IN THE SUPREME COURT OF OHIO

BOONE COLEMAN CONSTRUCTION, INC.,	:	Sup. Ct. Case No. 14-0978
Plaintiff – Appellee,	:	
v.	:	Appeal from the Pike County Court of Appeals, Fourth Appellate District,
VILLAGE OF PIKETON, OHIO,	:	Case No. 13CA836
Defendant – Appellant.	:	

MERIT BRIEF OF *AMICI CURIAE*, THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, THE OHIO MUNICIPAL LEAGUE, THE OHIO SCHOOL BOARDS ASSOCIATION, AND THE OHIO TOWNSHIP ASSOCIATION, IN SUPPORT OF APPELLANT

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STATEMENT OF THE FACTS

The *Amici Curiae* defer to the Statement of the Facts as set forth by the Appellants.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Just months ago, this Court reiterated the "cardinal principle" that when interpreting risk allocation provisions in a construction contract, courts must "give effect to the intent of the parties." *See Transtar Electric, Inc. v. A.E.M. Electric Services, Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 9-11; *see also Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993) (it is well-settled in Ohio that "parties are free to enter into contracts that contain provisions which apportion damages in the event of default"). As early as 1925, the Court noted:

> **The parties themselves best know** what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages * * * it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. * * * **The interests of the public are quite as likely to be served in maintaining the inviolability of contracts as they are in contriving ways** and means to make a contract mean what is not apparent upon the face of it, **to save a party from some conjectural inequity** growing out of his supposed inadvertence or improvidence. (Emphasis added.)

(Emphasis added.) *Jones v. Stevens*, 112 Ohio St. 43, 52, 146 N.E. 894 (1925). The foregoing principle remains essential, but was forgotten by the Fourth District in its May 22, 2014 Decision and Judgment Entry, *Boone Coleman Constr., Inc. v. Village of Piketon*, 2014-Ohio-2377, 13 N.E.3d 1190 (4th Dist.) (the "Decision").

Having found the Appellee, Boone Coleman Construction, Inc. ("Boone Coleman"), chargeable for all 397 days of delay on the Pike Hill Roadway Project (the "Project"), the Fourth District was required to simply enforce the per-diem liquidated damages clause included in Boone Coleman's contract with the Village of Piketon (the "Village"). *Boone Coleman Constr., Inc.* at ¶ 40-43. Instead, the Fourth District held that, in hindsight, the total amount of liquidated

damages was unfair, given the size of Boone Coleman's contract. *Id.* As described in this Merit Brief, the Fourth District erred in both its analysis and conclusion.

Proposition of Law No. 1: When evaluating the enforceability of a liquidated damages clause in a construction contract, a court must conduct its analysis prospectively, based on the per-diem amount stipulated in the contract, and not retrospectively, based on the total liquidated damages that ultimately accrue.

This Court has recognized a need to balance the inviolability of contracts with a desire to avoid contractual penalties. *Lake Ridge Academy*, 66 Ohio St.3d at 381, 613 N.E.2d 183. To maintain that balance, Ohio courts will enforce a liquidated damages clause if it satisfies the following three-prong test:

(1) Actual damages would be uncertain as to amount and difficult to prove;

(2) 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; and

(3) The contract is consistent with the conclusion that the parties intended that damages in the amount stated should follow if there was a breach.

Samson Sales, Inc. v. Honeywell, Inc., 12 Ohio St.3d 27, 28, 465 N.E.2d 392 (1984); *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶ 67-68 (4th Dist.). Essential to this case, and understanding the Fourth District's error, is that the foregoing factors must be evaluated "in light of what the parties knew at the time the contract was formed." *Lake Ridge Academy* at 382. Accordingly, an otherwise valid liquidated damages provision cannot, in hindsight, become an unenforceable penalty. *Id.*

In its Decision, the Fourth District failed to recognize or apply these well-reasoned principles. The court applied the second prong of the *Samson* test *retrospectively*, by ignoring the contracted per-diem and instead evaluating the total liquidated damages "produced" after Boone Coleman's delay. *Boone Coleman Constr., Inc.*, 2014-Ohio-2377, 13 N.E.3d 1190 at ¶

40-43. Citing *Samson*, the Fourth District concluded "[w]here the **resulting amount** is manifestly inequitable and unrealistic, courts are justified in determining the provision to be an enforceable penalty." (Emphasis added.) *Id.* at ¶ 43. This Court's decision in *Samson*, however, makes no mention, either expressly or impliedly, of the "resulting amount." *See e.g., Samson Sales, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392. Indeed, since the parties could not have known the resulting amount at the time the contract was formed, the Fourth District relied entirely, and impermissibly, on hindsight. *See Id.* at 28; *see also Lake Ridge Academy* at 382. The court overlooked the very provision it was asked to evaluate, and then declared the same provision an unenforceable penalty. *Boone Coleman Constr., Inc.* at ¶ 40-43.

The Fourth District based its Decision on *Harmon v. Haehn*, 7th Dist. Mahoning No. 10 MA 177, 2011-Ohio-6449, but failed to recognize the important differences. In *Harmon*, the liquidated damages clause was not contained in a construction contract pursuant to R.C. 153.19, nor was it a per-diem. *Id.* at ¶ 50-54. Instead, the parties stipulated to a "liquidated damages" pay-out of $250,000 in the event the lessor sold real property occupied by the lessee, which the court found deficient under all three elements of the *Samson* test. *Id.* In contrast to the Fourth District's analysis, the *Harmon* court properly assessed the liquidated damages stated in the parties' contract. *Compare Boone Coleman Constr., Inc.* at ¶ 40-43 *with Harmon*, 2011-Ohio-6449 at ¶ 52-54. In other words, that analysis was based on "what the parties knew at the time the contract was formed." *See Lake Ridge Academy*, 66 Ohio St.3d at 382.

The First District's decision in *Security Fence Group, Inc. v. City of Cincinnati*, 1st. Dist. Hamilton No. C-020827, 2003-Ohio-5263, is more closely aligned with the facts and issues in this case. As is true here, in *Security Fence* the court was asked to evaluate the enforceability of a per-diem liquidated damages clause, which was mandated by R.C. 153.19. *Id.* at ¶ 2, 7-12.

Moreover, the lawsuit stemmed from delays to a road construction project. *Id.* at ¶ 2-5. After noting a duty to "step back and examine [the liquidated damages provision] in light of what the parties knew at the time the contract was formed," the court limited its analysis to the stipulated $600 per-diem, not the resulting total. *Id.* at ¶ 8. The court found the clause enforceable, in large part because the damages were computed, by agreement, on a per-day basis, and were therefore tailored to the severity of the breach. *Id.* at ¶ 10-11.

The Fourth District's Decision is inconsistent with settled precedent. Most importantly, the Fourth District simply failed to apply the *Samson* test to the actual clause it found unenforceable. *See Boone Coleman Constr., Inc.*, 2014-Ohio-2377, 13 N.E.3d 1190 at ¶ 40-43. The court did not find the $700 per-diem unreasonable at the time the contract was executed, which should have been the extent of its analysis. *Id.* Rather, the court concluded that the total assessed liquidated damages was a penalty when retrospectively compared to the contract amount. *Id.* If allowed to stand, the Decision excuses delays on important public projects and contradicts the legislature's requirement of per-diem liquidated damages. The Decision also produces the illogical result of protecting a contractor that delayed a project for 397 days, when presumably liquidated damages for a shorter delay would have been enforced. It is poor public policy indeed to allow a breaching party the unilateral ability to avoid paying damages for its breach by compounding that very breach.

Proposition of Law No. 2: Liquidated damages are not a penalty simply because a project consists of new construction; proof of actual damages to the non-breaching party is not required as a condition to the enforcement of liquidated damages.

Under the second prong of the *Samson* test, a court must weigh the reasonableness of a liquidated damages provision in light of the contract as a whole and in light of the facts and circumstances known at the time of contracting. *Samson Sales, Inc.*, 12 Ohio St.3d at 28, 465

N.E.2d 392. In performing that analysis, courts compare the stipulated liquidated damages to the foreseeable harm caused by a breach, and where appropriate, the contract sum. *See Id*; *see also Lake Ridge Academy*, 66 Ohio St.3d at 381, 613 N.E.2d 183. By failing to properly consider the stipulated per-diem, as discussed above, the Fourth District's comparison analysis was deeply flawed. Setting that aside, the Fourth District also erred in its evaluation of the parties' contract and the foreseeable damages resulting from delays to a public project.

When a public project is delayed, the primary harm to a public owner, and the citizens it serves, is lost use of the improvement. A delay to the use of safer roads, cleaner water, and better schools clearly harms the public, as well as public owners, however the damage is almost impossible to quantify. *See Samson Sales, Inc.*, 12 Ohio St.3d at 28 (liquidated damages enforced when actual damages would be uncertain as to amount and difficult to prove). As noted in *Security Fence*:

> The evidence indicated that any actual damages would be difficult to prove. **The primary damages expected to flow from the breach of the 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.

The court went on to conclude that:

> [T]he trial court was required to evaluate the damages provision in light of the situation at the time of the execution of the contract. Here, the parties could have reasonably anticipated that the street would be closed due to [the contractor's] delay, and **they accordingly provided for a damages provision – computed on a per-day-basis – that would reflect the relative inconvenience** anticipated to result from the breach.

(Emphasis added.) *Security Fence Group, Inc.*, 2003-Ohio-5263, at ¶ 10-11. The court in *Security Fence* recognized what the Fourth District did not: the primary damage caused by delays to a public improvement is a delay to the public's beneficial use of the same. *See Id*; *see also Klemas v. Flynn*, 66 Ohio St.3d 249, 251, 611 N.E.2d 810 (1993) (comparing R.C.

5321.16(C) to liquidated damages, as they compensate for "loss of use" and "inconvenience"); *see also Mt. Olivet Baptist Church, Inc.*, 10th Dist. Franklin No. 84AP-363, 1985 Ohio App. LEXIS 9120, *24 (Oct. 31, 1985) (liquidated damages allow recovery for loss of use, which is an "unquantifiable" harm).

For that reason, the legislature mandated a per-diem to tailor liquidated damages, as closely as possible, to the foreseeable consequences of a contractor's breach. *See* R.C. 153.19. It is also common for a public owner to base the per-diem amount on the contract value, keeping liquidated damages reasonable in comparison to the size, complexity, and cost of the project. Even the smallest contracts have the potential of derailing a construction project, thereby causing significant delays and damages.

While the Fourth District did note that the Project was initiated due to safety concerns, *Boone Coleman Constr., Inc.*, 2014-Ohio-2377, 13 N.E.3d 1190 at ¶ 7, it failed to fully understand the nature of the damages stemming from delays, holding in pertinent part:

> [T]he party seeking to enforce the liquidated damages—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. * * * there is no evidence 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 the construction.

Id. at ¶ 42. According to the Fourth District, the only damage resulting from delays to new construction is actual physical harm to the public, which must be evidenced by a history of accidents. *See Id.* The Fourth District also ignored the extended construction management costs, consultants' fees, and overhead that are typically recovered through liquidated damages. *Id.*

Of particular concern to the *Amici Curiae* is the Fourth District's inexplicable conclusion that because the highway and traffic signal were new, there was no loss to the public from a

delay. *Boone Coleman Constr., Inc.* at ¶ 42. The court's analysis would presumably bar liquidated damages on all projects for new construction, which would essentially render R.C. 153.19 meaningless. *See Id.* Contrary to the Fourth District's view, the public benefits from new construction in the same way it benefits from an improvement to existing infrastructure; and it incurs the same harm when its use is delayed. Moreover, in Ohio, evidence of actual damages is not required for the enforcement of a liquidated damages clause. *Physicians Anesthesia Serv. Inc. v. Burt*, 1st Dist. Hamilton No. C-060761, 2007-Ohio-6871, ¶ 20; *USS Great Lakes Fleet, Inc. v. Spitzer Great Lakes, Ltd.*, 85 Ohio App.3d 737, 741, 621 N.E.2d 461 (9th Dist. 1993) (where a liquidated damages clause is otherwise valid, the owner is "**not required to prove that actual damages resulted** from the breach.") (Emphasis added.); *B&G Props. Ltd. P'ship v. OfficeMax, Inc.*, 2013-Ohio-5255, 3 N.E.3d 774, ¶ 31 (8th Dist.).

Public owners often act in anticipation of the needs of the citizens they serve. Must a public owner wait for a traffic accident before contracting for a road improvement or enforcing a completion date? Sound policy dictates that a public owner acting to anticipates a potential need, or possible risk to the public, should be free to act to address the need or risk without being required to wait until the harm occurs. Such an owner should not be punished by being unable to enforce the contractual completion date for such an improvement. Even though roadway and traffic safety improvements, courthouses, jails, water and wastewater projects, and schools may be constructed in anticipation of changing or increased needs of the public, completion dates for those projects are critical to the health, safety, and education of the public. In fact, the size and capacity of public facilities are typically based on a projection of future need, rather than historic need, but that does not make their completion date any less important.

The Fourth District's departure from this sound analysis, an analysis anchored in important public policy considerations, results in a situation where a public owner may be unable to enforce liquidated damages for delays to new construction project. The Decision also introduces costly uncertainty into the case law interpreting the *Samson* test. Finally, the Decision treats a contractor that delays completion by more than a year more favorably than one who delays the project by one month.

CONCLUSION

Until the Fourth District's Decision, the enforceability of a liquidated damages provision in a construction contract was analyzed prospectively, based on the reasonableness of the stipulated per-diem at the time the contract was executed. In conducting the foregoing analysis, Ohio law left no room for an arbitrary distinction between new construction and improvements to existing infrastructure. The Fourth District did not follow that precedent. Instead, the court below analyzed, retrospectively, the conjectural fairness of liquidated damages after Boone Coleman delayed the project by 397 days. The Decision, therefore, contradicts settled Ohio law and sound public policy. There is now alarming precedent against the enforcement of liquidated damages in new public construction. Under the Fourth District's reasoning, owners must prove delays caused a quantifiable harm to the public, by showing the project was necessary to address an ongoing safety issue. The Fourth District also created a perverse incentive for contractors: the longer the contractor delays a project, the less likely it is that the owner will be able to enforce a liquidated damages provision. This will add risk, cost, delays, and disruptions to public projects. Accordingly, the *Amici Curiae* request that the Court overturn the Decision of the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICI CURIAE, THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, THE OHIO MUNICIPAL LEAGUE, THE OHIO SCHOOL BOARDS ASSOCIATION, AND THE OHIO TOWNSHIP ASSOCIATION, IN SUPPORT OF APPELLANT**, was served by regular U.S. mail, postage prepaid, this 5th day of December, 2014, upon the following:

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