice provisions of the parties' construction contract.

{¶128} Therefore, by failing to follow the detailed notice provisions for its claims for an extension of the project completion date and for additional compensation, Boone Coleman did not prove its entitlement to either adjustment. We overrule Boone Coleman's first assignment of error insofar as it argues that its 397-day delay in completing the project was justified. We also overrule Boone Coleman's second assignment of error regarding its claims for additional compensation.

#### B. Waiver of Claims for Subsurface Conditions

{¶129} Even if we assume that Boone Coleman had complied with the notice provisions for its claim seeking additional compensation to remediate subsurface conditions, its claim still must fail. Boone Coleman claims that it relied on inaccurate site plans concerning subsurface conditions in preparing and submitting its bid so that under the doctrine expressed in *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918), it was not responsible for those defects. In *Spearin*, the United States Supreme Court recognized that when a contractor is "bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Id.* at 136.

{¶130} However, Boone Coleman waived this argument by not raising it in opposition to the village's motion for summary judgment. It is axiomatic that a litigant's failure to raise an issue at the trial court level waives its right to raise that issue on

appeal; appellate courts generally will not consider any error a party failed to bring to the trial court's attention when the trial court could have avoided or corrected the error. *Lauer v. Layco Enterprises, Inc.*, 4th Dist. Washington App. No. 12CA40, 2013-Ohio-1916, ¶ 11. Therefore, Boone Coleman waived this argument on appeal by failing to raise it below. See *Central Allied Enterprises, Inc. v. Adjutant General's Dept.*, 10th Dist. No. 10AP-701, 2011-Ohio-4920, ¶17, fn. 1 (contractor waived arguments concerning *Spearin* doctrine by failing to present them to the trial court).

{¶131} Moreover, even if we chose not to apply waiver, Boone Coleman was not entitled to reimbursement to correct subsurface problems because the construction contract expressly stated that it was the "sole responsibility of the Contractor to take any and all measures he feels necessary to ascertain the subsurface conditions prior to bidding" and that "[n]o claims for additional costs will be considered for material, labor, equipment, or subcontractors/subconsultants to address subsurface conditions encountered during construction." The *Spearin* doctrine does not invalidate express contractual provisions like these. See *S & M Constructors, Inc. v. Columbus*, 70 Ohio St.2d 69, 75, 434 N.E.2d 1349 (1982) (contractor's claim for additional compensation because subsurface conditions reported to contractors before bidding differed materially from actual subsurface conditions encountered during the project was properly rejected because of provision in which contractor agreed that it would make no claim against the city for subsurface conditions), quoting *Spearin* at 136 (" 'Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered' ").

{¶132} Thus, we overrule Boone Coleman's second assignment of error.

### C. Liquidated Damages Provision is Unenforceable

{¶133} In Boone Coleman's remaining argument in its first assignment of error, it asserts that the trial court erred in assessing liquidated damages of \$700 a day for its 397-day delay in completing the project. As previously discussed, Boone Coleman did not complete the contract by the agreed upon deadline and did not properly request an extension of time under the notice provisions set forth in the contract. However, it claims that the liquidated damages of \$277,900 constitutes an unenforceable penalty.

{¶134} "The freedom to contract is a deep-seated right that is given deference by the courts." *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 947 N.E.2d 78, ¶ 15. In general, "parties are free to enter into contracts which apportion damages in the event of default." *Lake Ridge*, 66 Ohio St.3d at 381, 613 N.E.2d 183. "The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint." *Id.*, quoting *Blount v. Smith*, 12 Ohio St.2d 41, 47, 231 N.E.2d 301 (1967).

{¶135} Nevertheless, penalty provisions in contracts are invalid on public policy grounds because a penalty attempts to coerce compliance with the contract instead of representing damages that may actually result from a failure to perform. *Heskett*, 2011-Ohio-6100, at ¶ 22; *Lake Ridge* at 381. In *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), paragraph one of the syllabus, the Supreme Court of Ohio set forth the following three-part test for evaluating the enforceability of a liquidated damages provision:

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 amounts 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 damages in the amount stated should follow the breach thereof.

{¶136} As noted above, we conduct a de novo review to determine whether a liquidated damages clause operates in effect as an unenforceable penalty.

{¶137} As the parties acknowledged in their liquidated damages clause, there are “difficulties involved in proving in a legal or arbitration [proceeding] the actual loss suffered by [the village] if the Work is not completed on time.” The impetus for the construction project was the installation of the traffic light based on safety concerns, so the absence of this light during the period of Boone Coleman’s lengthy delay increased the inconvenience and the safety risk for drivers over the roadway; these concerns are not easily quantifiable in damage terms. *See Security Fence Group, Inc. v. Cincinnati*, 1st Dist. No. C-020827, 2003-Ohio-5263, ¶ 9 (in upholding a liquidated damages provision in a public construction contract involving the replacement of a bridge and a subcontract to provide guardrails and barriers for the project, the court observed that the “primary damage expected to flow from the breach of contract was inconvenience to the public, an amorphous form of damages”).

{¶138} This is particularly so because, as Boone Coleman admits in its quotation of a treatise in its appellate brief, in construction contracts damages can seldom be reasonably estimated in advance. Thus, courts should not permit a contractor to nullify a reasonable estimate of damages by inconclusive testimony. *See Ant. Brief*, p. 15, fn. 45, quoting 5 Corbin, *Corbin on Contracts*, Section 1072; *see also Space Master*

*Internatl., Inc. v. Worcester*, 940 F.2d 16 (1st Cir.1991) (rulings on liquidated damages provisions in construction contracts are particularly deferential to the parties' agreement). Therefore, the damages incurred as a result of a delay were uncertain as to amount and difficult to prove.

{¶139} Next, applying the third part of the *Samon Sales* test, we find the plain and unambiguous language of the liquidated damages clause is consistent with the conclusion that the parties intended that damages in the amount of \$700 per day would follow the contractor's breach of the project completion deadline. Boone Coleman is an experienced contractor who was represented by counsel during the bidding process. The parties themselves best knew their expectations regarding the agreement, and those expectations were reflected in the language used in the contract, which deemed time deadlines to be "of the essence" of their agreement.

{¶140} Nevertheless, although the evidence satisfies the first and third parts of the *Samson Sales* test, it did not meet the second part. That is, when we view the contract as a whole in its application, we conclude the amount of damages is so manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable. Given the circumstances of this case we conclude the amount of damages is so unreasonably high and so disproportionate to the consideration paid that the clause amounts to a penalty.

{¶141} In *Harmon v. Haehn*, 7th Dist. Mahoning No. 10 MA 177, 2011-Ohio-6449, ¶ 52, 54, the appellate court reached a similar conclusion notwithstanding the satisfaction of the first and third parts of the *Samson Sales* test because the stipulated damages were equal to nearly one-third of the ultimate selling price of the property:

However, even assuming that the damages at the time of the contract's formation were uncertain, and the contract is consistent with the parties' intention that damages in the amount of \$250,000 should follow a breach, the amount of damages specified is manifestly unreasonable and thus the clause is a penalty pursuant to the second prong of the *Lake Ridge* test, "Reasonable compensation for actual damages is the legitimate objective of the liquidated damages provisions and, where the amount specified is plainly unrealistic and inequitable, courts will ordinarily regard the amount as a penalty." *Hunter v. BPS Guard Servs., Inc.* (1995), 100 Ohio App.3d 532, 551, 654 N.E.2d 405. A damages provision is likewise unenforceable where the amount specified is manifestly disproportionate to the consideration paid or the damages that could foreseeably result from a breach. *Samson Sales* at 29, 465 N.E.2d 392.

\*\*\*

In addition, the \$250,000 stipulated damages amount is equal to nearly one-third of the ultimate selling price of the property. Moreover, Harmon did not testify as to how the \$250,000 bore a reasonable relationship to the amount of damages in the event of a breach. This court has previously held where the appellants never testified to or presented any evidence of a method of calculation used to arrive at the stipulated damages amount, nor could their attorney recall any attempts at calculating the damages to arrive at the figure, there was no basis for concluding that the amount constituted anything more than a penalty, and that it was therefore unenforceable. *Wright v. Basinger*, 7th Dist. No. 01 CA81, 2003-Ohio-2377, at ¶ 20.

{¶142} Like the clause that the court in *Harmon* found to be unenforceable, the clause in this matter produced an award nearly equal to 1/3 of the value of the contract, i.e., \$277,900 in liquidated damages on a \$683,300 total contract price. And as in *Harmon*, the party seeking to enforce the liquidated damages clause—the village here—did not present testimony or evidence to credibly support the relationship between the damages specified and the actual damages that would be incurred. There is no cited evidence in the record, for example, of a history of accidents at the intersection where the traffic signal was placed. Moreover, unlike the facts in *Security Fence*, 1st Dist. No. C-020827, 2003-Ohio-5263, there is no evidence here of the loss of a preexisting use of

the highway resulting from the construction delay; there was no loss of any existing traffic signal during construction.

{¶143} Reasonable compensation for actual damages is the legitimate objective of liquidated damages provisions. Where the resulting amount is manifestly inequitable and unrealistic, courts are justified in determining the provision to be an unenforceable penalty. *Samson Sales* at 28. Because we conclude that the liquidated damages clause here constituted an unenforceable penalty, we sustain this portion of Boone Coleman's first assignment of error.

#### V. CONCLUSION

{¶144} The trial court properly granted summary judgment in favor of the village on Boone Coleman's claim, but erred in granting summary judgment in favor of the village on its counterclaim for liquidated damages. Having sustained the part of Boone Coleman's first assignment of error challenging the summary judgment on liquidated damages, we reverse that portion of the trial court judgment and remand that part of the case for further proceedings. Having overruled Boone Coleman's remaining assignments of error, we affirm the remainder of the judgment of the trial court.

JUDGMENT AFFIRMED IN PART  
AND REVERSED IN PART AND  
CAUSE REMANDED.

Ringland, J., concurring in part and dissenting in part.

{145} I respectfully concur in part and dissent in part from the majority's decision. I concur with the majority's resolution of (1) Boone Coleman's second assignment of error dealing with Boone Coleman's counterclaim and (2) that portion of the first assignment of error relating to the liquidated damages. However, I dissent as to that portion of the first assignment of error relating to the trial court's determination of fault for the project delays as I would find that under Civ.R. 56, genuine issues of material fact exist concerning who was responsible for the delay in completing the traffic light portion of the project.

{146} "Unilateral and mutual delays, by which the owner causes some or all of his damages, cannot be the basis for his recovery of liquidated damages, absent a reasonable basis for apportioning those damages." *Mt. Olivet Baptist Church, Inc. v. Mid-State Builders, Inc.*, 10th Dist. Franklin No. 84AP-363, 1985 WL 10493 (Oct. 31, 1985). Through its passage of R.C. 4113.62(C)(1), the Ohio Legislature has made it clear that provisions in a construction contract that preclude liability for delay during the course of construction when the cause of the delay is the proximate result of the owner's act or failure to act are void and unenforceable.

{147} Boone Coleman has alleged that the delay was due to and caused by the village's failure to review and accept the railroad's design plans for the construction of the traffic signal through its agent, the project engineer. Boone Coleman alleges that the village failed to contract with the railway company for a tie-in between the roadway and railway signal systems. In turn, the village argues that Boone Coleman was contractually responsible to "coordinate" with the railroad during construction regarding

control wiring related to the proposed traffic signal and the existing railroad crossing controller. The term "coordinate" in this context is ambiguous and must be resolved against the village.

{148} Boone Coleman effectively argues that to follow that the village's interpretation of "coordinate" is unworkable as it would require Boone Coleman to negotiate and contract with the railway on behalf of the village, thereby usurping the village engineer's function. Further, Boone Coleman argues that there is a question of fact as to whether it was comprehended at the time of the contract formation that a contract with the railway was needed. Finally, because there is a question of fact as to whether Boone Coleman had the authority to contract on the village's behalf, there is also a question of fact as to whether the project delay was due to the actions or inactions of Boone Coleman, or those of the village.

{149} Accordingly, I dissent on the issue of fault relating to the delay in completing the project and would remand to the trial court for further hearings and trial.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Court of Common Pleas to carry this judgment into execution.

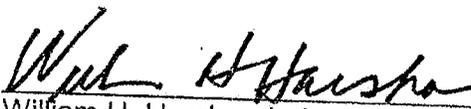
Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J.: Concurs in Judgment and Opinion.

\* Ringland, J.: Concurs in part and Dissents in part with Opinion.

For the Court

BY:   
William H. Harsha, Judge

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

\* Robert P. Ringland, from the Twelfth Appellate District, sitting by assignment of The Supreme Court of Ohio in the Fourth Appellate District.

COURT OF COMMON PLEAS, PIKE COUNTY, OHIO

BOONE COLEMAN CONSTRUCTION, INC.

Plaintiff,

Case No. 2010CIV000014

-vs-

VILLAGE OF PIKETON, OHIO

Defendant.

DECISION

Procedural Posture and Factual Background.

This cause came on for non-oral hearing upon the Motion For Summary Judgment filed on behalf of the Defendant, Village of Piketon, Ohio, on July 2, 2012, and upon the material filed on behalf of each party that the Court may appropriately consider in support of such motion and in opposition to such motion.

The Court finds that the Plaintiff's Complaint in this action as filed on January 12, 2012, and that the Defendant was served with summons and a copy of the Complaint in the manner provided by law.

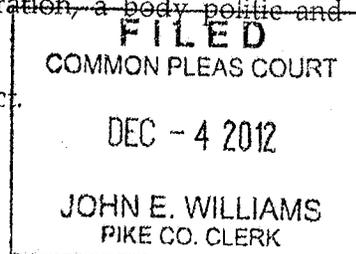
The Court further finds that the Defendant filed an Answer and Counterclaim on March 5, 2012, and that the Plaintiff was served with a copy the Defendant's Answer and Counterclaim in the manner provided by law.

The Court further finds that the Plaintiff filed a Reply to the Defendant's Counterclaim on March 18, 2012.

The Court finds that it has jurisdiction over the parties and of the subject matter.

This action arises out of a contract entered into between the Plaintiff and the Defendant for a construction project to install a traffic light signal and make related roadway improvements at the intersection of U.S. Route 23 and Market Street, within the Village of Piketon, in Pike County, Ohio. The Plaintiff is an Ohio corporation, which operates a construction business. The Defendant is a political subdivision, specifically a municipal corporation, a body politic and corporate.

The Plaintiff was the lowest bidder on the project.



Pursuant to the agreement entered into between the parties, the Plaintiff agreed to construct the project for the sum of \$683,300.00.

Originally, the provisions of the contract required that the Plaintiff complete the project within 120 days after the date when the contract time commenced to run. The contract time was to commence to run on the day indicated in the Notice To Proceed.

The following are a few of the material provisions of the contract between the parties:

**"ARTICLE 4 - CONTRACT TIMES**

*4.01 Time of the Essence*

A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

*4.02 Days to Achieve Substantial Completion and Final Payment*

A. The Work will be substantially completed within 120 days after the date when the Contract Times commence to run as provided in paragraph 2.03 of the General Conditions, and completed and ready for final payment in accordance with paragraph 14.07 of the General Conditions within 120 days after the date when the Contract Times commence to run.

*4.03 Liquidated Damages*

A. CONTRACTOR and OWNER recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the time(s) specified in paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$700.00 for each day the expires after the time specified in paragraph 4.02 for Substantial Completion until the Work is substantially complete.

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After Substantial Completion, if CONTRACTOR shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by OWNER, CONTRACTOR shall pay OWNER \$700.00 for each day that expires after the time specified in paragraph 4.02 for completion and readiness for final payment until the Work is completed and ready for final payment."

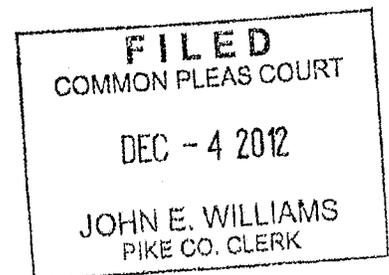
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"10.05 *Claims and Disputes*

A. *Notice:* Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to ENGINEER and the other party to Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event (unless ENGINEER allows additional time for claimant to submit additional or more accurate data in support of such claim, dispute, or other matter). A claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of paragraph 12.01.B. A claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to ENGINEER and the claimant within 30 days after receipt of the claimant's last submittal (unless ENGINEER allows additional time)."

\* \* \*

"D. No Claim for an adjustment in Contract Price or Contract Times (or Milestones) will be valid if not submitted in accordance with this paragraph 10.05."



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\* \* \*

" 12.01 *Change of Contract Price*

A. The Contract Price may only be changed by a Change Order or by a Written Amendment. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the claim to the ENGINEER and the other party to the Contract in accordance with the provisions of paragraph 10.05.

"12.02 *Change of Contract Times*

A. The contract Times (or Milestones) may only be changed by a Change Order or by a Written Amendment. Any claim for an adjustment in the Contract Times (or Milestones) shall be based on written notice submitted by the party making the claim to the ENGINEER and the other party to the Contract in accordance with the provisions of paragraph 10.05.

B. Any adjustment of the Contract Times (or Milestones) covered by a Change Order or of any Claim for an adjustment in the Contract Times (or Milestones) will be determined in accordance with the provisions of this Article 12."

\* \* \*

"PROJECT SPECIAL CONDITIONS"

17. Subsurface Conditions.

A. Geotechnical subsurface investigations and soil boring logs are provided by the Owner for information to the Contractors for this project. However, it is the sole responsibility of the contractor to take any and all measures he feels necessary to ascertain the subsurface conditions prior to bidding. During construction, the Contractor will be required to provide all labor, equipment, materials, means, methods, and measures to construct the improvements regardless of the subsurface conditions encountered. No claims for additional costs will be considered for material, labor, equipment, or subcontractors/subconsultants to address subsurface conditions encountered during construction. The costs of

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all related activities thereto shall be incidental to the project."

On July 27, 2007, the Defendant issued a Notice to Proceed to the Plaintiff, stating that the Contract Times under the contract would commence to run on July 30, 2007, with the date of Substantial Completion shown as November 27, 2007.

Subsequently, the Substantial Completion date was extended to May 30, 2008.

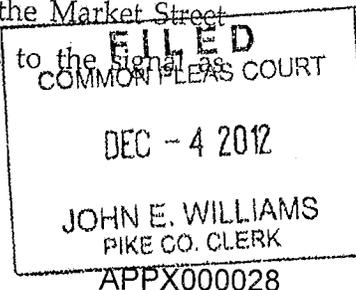
On May 22, 2008, the Village Mayor sent a letter to the Plaintiff on behalf of the Defendant, notifying the Plaintiff that, "in accordance with Contract Documents, the Village will assess Boone Coleman Liquidated Damages in the amount of \$700.00 per each day that expires after the time specified in paragraph 4.02 for Substantial Completion until the work is determined to be substantially complete."

On July 7, 2008, the President of the Village Council sent a letter to the Plaintiff and to the Plaintiff's surety, informing each of them that "the Village of Piketon is giving you notice that we are assessing per contract agreement mitigating damages in the amount of \$700.00/ day as of 5-31-08 to Boone Coleman Construction until the Pike Hill Project is complete."

The project was completed on July 1, 2009.

The parties agree that Defendant has paid the Plaintiff the total sum of \$535,823.00 for work upon the project.

The Plaintiff asserts three claims in the Complaint. In Branch One the Plaintiff seeks damages in the amount of \$147,477.00, such amount being the difference between the original contract price of \$683,300.00 and the above-stated amount that has been paid by the Defendant to the Plaintiff. In Branch Two, the Plaintiff seeks judgment for \$20,120.00 for the cost of repairing "sub-surface problems," which the complaint indicates "were not disclosed in the engineer or geo-technical drawings" and Plaintiff further indicates these problems could not have "reasonably been anticipated or discovered with the exercise of due diligence on the Plaintiff's part." In Branch Three, the Plaintiff seeks judgment for \$86,780.26 for alleged revisions to the retaining wall for the Market Street approach to the intersection from the east and for revisions to the signals required by the Ohio Department of Transportation.



In its Answer, the Defendant demands that the Plaintiff's Complaint be dismissed, and the Defendant denies many of the allegations of the complaint, admitting, however, that the original contract price was \$683,000.00 and that the Defendant has paid the Plaintiff \$535,823.00, and admitting that there were some revisions to the signal as alleged in Plaintiff's Branch Three. The Defendant further asserts several affirmative defenses in its Answer, including, without limitation, waiver, estoppel, ratification and/or acquiescence, set-off and/or recoupment, and that "Plaintiff failed to comply with certain conditions precedent to recovering its claim, and otherwise waived all or part of its claims due to its failure to, by way of example, provide prompt written notice of claims, as required by contract, and its failure to obtain written change orders prior to performing what it now contends is changed work."

The Defendant also asserts a Counterclaim against the Plaintiff in the amount of at least \$276,500.00 for liquidated damages, plus pre-judgment and post-judgment interest, attorneys' fees and costs.

**Standard of Review.**

Rule 56 of the Ohio Rules of Civil Procedure governs the procedure to be followed in the case of summary judgment motions and provides in part that "[S]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show 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. No evidence or stipulation may be considered except as stated in this rule."

Civ.R. 56(C) also provides that "A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

Civ.R. 56(E) further provides as follows: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may

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not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

In determining whether summary judgment is appropriate, "the trial court should neither weigh the evidence nor assess affidavit credibility." *Steele v. Auburn Vocational School District* (1994), 104 Ohio App.3d 204, 206-207; *Mayfield v. Boy Scouts of Am.* (1994), 95 Ohio App.3d 655, 659-660; *Herald v. Ohio Valley Bank* (December 17, 2001), Meigs Co. Appellate No. 00CA28, 01-LW-4860, unreported.

The purpose of summary judgment is not to try issues of fact, but is rather to determine whether triable issues of fact exist. *Iams v. DaimlerChrysler Corp.*, 174 Ohio App.3d 537.

Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously, with any doubts resolved in favor of the nonmoving party. *Bridge v. Park Natl. Bank*, 179 Ohio App. 3d 761.

For cases in which there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law, however, summary judgment is an appropriate manner to end the litigation in a judicially economic manner, limiting the expenditure of resources by the parties. *Youngerman v. Meijer, Inc.*, (Sept. 20, 1996), Montgomery Co. App., 96-LW-3237.

Decision.

Having considered all evidence filed in this action that the Court may appropriately consider in determining the merits of the Defendant's Motion For Summary Judgment, and having construed all evidence most strongly in favor of the Plaintiff, as required by Civ.R. 56 when considering the Defendant's Motion for Summary Judgment, the Court finds that there is no genuine as to any material fact, and that the Defendant is entitled to judgment as a matter of law, in favor of the Defendant and against the Plaintiff, dismissing Branch One, Branch Two and Branch Three of the Complaint and granting judgment in favor of the Defendant, and against the Plaintiff, upon the Defendant's counterclaim, for the

Branch One, Branch  
TWO, and Branch  
THREE of the  
COMPLAINT  
FOR THE  
DEFENDANT  
DEC - 4 2012  
JOHN E. WILLIAMS  
PIKE CO. CLERK

sum of \$130,423.00, plus pre-judgment interest thereon at the rate of five percent (5%) per annum from July 1, 2009, to December 31, 2009, inclusive, at the rate of four percent (4%) per annum from January 1, 2010, to December 31, 2011, inclusive, and at the rate of three percent (3%) per annum from January 1, 2012, until the date of filing of the judgment entry, and interest upon the judgment at the statutory rate thereafter until paid, and for the costs of this action.

The Court finds that reasonable minds could come to be one conclusion, and that conclusion is adverse to the Plaintiff, as to Branch One, Branch Two and Branch Three of the Complaint and is adverse to the Plaintiff as to the Defendant's Counterclaim, the Court having construed all evidence most strongly in favor of the Plaintiff.

The Court finds and determines that the contract between the parties is clear and unambiguous, and that the liquidated damages provision of the contract is valid and enforceable in the present action, under the three-prong test set forth in *Sampson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27; 465 N.E.2d 392 (1984).

With respect to Branch One of the Complaint, the Court finds that the Plaintiff did not substantially complete the work agreed to in the contract by May 30, 2008, which was the agreed-to substantial completion date, as extended, and that the Plaintiff is responsible for the delays in completion. The Plaintiff is not entitled to a time extension, because the delays that were occasioned by failures to coordinate with AEP, Norfolk and Southern Railway and the Ohio Department of Transportation, and the termination of the Plaintiff's signal installer, were the responsibility of the Plaintiff, not the Defendant, under the contract, and because the Plaintiff failed to provide written notice of delays in the manner and within the time required by the parties' contract, thereby waiving any right it now claims to a time extension. The delays in completion implicate the liquidated damages clause of the contract mentioned above, and the Defendant is entitled to assess liquidated damages at the contract rate of \$700.00 per days from the substantial completion date of May 30, 2008, until the project was completed on July 1, 2009, a total of 397 days. The total liquidated damages assessed for such period, \$277,900.00, far exceeds difference between the original contract price (\$683,300.00) and the amount that the Defendant has paid to the

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Plaintiff (\$535,823.00), for which difference, in the amount of \$147,477.00, the Plaintiff is seeking judgment in Branch One of the Complaint.

With respect to Branch Two of the Complaint, the Court finds that the Plaintiff is not entitled to recover additional compensation based upon alleged additional work that the Plaintiff claims was necessitated due to subsurface conditions at the project. Pursuant to the provisions of Section 17 of the Project Special Conditions, quoted above, which constitute a part of the parties' contract, the Plaintiff clearly agreed that "[N]o claims for additional costs will be considered for material, labor, equipment, or subcontractors/subconsultants to address subsurface conditions encountered during construction. The costs for all related activities thereto shall be incidental to the project." This provision shifts the risk of different subsurface conditions to the contractor, and is enforceable against the contractor. *S&M Constructors, Inc. v. City of Columbus* (1982), 70 Ohio St.2d 69; 434 N.E.2d 1349. Furthermore, the Plaintiff failed to provide written notice and supporting data in a timely manner, as required by provisions of the contract, quoted above, in order to preserve any entitlement the Plaintiff now claims for an increase in contract price based upon subsurface conditions as alleged in Branch Two.

With respect to Branch Three of the Complaint, the Plaintiff seeks additional compensation under the contract, and possibly also under quasi-contract theory, for that which the Plaintiff refers to as "[R]evisions to the retaining wall for the Market Street approach to the intersection from the east, and "[R]evisions to the signal as required by the Ohio Department of Transportation." With respect to the claims asserted in Branch Three, it is clear that the Plaintiff did not comply with the provisions of the parties' contract requiring timely written notice and supporting data in order to preserve any claimed entitlement for an increase in contract price. Further, the fact that a written contract exists between the parties covering the subject matter of construction of the project precludes the Plaintiff's assertion of any claim based upon alleged unjust enrichment or other quasi-contract claims. Finally, as a municipal corporation, the Defendant is not liable for claims under quasi-contract theories such as quantum meruit or unjust enrichment.

With respect to the Defendant's Counterclaim, which is based upon the liquidated damages clause of the parties' contract, it is clear that the amount

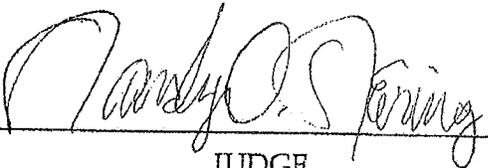
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claimed by the Defendant, \$277,900.00 (\$700.00 per day multiplied by 397 days), completely subsumes the amount claimed by the Plaintiff in Branch One as the unpaid balance of the contract price. The amount by which the Defendant's claim for liquidated damages exceeds the amount claimed by the Plaintiff in Branch One is the amount for which judgment should be rendered in favor of the Defendant upon the counterclaim (\$130,423.00), plus pre-judgment interest, post-judgment interest and court costs, as indicated above.

Counsel for the Defendant is directed to prepare, circulate and submit a proposed Judgment Entry consistent with this Decision.

The Clerk of Courts is instructed to send a copy of this Decision to counsel for each party herein, by ordinary U.S. Mail.

  
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JUDGE

12-04-2012

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COMMON PLEAS COURT  
DEC - 4 2012  
JOHN E. WILLIAMS  
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IN THE COURT OF COMMON PLEAS  
PIKE COUNTY, OHIO

Boone Coleman Construction, Inc., : Case No. 10CIV014  
 :  
Plaintiff, : Judge Randy D. Deering  
 :  
v. :  
 :  
Village of Piketon, Ohio, :  
 :  
Defendant. :

**JUDGMENT ENTRY**

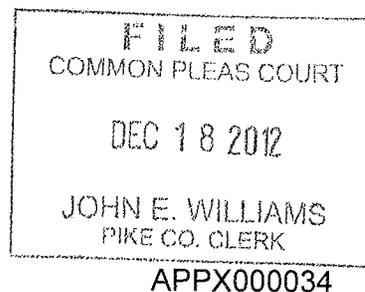
This matter came before the Court on Defendant-Counterclaimant Village of Piketon, Ohio's Motion for Summary Judgment. The Court, having considered the pleadings, the legal memoranda and argument by the parties, and the applicable law, hereby finds as follows:

Based on the record before it, the Court having granted Defendant's Summary Judgment in a Decision dated December 4, 2012 (the "Decision"), for the reasons set forth in the Decision, which are incorporated herein by reference, and for good cause it is therefore:

ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment, is well-taken and thus is GRANTED and Plaintiff Boone Coleman Construction, Inc.'s Complaint, be and hereby is DISMISSED WITH PREJUDICE. It is further

ORDERED, ADJUDGED AND DECREED that judgment enter for the Village on its Counterclaim and against Boone Coleman:

- (1) in the net amount of \$130,423.00, for liquidated damages pursuant to the Contract between the parties, (consisting of \$277,900 in liquidated damages less the remaining Contract Balance of \$147,477 ); plus



- (2) \$17,317.78, for pre-judgment interest at the statutory rate from July 1, 2009 until December 4, 2012 (the Date of the Decision), plus \$10.72 for each calendar day thereafter until the date of filing of this Judgment Entry; plus
- (3) post-judgment interest calculated on the total amount of the judgment as of the date of the filing of this Judgment Entry until payment to the Village, at the statutory rate of three percent (3%) per annum.

It is further ORDERED, ADJUDGED AND DECREED that this is a final judgment as to Boone Coleman and the Village of Piketon, and thus a FINAL APPEALABLE ORDER. The clerk shall give notice of the entry of this judgment in accordance with the applicable Ohio rules.

Costs shall be taxed to and paid by Boone Coleman.

IT IS SO ORDERED.

  
12-18-12  
Judge Randy D. Deering

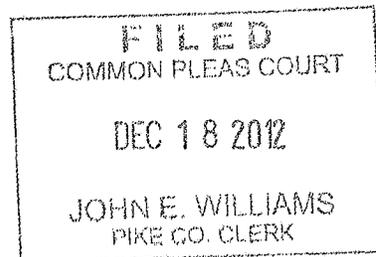
Approved:

APPROVED, see attached

Stephen C. Rodeheffer, Esq.  
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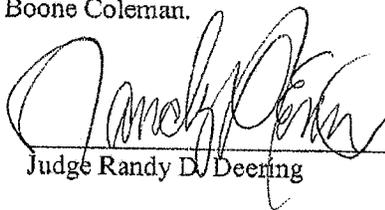


- (2) \$17,317.78, for pre-judgment interest at the statutory rate from July 1, 2009 until December 4, 2012 (the Date of the Decision), plus \$10.72 for each calendar day from December 5, 2012 until the date of filing of this Judgment Entry; plus
- (3) post-judgment interest calculated on the total amount of the judgment as of the date of the filing of this Judgment Entry until payment to the Village, at the statutory rate of three percent (3%) per annum.

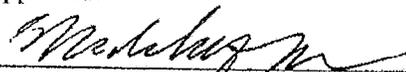
It is further ORDERED, ADJUDGED AND DECREED that this is a final judgment as to Boone Coleman and the Village of Piketon, and thus a FINAL APPEALABLE ORDER. The clerk shall give notice of the entry of this judgment in accordance with the applicable Ohio rules.

Costs shall be taxed to and paid by Boone Coleman.

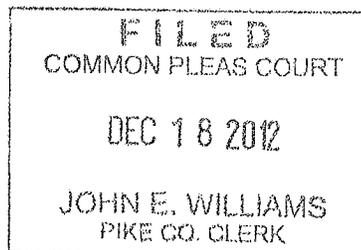
IT IS SO ORDERED.

  
12-18-12  
Judge Randy D. Deering

Approved:

  
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*Counsel for Defendant/Counterclaim Plaintiff,  
Village of Piketon, Ohio*



**153.19 Contract shall contain provision as to time of completion.**

All contracts under sections 153.01 to 153.60 , inclusive, of the Revised Code, shall contain provision in regard to the time when the whole or any specified portion of work contemplated therein shall be completed and that for each day it shall be delayed beyond the time so named the contractor shall forfeit to the state a sum to be fixed in the contract, which shall be deducted from any payment due or to become due to the contractor.

Effective Date: 10-01-1953