

IN THE SUPREME COURT OF OHIO

BOONE COLEMAN CONSTRUCTION CO., INC.,	:	Case No. 2014-0978
	:	
Plaintiff-Appellee,	:	On Appeal from the Pike County Court of Appeals, Fourth Appellate District
v.	:	
	:	
THE VILLAGE OF PIKETON, OHIO,	:	Court of Appeals Case No. 13CA836
	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT THE VILLAGE OF PIKETON

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INTRODUCTION

In its Merit Brief,¹ Appellee Boone Coleman Construction Co., Inc. (“Boone Coleman”) does not challenge, respond to, or even address the primary arguments advanced by the Appellant The Village of Piketon (the “Village”) and the Amici: that the Court of Appeals for the Fourth District erred by not considering the reasonableness of the stipulated per-diem rate itself, \$700 per day, in proportion to the *Contract* as a whole.

Instead, Boone Coleman spends most of its time re-arguing facts already decided by two courts, the findings of which Boone Coleman has declined to appeal. Unable or unwilling to defend the legal soundness of the Court of Appeals’ decision under the *Samson Sales*² test, Boone Coleman instead argues that it was not responsible for the extensive Project delays in the first place. However, those arguments were rejected by both the trial court and the Fourth District, which found Boone Coleman chargeable for the entirety of the 397-day Project delay. Boone Coleman did not appeal the Fourth District’s finding in this regard. Its attempt to re-argue the settled point of its responsibility for the delay is moot, and not properly before the Court as part of the two narrow Propositions of Law accepted for review.

The remainder of Boone Coleman’s Merit Brief is spent promoting an untenable legal position that would largely negate liquidated damage clauses in *all contracts*, not just the per diem damage-for-delay clauses in construction contracts at issue here. Boone Coleman argues that to determine whether a liquidated damage clause is enforceable under the *Samson Sales* test trial courts *must* consider and compare the *actual damages* resulting from non-performance of a

¹ Boone Coleman mistakenly titled its Merit Brief the “Reply Brief of Appellee Boone Coleman Construction Co., Inc.” For simplicity’s sake and to avoid confusion with Appellant’s properly-titled Reply Brief, Boone Coleman’s brief filed on December 30, 2014 will be referred herein as its “Merit Brief.”

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

contract. Boone Coleman’s proposed rule is a radical shift of existing Ohio law. Were this Court to adopt that rule, moving forward parties in Ohio seeking to enforce a liquidated damage clauses will be required to litigate the issue of actual damages—*the very thing that the negotiation of a liquidated damage provision is designed to avoid*. See 1-9 Murray on Contracts, Section 126(C), at 795 (5th Ed. 2011) (recognizing that by entering into a liquidated damages provision, the parties are “substituting their private agreement on damages for the usual judicial assessment process”). Not only is such a rule impractical and undesirable as a matter of public policy, it contravenes this Court’s directives in *Samson Sales* and *Lake Ridge*³.

Boone Coleman’s failure (or inability) to offer a cogent response to the Propositions of Law set forth by the Village and the Amici concedes the soundness of those Propositions. This Court should thus adopt those Propositions and reverse in part the Decision of the Fourth District as it relates to the enforceability of the liquidated damages clause in the parties Contract.

ARGUMENT

I. Boone Coleman’s desire to re-litigate its responsibility for the Project delays is irrelevant and inappropriate to the instant Appeal.

Boone Coleman focuses almost a third of its Merit Brief (four of fifteen substantive pages) not on the narrow issues relevant to this Appeal, but rather on trying to re-argue the settled factual issue of its responsibility for the 397 days of Project delay. This is a red herring. At summary judgment, the trial court determined that Boone Coleman was responsible for the entire 397-day delay. The Fourth District affirmed this finding. Boone Coleman has not appealed that holding.

Both the trial court and appeals court rejected Boone Coleman’s excuses for its late completion and found it to be contractually chargeable for the entire 397 days of Project delay. During discovery, Boone Coleman identified four causes of Project delay that occurred after the

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

original 180-day time extension that pushed the Project completion date to May 30, 2008. Those four delays related to alleged failures by ODOT, AEP, Norfolk & Southern Railroad (“NSR”), and the “financial problems” of Boone Coleman’s traffic light supplier. (*See* Ex. 7 to the Motion, Boone Coleman Interrogatory Answer No. 7.)

Article SC-6.08.A of the Contract’s Supplementary Conditions specified the parties’ respective responsibilities relating to coordination and permits required from the third-party entities involved in the Project. (Spencer Aff. at ¶¶ 23-24; Contract at BC000721, SC-6.08.A.) Under Article DC-6.08.A, coordination during the Project with each of the third parties in question (AEP, ODOT, and NSR) was Boone Coleman’s responsibility. Boone Coleman was also contractually responsible for the performance failings of its lower tiers, including its traffic light supplier. The trial court found—and the Court of Appeals affirmed—that these plain and unambiguous contractual provisions placed responsibility for the extensive Project delays with Boone Coleman. (Decision at ¶ 24.)

Moreover, even if Boone Coleman was not responsible for the delay, both the trial court and Fourth District found it waived any right to additional time or money by failing to comply with the Contract’s written notice provisions. In the Contract, the parties 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.” (Contract at ¶12.02(A))

Both the trial court and the Fourth District found that Paragraph 10.05 of the Contract was key to resolving Boone Coleman’s belated claims for additional time (to excuse the 397 day delay) and money. Under that paragraph, Boone Coleman agreed that within thirty days after the start of

any event it believed justified a time extension or price increase it had to provide written Notice of those claims to both the Project Engineer and the Village. (Spencer Aff. at ¶ 18; Contract at BC000711, ¶10.05(A).) The parties also 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. (*Id.*) The trial court and Fourth District found that Boone Coleman failed to comply with the above contractual requirements and both courts held it had thus waived any right to additional time or money. (Decision at ¶ 33.)

On June 11, 2014, the Village filed the instant Appeal, appealing only that portion of the Fourth District's decision invalidating the Contract's per-diem liquidated damages clause as applied to the 397-day delay. Boone Coleman opposed the jurisdictional appeal, and declined to cross-appeal the Fourth District's factual determinations regarding either Boone Coleman's responsibility for, or its failure to preserve a contractual allowance for, the extensive delays of the Project. As such, those issues have been determined and are the law of the case. *See State ex rel. City of Cleveland v. Astrab*, 139 Ohio St.3d 445, 2014-Ohio-2380, 12 N.E.3d 1197, ¶ 21 (quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3-4, 462 N.E.2d 410 (1984)) (“[T]he [law-of-the-case] doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.”).

Boone Coleman has no right to reopen and back-door a cross-appeal on these decided matters, which are not germane to the narrow question before the Court: did the Fourth District change or properly apply the second prong of the *Samson Sales* test when it decided that the parties' liquidated damages clause was an unenforceable penalty as applied to the 397 day delay?

Boone Coleman’s insistence on trying to excuse its responsibility for the Project overruns are inappropriate, misguided (in any event), and should be disregarded.

II. There was only one Project, a necessary component of which was to install a traffic light at U.S. 23 and Market Street.

In its Merit Brief, Boone Coleman persists in asserting the baffling position that despite the evidence—including but not limited to one Contract, one Contract Sum, one Contract Completion date and one Invitation to Bid—the Project was really “two projects;” one to improve the roadway, and another to install the traffic light. This is untrue. There is no genuine dispute that this was one Project. There was one Contract to control the terms and conditions of that Project. And yes, as with nearly every other construction project of any significance, the Project had several components which were *all necessary* for completing the Project and payment to Boone Coleman of the full Contract price.

Moreover, the traffic light was the “*driving force*” behind the entire Project. (*See* Decision at ¶ 7; Spencer Dep. at 20:16-17; Spencer Aff. at ¶ 2.) Until the traffic light was installed and operational, the Project was not complete and Boone Coleman had no right to payment of the full Contract price. A residential contractor doesn’t get to leave the roof off a house, claim the home is substantially complete, and demand payment from the homeowner. Likewise, Boone Coleman’s failure to install the traffic light by the agreed-date was a breach of the Contract. The Project was not finished and under the plain language of the Contract it signed with the Village, Boone Coleman’s failure in this regard triggered the application of the agreed per diem damages for delay clause.

Boone Coleman’s attempt to split the Project in two misrepresents the facts and is both: (1) a transparent attempt to make the as-applied liquidated damages appear inequitable, and (2) an implicit concession that the liquidated damages rate in the Contract is reasonable. Not even the

Fourth District agreed with Boone Coleman’s “two Projects’ argument,” which lacks any basis in the record and should be disregarded.

III. Boone Coleman’s Proposition of Law contradicts this Court’s precedent and effectively nullifies all liquidated damage provisions.

As argued in the Merit Briefs of both the Appellant and the Amici, the Decision of the Fourth District threatens to undermine per diem liquidated damage clauses in public contracting—a component *required* under Ohio law—by demanding a retroactive examination of the per diem rate. Boone Coleman goes one step further in its Merit Brief by asking this Court to articulate a rule that trial courts “must” consider both (1) the actual damages for delay anticipated at the time of contracting and (2) as are actually incurred during the performance of the contract, and compare them to the agreed liquidated damage clause. Setting aside the impracticality inherent in examining reasonableness both prospectively and retroactively, such a rule runs afoul of this Court’s prior edicts, and undermines the very purpose and utility of liquidated damages.

Contrary to Boone Coleman’s blanket assertion on page 7 of its Merit Brief, there is a wealth of precedent, both from this Court and the traditional common law authorities, making clear that the reasonableness of a liquidated damage provision is to be determined *as of the time of contracting*. The Court need look no further than its last discussion of liquidated damage clauses in *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 613 N.E.2d 183 (1993), where this Court stated:

[W]hen 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 (citing 3 Restatement of the Law 2d, Contracts, Section 356(1) at 157 (1981)) (emphasis added). This comports with the United States Supreme Court’s holding that “[t]hese

provisions are to be judged as of the time of making the contract.” *Priebe & Sons Inc. v. United States*, 332 U.S. 407, 412, 68 S.Ct. 123, 92 L.Ed. 32 (1947). In fact, the parties’ *estimation* of actual damages at the time of contracting, if reasonable, is so sacrosanct that the non-breaching party is absolved of any duty to mitigate his resulting damages. *Lake Ridge*, 66 Ohio St.3d at 385.

While Boone Coleman argues that the *Lake Ridge* court examined the proportionality of the liquidated damages clause to “actual damages,” it neglects to mention that the court did so on a *prospective basis*. In *Lake Ridge* the liquidated damages rate was based on the parties estimate at the time of contracting that as of the August 1 deadline for student withdrawal, the school would have spent nearly a full year’s worth of tuition preparing for the student’s attendance that school year. *Id.* at 383. Therefore, the *Lake Ridge* Court did not find it necessary, let alone demand the parties investigate and litigate the actual damages, if any, the school actually incurred as a result of the defendant’s breach. Instead, the Court merely found it “not unreasonable to conclude that Lake Ridge’s actual damages were the equivalent of one full tuition.” *Id.*⁴

Importantly, none of the cases cited by Boone Coleman (*Cad Cam, Inc. v. Underwood*, *Lakewood Creative Costumers v. Sharp* and *Harmon v. Haehn*) involve a per-diem damage for delay clause in a construction contract. Moreover, the cases are easily distinguishable from the facts here, and do not support Boone Coleman’s proposition of law.

In *Cad Cam, Inc. v. Underwood*, 36 Ohio App.3d 90, 521 N.E.2d 498 (2d Dist. 1987), the Second District declined to enforce a liquidated damage provision in an employment contract that

⁴ While the reasoning of *Lake Ridge* is sound and supports the reversal of the Fourth District’s Decision in this case, it is important to note that the liquidated damages provisions in *Lake Ridge* and the one *sub judice* are apples and oranges in comparison. In *Lake Ridge*, the liquidated damage clause was an estimate that as of a specified date, damages of a **sum certain** were incurred by the non-breaching party. In the instant case, the parties’ per diem clause reflected the parties’ agreement that the Village would be damaged an estimated \$700 a day for each day of Project delay chargeable to Boone Coleman. The longer the delay, the greater the estimated damages.

required an employee to pay his former employer half his annual salary if he took a position with a competitor. *Id.* at 91. In its analysis under the second prong of *Samson Sales*, the *Cad Cam* court first recognized the unique nature of the case before it. The court observed that in the Supreme Court cases *Jones v. Stevens*⁵ and *Samson Sales*, the liquidated damage clause “went to the heart of the entire contractual undertaking,” and thus the appropriate test was whether “the contract *as a whole* was manifestly unconscionable, unreasonable and disproportionate in amount.” *Id.* at 92-93 (emphasis added). However, the *Cad Cam* court reasoned that the liquidated damage provision in the employment contract before it was “triggered by a breach other than a failure of the entire contractual undertaking;” i.e., a “specific contractual undertaking” not to become employed by a competitor. *Id.* at 93. As a result, the court determined that it had to weigh the “specified damages” to the “specific contractual undertaking” to determine their enforceability under *Samson Sales*. *Id.* This approach required the court to examine the actual costs associated with the employees’ assumption of a position with the employer’s competitor. *Id.* Finding these “likely” costs to be negligible, the court declined to enforce the provision. *Id.* at 93-94.

Unlike *Cad Cam*, the dispute here involves a construction case where the Ohio Revised Code requires a per diem liquidated damage provision for delay. And unlike the facts of *Cad Cam*, the issue of Project delay goes to the very heart of the contractual agreement to complete installation of the traffic light by the agreed date. Boone Coleman’s breach was not just material but *fundamental* because it failed to complete the Project by the promised date and deprived the Village, its residents, and the commuters on the busy highway of a working and immensely valuable traffic light—the heart and “driving force” of the Project. Thus, even assuming *arguendo* that the analysis in *Cad Cam* is correct, the proper application of the second prong of *Samson Sales*

⁵ 12 Ohio St.3d 27, 465 N.E.2d 392 (1984).

to the construction contract at issue here is to compare the per diem rate with the Contract “as a whole” (i.e., the entire Contract price) as of the date of execution.

In *Lakewood Creative Costumers v. Sharp*, 31 Ohio App.3d 116, 509 N.E.2d 77 (8th Dist. 1986), the Eighth District declined to enforce a costume rental late fee constituting one-half the rental fee for each day the costume was not returned. *Id.* at 116. This costume rental case has no application to the public construction case at bar. Even if it did, it should be noted that the *Lakewood Creative* court failed to properly articulate the second prong of *Samson Sales*. The *Lakewood Creative* court jumbled the order of the *Samson Sales* test factors, and stated that a liquidated damage clause is enforceable “where the sum stipulated is in reasonable proportion to the loss actually sustained.” *Id.* at 117. This is not what the second prong of *Samson Sales* says. Rather, the second prong of *Samson Sales* asks the court to determine whether “the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties.” 12 Ohio St.3d at 2d. Thus, *Lakewood Creative*’s application of the test—upon which Boone Coleman now relies and advocates—was inherently flawed.

Further, the *Lakewood Creative* court determined, unlike the case *sub judice*, that the liquidated damage clause in that case failed the first prong of the *Samson Sales* test because “the actual damages incurred by the breach are not uncertain or difficult to ascertain.” *Lakewood Creative*, 31 Ohio App.3d at 117. In contrast, here both the trial court and Fourth District agreed that the actual damages resulting from Boone Coleman’s delays were inherently uncertain of proof and difficult to ascertain. (Decision at ¶ 38.) As such, the court’s ability in *Lakewood Creative* to easily consider and compare actual damages contrasts sharply here where, as explained in the

Village’s Merit Brief as well as the brief of Amici in Support of the Village, damages for delayed completion of public improvements are real but inherently difficult to determine.

Finally, and as explained in the Village’s Merit Brief, the Seventh District’s decision in *Harmon v. Haehn*, 7th Dist. No. 10 MA 177, 2011-Ohio-6449, is easily distinguishable from this dispute. As with *Lakewood Creative*—and unlike the case *sub judice*—the liquidated damage provision in *Harmon* did not pass the first prong of *Samson Sales* test because “damages at the time the contract was formed were relatively certain” and “could be easily calculated....” *Id.* at ¶ 51. Moreover, the *Harmon* court compared the liquidated damage provision to the potential, actual damages known *at the time of contracting*: the monthly rent on the lease. *Id.* at ¶¶ 52-54. Thus, while it is inapposite to the facts of this dispute, to the extent the *Harmon* decision has any relevance to this case the decision supports the prospective application of *Samson Sales* previously endorsed by this Court, and again urged by the Village and the Amici.

Not only is Boone Coleman’s Proposition of Law unsupported by the case law, the breadth of the proposition it urges has serious ramifications for the enforceability of *any* liquidated damage provision in Ohio. The very purpose of liquidated damage provisions is to avoid costly and time consuming litigation over difficult to determine damages by permitting—or mandating, in the case of public construction contracts under R.C. 153.19—contractual parties to negotiate, ahead of time, the damages flowing from a contract’s breach. With Boone Coleman’s approach, courts will be obligated to compare the stipulated damages with the actual damages incurred *after* a contract’s breach before it can determine the provision’s enforceability under *Samson Sales*. If a party can challenge and force the issue of actual damages to be fully litigated as a requirement of a court’s decision on the enforceability of a liquidated damages provision, then what is the point of liquidated damages in the first place? Sophisticated parties that would normally have the foresight

to spare themselves (and the judiciary's) time and money from litigating actual damages would no longer have any incentive to negotiate these clauses into their contracts. In effect, a long-accepted tool of commercial efficiency would no longer have any practical benefit here in Ohio. And the plain language and legislative intent of R.C. 153.19 would be needlessly compromised.

Here, the Village seeks a narrow rule clarifying to trial courts in Ohio how to apply *Samson Sales* to per-diem damage for delay provisions in construction contracts. Boone Coleman, however, seeks a blanket rule that dictates a liquidated damage provision cannot be enforced unless actual damages are *also* litigated and determined when the contracting party chooses to challenge a clause. The Village's approach closely follows this Court's prior edicts, encourages the sound public policy of timely completing public works, and allows parties to freely negotiate their own assessment of contractual damages. Boone Coleman's proposition does not. The Village's Propositions of Law should be adopted by this Court.

IV. Boone Coleman's argument that the Village incurred no actual damages as a result of the 397-day Project delay illustrates the critical error of the Court of Appeals' Decision.

At page 11 of its Merit Brief, Boone Coleman attempts to justify the Fourth District's Decision by arguing that during the delay period, the Village "used the intersection without interruption as it had been used since it was created years ago," and thus suffered no actual damages. Boone Coleman's argument has no support in the record. It also suffers from the precise logical and practical deficiency the Village and Amici forewarned by the Second Proposition of Law advanced in their respective Merit Briefs.

The Village did not hire Boone Coleman to build an intersection "as it had been used since it was created years ago." The Village hired Boone Coleman to build an intersection with an entirely new feature: a traffic light. For each day past the agreed date of completion—i.e., the day

the Village *bargained-for* and *expected* to use the traffic light at U.S. 23 and Market Street—the Village (its citizen-taxpayers and commuters on the highway) plainly suffered damages: they were deprived of the increased safety, efficiency and convenience offered by the traffic light Boone Coleman promised to install in exchange for payment of taxpayer funds. Boone Coleman had no problem freely agreeing to this principle at the time of contracting. The precise *amount* of this loss-of-use damage is inherently uncertain and extremely difficult to prove, but as even the Fourth District agreed, there is no doubt the damage was real. (*See* Decision at ¶ 38.) This conclusion is buttressed by Ohio case law and the common law authorities. *See Security Fence Group, Inc. v. City of Cincinnati*, 1st Dist. No. C-020827, 2003-Ohio-5263, ¶ 9 (“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.”); *see also* 1-9 Murray on Contracts, Section 126(B), at 795 (5th Ed. 2011) (“Measurement of harm to the public where performance is delayed is extremely difficult to calculate with reasonable certainty.”); 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.”).

Boone Coleman’s argument then, distilled to its essence, is that when the construction of a *new* improvement is at issue, the public owner incurs no damages for delayed completion of the new improvement. As explained by the Village and the Amici in their respective Merit Briefs, such logic threatens to vitiate liquidated damage clauses for any contract to construct a new public improvement. Considering that R.C. 153.19 requires such clauses in any state construction contract—with no distinction between new and existing improvements—such a rule is untenable and should not be countenanced by this Court.

V. Boone Coleman advocates the vitiation of ODOT’s per-diem liquidated damage rate schedule.

Finally, Boone Coleman argues that the per-rate at issue—\$700 per day—is “an arbitrary number” because it was predicated on the liquidated damage rate promulgated by ODOT at the time. But ODOT is the state agency charged with the construction, maintenance, and administration of billions of dollars of roadway improvements like the one at issue in this case. If anyone is in a position to calculate the “amorphous form of damages” incurred by the public by the delayed delivery of a roadway project, it is ODOT. Further, Boone Coleman ignores the fundamental point that when structured as a per-diem (as in the Contract, as required by R.C. 153.19, and as set forth in the ODOT rate schedule) the liquidated damage clause is carefully tailored to adjust to the magnitude of the breach *and* the Contract value. The only reason liquidated damages rose to the amount now objected-to by Boone Coleman is because *Boone Coleman delayed the Project by 397 days*.

Until the Fourth District’s Decision, the ODOT liquidated damage rate has never been successfully challenged in an Ohio court. Highway contractors in this state, which include Boone Coleman (until this case), have agreed to it on hundreds of millions of dollars, if not billions of dollars, of public roadway improvements. If the Fourth District’s Decision is upheld and Boone Coleman’s rationale adopted, any roadway construction contract that utilizes the ODOT rate can be challenged as “arbitrary.” This Court should give deference to the agency’s well-accepted calculation of per-diem damages for delay of roadway construction projects, and uphold the parties’ agreed \$700 rate as proportionate and reasonable estimation of the Village’s per-diem damages for delayed completion of the parties’ almost \$700,000 public construction Contract.

CONCLUSION

For all of the foregoing reasons herein and set forth in the Merit Briefs of the Village and Amici, this Court should reverse that portion of the Fourth Appellate District's Decision nullifying the liquidated damage provision in the parties' Contract, affirm the trial court's Decision and Judgment in its entirety, and adopt the two Propositions of Law advanced in the Merit Briefs of the Appellant and the Amici.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this *Reply Brief of Appellant The Village of Piketon* was filed with the Court's Electronic Filing System and served electronically and via ordinary U.S. mail, postage prepaid upon the parties listed below this 20th day of January, 2015:

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