

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HOVAS CONSTRUCTION, INC.,
a Mississippi corporation

APPELLANT

VS.

NO. 2010-CA-01755-SCT

BOARD OF TRUSTEES OF WESTERN
LINE CONSOLIDATED SCHOOL DISTRICT

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

Submitted by:

DAVID S. ROUNSAVALL, MSB [REDACTED]
ROBERTSHAW, NOBLE, EVANS & ROUNSAVALL
128 South Poplar Street
Post Office Drawer 1498
Greenville, Mississippi 38702-1498
Telephone: (662) 378-2171
Facsimile: (662) 335-9049
E-Mail: david.rner@suddenlinkmail.com

ATTORNEY FOR APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, Board of Trustees of Western Line Consolidated School District, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualifications or recusal. The persons are:

1. Reginald R. Hovas, President of Hovas Construction, Inc.-
Appellant
P.O. Box 600
Greenville, MS 38702-0600
2. Nathan P. Admas, Jr., Esq.
Mansour & Adams
P.O. Box 1406
Greenville, MS 38702-1406

Attorney for Appellant

3. Larry Green, Superintendent-Appellee
Western Line Consolidated School District
102 Maddox Road
Avon, MS 38723

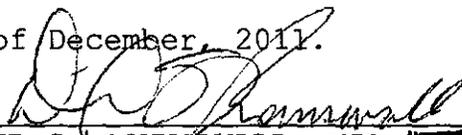
4. Clarence Hall, Jr., President -Appellee
Board of Trustees of Western Line Consolidated School
District and Members of the Board of Trustees-Appellees
102 Maddox Road
Avon, MS 38723

5. David S. Rounsavall, Esq.
Robertshaw, Noble, Evans & Rounsavall
128 S. Poplar Street
P.O. Box 1498
Greenville, MS 38702-1498

Attorney for Appellee

6. Honorable Margaret Carey-McCray
Washington County Circuit Court Judge
P.O. Box 1775
Greenville, MS 38702-1775

This, the 29th day of December, 2011.



DAVID S. ROUNSAVALL, MSB # [REDACTED]

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STATEMENT OF THE FACTS

In the fall of 2007, THE WESTERN LINE SCHOOL DISTRICT BOARD OF TRUSTEES (hereinafter "Western Line") voted to proceed with a construction project at O'Bannon High School. Specifications for the project were prepared by JBHM Architects of Tupelo, Mississippi. The specifications for contractors to review prior to bidding on the project consisted of replacing windows, repairs and renovations to the plumbing and restrooms in the 500 building and an addition to the 100 building consisting of a faculty break room and student restrooms. Hovas Construction, Inc. (hereinafter "Hovas") received and reviewed the specifications and information for the project. Bids were received and opened at a Special Meeting of the Board on November 29, 2007. The lowest bid was submitted by Hovas and the Board of Trustees voted to award the bid for the project to Hovas in the amount of \$450,000.00 (Defendant's Exhibit 1, Green Affidavit, Vol. 2, TR 219). On several occasions before Hovas began work on the project, Western Line's superintendent, Larry Green, discussed with Hovas the problems the school was having with the plumbing in the restrooms in the 500 building. (Green Affidavit, Vol. 2, TR 219-220)

A contract dated December 10, 2007, was entered into between Western Line and Hovas for the project. The contract allowed 180 days for completion of the entire project. The contract provided the date for substantial completion would be June 6, 2008. Paragraph 3.3 of the contract provided that liquidated damages

would be assessed at the rate of \$500 per day for each day the project was not completed on time. (Plaintiff's Exhibit 1, Vol. 1, TR 60) Western Line uses the months of June and July to prepare all grounds and buildings for the next school year. It was very important for this project to be completed on time so that the school maintenance personnel and administration could have the renovated building and the new addition ready when school started. (Green Affidavit, Vol. 2, TR 220) The agreement entered into between Western Line and Hovas is a standard form agreement used in projects similar to the one performed at O'Bannon High School in this case, and the liquidated damages provision in the agreement is standard for a project this size. (Defendant's Exhibit 2, Laney Affidavit, Vol. 2, TR 226)

Hovas is a contractor located in Greenville, Mississippi with over 40 years experience in the construction business. When Hovas voluntarily entered into the contract on December 10, 2007, it was aware of the liquidated damages provision and the terms of the provision which provided that liquidated damages would be assessed at the rate of \$500.00 per day. (Defendant's Exhibit 3, Hovas deposition, page 13, lines 3 to 25; page 14, lines 1 to 20, Vol. 2, TR 228-229)

Hovas began work on the project and completed the replacement of windows with no problems. Hovas continued with work on the replacement and renovation to the restroom in the 500 building as well as the addition to the 100 building. JBHM Architects approved

final shop drawings for the addition to the 100 building in February of 2008. The steel building and addition to the 100 building was a standard metal building that did not require any special design or special features. (Laney Affidavit, Vol. 2, TR 224-225) The steel building addition was erected by Hovas on May 22, 2008. However, block work and brick work as well as the interior work for the 100 building were not completed until July 15, 2008. Although Hovas contends it performed all work it could before receiving the steel building, Charles Laney, the project manager for JBHM Architect, states in his Affidavit that there were several areas of the project that were not constructed prior to receiving the steel building that should have been completed while waiting on the building. The renovations to the restrooms in the 500 building, which were completely separate from the addition to the 100 building which the steel building was used for, were not completed. (Laney Affidavit, Vol. 2, TR 225) The renovations to the restrooms in the 500 building were never properly completed by Hovas. (Laney Affidavit, Vol. 2, TR 223-224) On July 15, 2008, the architect presented its Notice of Substantial Completion. (Vol. 1, TR 97-98)

The fall semester for O'Bannon High School commenced on August 4, 2008. (Green Affidavit, Vol. 2, TR 220) A portion of the addition to the 100 building was not ready when school started. The renovated restrooms in the 500 building were never properly completed and the District immediately began to have problems after

Hovas turned the project over to the District. Hovas was called on several occasions to correct the problem but was never successful in correcting the problem with the restrooms in the 500 building.(Laney Affidavit, Vol. 2, TR 224) As a result of the continuous problems with the restrooms, O'Bannon was unable to use the restrooms during the 2008-2009 school year. This was a major problem as there were no other restrooms in the 500 building. Therefore, during the 2008-2009 school year students had to leave the 500 building and go to other buildings on campus to use the restrooms causing disruptions of the school.(Green Affidavit, Vol. 2, TR 220)

At the request of JBHM Architects, on March 5, 2008, RH Plumbing, Inc. ran a line with a camera through the sewer pipes of the 500 building to locate the problem. The problem was located within the pipes that were to have been replaced by Hovas during the renovations to the restrooms in the 500 building. The replacement of these pipes was included in the specifications provided to Hovas prior to bids being received as part of the project. The slab was broken up and the piping replaced and fixed as should have been done by Hovas during the project. This was done in July of 2009, approximately one year after Hovas turned the project over as substantially completed. Western Line was required to pay RH Plumbing, Inc. \$9,872.45 for the remedial work that was necessary due to the defective work done by Hovas.(Green Affidavit,

Vol. 2, TR 221)

As a result of the delay in completing the project, Hovas' failure to properly renovate the restrooms in the 500 building, school disruptions experienced during the 2008-2009 school year, as well as other damages incurred by the District, the Board voted to uphold the liquidated damages provision of the agreement and assess liquidated damages in the amount of \$19,500.00.

SUMMARY OF THE ARGUMENT

The parties agree that Hovas was thirty-nine(39) days late in achieving substantial completion of the building, renovations and additions as provided in the contract. The parties agree that Paragraph 3.3 of the contract provides "for each calendar day thereafter the substantial completion of the contract is delayed, liquidated damages will be assessed as follows: \$500.00 per calendar day." The parties were aware of the liquidated damages provision and the terms of the provision in the contract when they voluntarily agreed to and signed the contract. Hovas now contends that Western Line should not be entitled to enforce the liquidated damages provision in the contract because it is not a reasonable estimate of actual damages incurred by Western Line, and Western Line had no actual damages as a result of Hovas' breach of the contract. Western Line did suffer actual damages as a result of Hovas' breach of the contract. The breach by Hovas did not allow school maintenance personnel and administration the requisite time normally utilized to prepare for the start of school for the 2008-2009 school year. As a result of the delay in completing the project on time by Hovas, a portion of the new addition to the 100 building was not usable at the beginning of the school year. Hovas' failure to properly renovate the restrooms in the 500 building caused disruptions during the school year as students had to leave the 500 building and go to other buildings on campus during the entire 2008-2009 school year for use of the restrooms.

Western Line incurred additional damages when it had to pay another contractor for remedial work performed on the plumbing Hovas never properly repaired. Without question, Western Line incurred damages as a result of Hovas' breach of the contract. In a case such as this where it is difficult for the parties to approximate actual damages that breach of a contract will cause, a contractual provision that prescribes an agreed amount of liquidated damages between the parties should be allowed. The contract is unambiguous. The parties' intention to include the liquidated damages provision is clear. This Court should enforce the terms of the contract and affirm the lower Court's ruling that the liquidated damages provision was reasonable and enforceable under the circumstances of this case.

ARGUMENT

It is said in 22 Am Jur 2d, Damages §686, page 746,

The parties to a contract have the right to agree to liquidated damages. Provisions for liquidated damages are valid and enforceable so long as they are not actually in the nature of a penalty.

22 Am Jur 2d, Damages §698, page 755 provides:

If damages which may result from a future breach of contract are not easy to compute, the parties may agree upon liquidated amount of damages and their agreement should control. The parties are presumed to have taken the uncertain and speculative character of the damages into consideration when making the agreement and to have agreed upon the definite sum for purposes of putting the question of damages beyond controversy and dispute.

22 Am Jur 2d, Damages §700, page 757 provides:

The question whether damages are difficult of ascertainment is to be determined by a consideration of the status of the parties at the time they enter into the contract, and not at the time of the breach.

In discussing whether a liquidated damages provision is reasonable, 22 Am Jur 2d, Damages §703, page 760 states:

Each case must depend upon its own particular facts and circumstances.

22 Am Jur 2d, Damages §706, page 763 states:

The courts will tend to find a liquidated damages clause enforceable if the parties understood and agreed to it.

It is said in 22 Am Jur 2d, Damges §711, page 768:

Provisions for fixed per diem payments for delay and performance of a contract or for failure to complete performance within a specified time are usually construed as stipulations for liquidated damages and not as penalties. Whether per diem liquidated damages are so unreasonable as to constitute a penalty is to be resolved by the trial court on the basis of the pleadings and

evidence, and appellant courts should not engage in speculation over whether the amount stipulated is out of portion to the damages suffered.

In Proposition I of its Brief, Hovas contends the trial court erred in not holding the liquidated damages provision of the contract unenforceable because it was not a reasonable pre-estimation of damages, was unreasonable, and thus constituted a penalty.

In the present case, it is undisputed that the contract required that substantial completion be reached 180 days from the date of commencement or no later than June 6, 2008, and included a liquidated damages provision which specified an assessment of \$500 for each calendar day that substantial completion of the contract is delayed. (Vol. 1, TR 61) Ordinarily, the intention of the parties will control as to whether a provision in a contract is for a penalty or for liquidated damages. Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co., 142 So.2d 200 (Miss 1962). To distinguish liquidated damages from a penalty, courts must look to the parties intentions. Culbreath Revocable Trust v. Sanders, 979 So.2d 704, 712, ¶29 (Miss. App. 2007).

When the parties entered into the contract in the present case, it would have been impossible to pre-estimate damages or to approximate actual damages that would be caused by Hovas breaching the contract. Hovas's breach of the contract caused a portion of the addition to the 100 building to be unusable at the start of the 2008-2009 school year. (Vol. 2, TR 220). The breach caused disruption of the school staff's attempt to prepare existing

buildings and grounds for the 2008-2009 school year. Western Line incurred damages as a result of having to pay RH Plumbing for remedial work on the sewer lines which was part of the renovation to the 500 building restrooms that Hovas contracted to repair and never properly completed. (Defendant's Exhibit 4, Vol. 2, TR 230) The students were unable to use the restrooms in the 500 building for the 2008-2009 school year. (Vol. 2, TR 220) Clearly it would be difficult for the parties to pre-estimate or put an exact monetary amount on these type damages incurred by the District for the disruptions experienced by the school administration and students. However, it is also clear the district was damaged as a result of Hovas' breach.

Under Mississippi law, where it is difficult to approximate actual damages that breach of a contract will cause, courts tend to be particularly indulgent of contractual provisions that prescribe crude but convenient liquidation of parties' rights. Patrick Petroleum Corp. of Michigan v. Callon Petroleum Co., 531 F.2d 1312, [C.A.5 (Miss.) 1976] certiorari denied Patrick v. U.S., 96 S.Ct. 3175, 426 U.S. 951, 49 L.Ed.2d 1189, rehearing denied 535 F.2d 660. The mere fact that the amount of damages ultimately suffered by a party may be less than the amount payable under the liquidated damages clause, does not, standing alone, permit courts to re-characterize a liquidated damages provision as a penalty. PYCA Industries, Inc. v. Harrison County Waster Water Management Dist., 177 F.3d 351 [C.A.5 (Miss.1999)] (emphasis added) Ordinarily, under

Mississippi law, the intentions of the parties will control as to whether a provision in a contract is for a penalty or for liquidated damages. Continental, 142 So.2d @ 209. Under Mississippi law, liquidated damages clauses are deemed unenforceable penalties generally only in limited cases in which (1) the actual damages resulting from the breach may be readily ascertained, or (2) the contract discloses no intention to fix the sum as liquidated damages or leaves the intentions in this regard in doubt. Id.

In the present case, the contract is unambiguous. Hovas was aware of the liquidated damages provision and the terms of the provision when it voluntarily entered into the contract. Hovas breached the contract. The parties clearly intended Paragraph 3.3 of the contract to be a liquidated damage provision. The Board of Trustees of Western Line are stewards of the taxpayers' funds and have a duty to not only expend the public funds wisely but also to withhold payment of any unwarranted expenditures. Western Line suffered damages. The fact the amount of actual monetary damages ultimately suffered by Western Line may have been less than the amount payable under the liquidated damages clause does not render the liquidated damages provision a penalty and unenforceable in this case.

Hovas also alleges the liquidated damages amount was unreasonable and constitutes a penalty. The liquidated damages in this case total \$19,500.00. The contract for the project was for a total of \$450,000.00. In Culbreath, the Mississippi Court of

Appeals held that a liquidated damages provision in a contract representing 7.6% of the purchase price was reasonable. Id. @ 712. In the present case, the liquidated damage amounts to only 4.3% of the total project amount and is reasonable in light of the circumstances and facts of this case.

In Proposition II of its Brief, Hovas contends the Circuit Court erred in holding that Western Line suffered actual damages. Western Line clearly suffered damages in this case. The renovations to the restrooms in the 500 building were never properly completed by Hovas. (Laney Affidavit, Vol. 2, TR 223-224) Hovas was called on several occasions and came out to the site but never fixed the problem. (Vol. 2, TR 224) The school was unable to use the restrooms.

On March 5, 2009, JBHM had RH Plumbing, Inc. run a line with a camera to videotape the sewer line to locate the problem. The problem was located within the pipes that were to have been replaced by Hovas during the renovations to the restrooms in the 500 building. As a result, on July 6, 7 and 8, 2009, RH Plumbing, Inc. replaced cast iron piping with PVC piping under the slab between the toilets in the restrooms which was remedial work to correct the defective work done by Hovas Construction during the restroom renovations at the O'Bannon High School. (Vol. 2, TR 224) By letter of July 20, 2009, Western Line was requested by the architects to pay RH Plumbing, Inc.'s statement in the amount of \$9,872.45 for the remedial work. This was work Hovas should have completed in the project. (Vol. 2, TR 224)

Hovas alleges that it performed its work as timely as possible given the circumstances regarding obtaining the steel building. However, the Affidavit of Charles Laney with JBHM clearly states that there were several areas of the project that were not constructed prior to receiving the steel building that should have been completed by Hovas while waiting on the steel building. (Vol. 2, TR 225)

The renovation to the restroom in the 500 building was not completed. This portion of the project was completely separate from the addition to the 100 building. There is no reason why Hovas could not complete the renovations to the restrooms in the 500 building while waiting for the steel building. (Vol. 2, TR 225)

In addition, contractors typically come off a certain distance from the edges of the exterior steel building walls and go ahead with construction of interior walls, plumbing, etc. while waiting for the steel to arrive. This was not done in this case. (Vol. 2, TR 225) The steel building and addition to the 100 building should have been completed by the scheduled due date consistent with the agreement even with the delay in receiving the steel. If Hovas had proceeded with due diligence concerning the renovation to the restrooms in the 500 building as well as the portions of the 100 addition that could have been done while waiting on the steel building, there would have been no delay in completing the entire project by the June 6, 2008, deadline as required by the agreement. (Vol. 2, TR 226)

In summary, there was no reason Hovas did not complete this

project on time even with the delay in receiving the steel building from Ruffin. Hovas failed to make and/or follow schedules on this project and did not proceed with due diligence to finish this project on time. (Vol. 2, TR 226-227)

These delays and defective work by Hovas caused a portion of the addition to the 100 building to not be ready when school started. During the 2008-2009 school year students had to leave the 500 building to go to other buildings on campus to use the restrooms causing disruptions of the school. Western Line was required to pay RH Plumbing, Inc. \$9,872.45 for remedial work that was necessary due to the defective work done by Hovas.

The Circuit Court found in its November 8, 2010 Findings of Fact, Conclusions of Law and Judgment (Vol. 1, TR 171-175) as follows:

. . . it was particularly important for the project to be completed on time so that the school maintenance personnel and administration could have the renovated building and new addition ready when school started. The delay caused a loss of use and/or disruption in the requisite time normally utilized by the Defendant in preparation for the start of school. The delay also caused disruptions during the school year as students were unable to use the restrooms in the renovated building. Students had to leave the building and go to other buildings to use the restroom. Consequently, it cannot be said that Defendants did not suffer actual damages. While there may now be a dispute as to the value of the damages caused by the delay, the general nature of liquidated damages clearly supports the assessment in accordance with the terms of the contract.

The court's ruling is correct. Hovas' baseless allegation that no actual damages were suffered is not supported by the facts of the case.

Hovas cites Massman Construction Company v. City Council of Greenville, Mississippi, 147 F.2d 925(5th Cir. 1945) for the proposition that Western Line suffered no actual damages. To the contrary as stated above, clearly Western did incur damages in terms of disruptions, delays and actual monetary damages. Massman also holds that parties may agree to liquidated damages and the courts will recognize and enforce such agreements for liquidated damages if they are reasonable. Id. @ 928. In determining whether a contract calls for liquidated damages or a penalty, a court's main endeavor is to ascertain the parties' intentions. The contract's purpose and provisions as a whole should be reviewed. Id. @ 927.

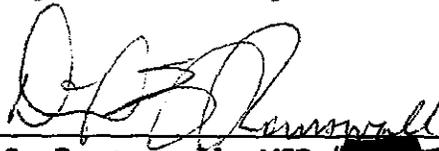
In the present case, it is clear that Western Line suffered damages. It is clear that under Mississippi law the amount of liquidated damages in this case is reasonable under the facts and circumstances. It is also clear that the parties' intentions in this case was for the provision to be a liquidated damages provision and not a penalty. The Circuit Court's ruling that Western Line suffered actual damages should be affirmed.

In Proposition III of its Brief, Hovas contends the Circuit Court erred in awarding liquidated damages to Western Line. The type damages incurred by Western Line for the delays, disruptions and breach in the present case made it difficult for the parties to determine or pre-determine, at the time of entering into the contract, damages that would result from a breach of the contract by Hovas. The parties clearly intended for Paragraph 3.3 of the

contract to be a liquidated damages provision and inserted an agreed, reasonable amount to be awarded as damages should there be a breach. The contract entered into between Western Line and Hovas is a standard form agreement used in projects similar to the one performed in this case. (Laney Affidavit Vol. 2, TR 226) The liquidated damages provision in the agreement is standard for a project this size. (Vol. 2, TR 226)

CONCLUSION

Under the facts of the present case, the parties' clear intentions were to have a liquidated damages provision. The terms of the liquidated damages provision were agreed to and are reasonable in light of the facts and circumstances of this case. The parties intentions are clear in the contract. This Court should enforce the terms of the contract and affirm the trial court's ruling that Western Line suffered damages and the liquidated damages provision is reasonable and enforceable. The Circuit Court's award of liquidated damages to Western Line should be affirmed.



David S. Rounsavall, MSB # [REDACTED]
Attorney for Defendant, Board of Trustees of
Western Line Consolidated School District

OF COUNSEL:

David S. Rounsavall, MSB [REDACTED]
ROBERTSHAW, NOBLE, EVANS & ROUNSAVALL
Post Office Drawer 1498
128 S. Poplar Street
Greenville, MS 38702-1498
Phone: (662) 378-2171
Fax: (662) 335-9049
E-Mail: david.rner@suddenlinkmail.com

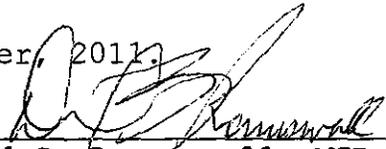
CERTIFICATE OF SERVICE

I, David S. Rounsavall, attorney of record for Appellee, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the Brief of Appellee to the following:

Nathan P. Adams, Jr., Esq.
Mansour & Adams
Post Office Box 1406
Greenville, Mississippi 38702-1406

Honorable Margaret Carey-MCray
Washington County Circuit Court Judge
Post Office Box 1775
Greenville, Mississippi 38702-1775

This, the 29th day of December, 2011.



David S. Rounsavall, MSB [REDACTED]