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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 1, 2025 Session

SH NASHVILLE, LLC ET AL. v. FWREF NASHVILLE AIRPORT, LLC

Appeal by Permission from the Court of Appeals
Chancery Court for Davidson County
No. 22-0569-BC Anne C. Martin, Chancellor

No. M2023-01147-SC-R11-CV

This case clarifies Tennessee's standard for determining whether a contractual provision setting forth an amount of damages in the case of a breach should be enforced as liquidated damages or should be unenforceable as a penalty. Purchaser sought a declaratory judgment that a damages provision in a purchase and sale agreement for an existing Hilton-branded hotel near the Nashville Airport was unenforceable. Seller responded that the plain language of the agreement established the enforceability of the provision because the parties agreed that actual damages would be difficult or impossible to ascertain and the liquidated sum was a reasonable estimate of damages. The trial court granted summary judgment in favor of Seller. The Court of Appeals reversed. We granted permission to appeal. We now clarify that when the parties to a contract expressly agree that actual damages would be difficult or impossible to ascertain and that their agreed upon liquidated sum is a reasonable estimate of damages, there is a presumption that the provision is enforceable as liquidated damages. To overcome this presumption, the party seeking to avoid enforcement of the provision must show, by a preponderance of the evidence, that the provision is actually an unenforceable penalty. Purchaser has not demonstrated any questions of fact to overcome the presumption. The judgment of the Court of Appeals is reversed, and the case is remanded to the Chancery Court for further proceedings consistent with this opinion.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed; Remanded to the Trial Court

DWIGHT E. TARWATER, J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, C.J., and HOLLY KIRBY, SARAH K. CAMPBELL, and MARY L. WAGNER, JJ., joined.

Sarah B. Miller, Britt K. Latham, and Garrah Carter-Mason, Nashville, Tennessee, for the appellant, FWREF Nashville Airport, LLC.

Donald Capparella, Michael Bressman, and Candi Henry, Nashville Tennessee, for the appellees, SH Nashville, LLC, and UNI Nashville Airport Hotel, LLC.

Emily Hamm Huseth, Michael F. Rafferty, Allison T. Gilbert, and William L. Brantley, Memphis, Tennessee, for the amici curiae, Belz Investco GP, Boyle Investment Company, LPI Memphis, Inc., Mid-America Apartment Communities, Inc., and Fogelman Properties, LLC.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

In October of 2019, FWREF Nashville Airport, LLC ("Seller") entered into a purchase and sale agreement (the "Agreement") with UNI Nashville Airport Hotel, LLC ("UNI" or "Purchaser") for an existing Hilton-branded hotel near the Nashville airport.[1] The Agreement set forth a purchase price of $79,000,000; an earnest money deposit of $1,750,000; and a closing date of January 3, 2020. The Agreement included a provision that stipulated, in relevant part, that

> [d]ue to the fluctuation in land values, the unpredictable state of the economy and of governmental regulations, the fluctuating money market for real estate loans of all types, and other factors which directly affect the value and marketability of the Property, the parties recognize that it would be extremely difficult and impracticable, if not impossible, to ascertain with any degree of certainty the amount of damages which would be suffered by Seller in the event of Purchaser's failure to perform its obligation to purchase the Property under this Agreement. Accordingly, the parties agree that a reasonable estimate of Seller's damages in such event is the amount of Earnest Money, and if Purchaser defaults in any material respect in performing the obligation to purchase the Property under this Agreement to close . . . then Seller, as its sole remedy[2] therefor[e] . . . shall be entitled to immediately terminate this Agreement . . . and receive and retain the Earnest Money as liquidated damages[.]

[1] Because UNI later assigned its interest to SH Nashville, LLC ("SH Nashville") we refer to UNI and SH Nashville collectively and interchangeably as "Purchaser."

[2] The Agreement additionally provided in Section 6.3 that "[i]f any litigation or other enforcement proceeding is commenced in connection with this Agreement, then the prevailing party shall be entitled to receive payment of its reasonable attorneys' fees and expenses and court costs from the other party (and in addition to any liquidated damages under Section 6.1)."

The next month, the parties executed the first of twenty-four amendments to the Agreement. Each of the amendments stated the amount of an additional earnest money deposit or deposits, set out that the earnest money was deemed earned by Seller and non-refundable to Purchaser, provided for either an extension of the closing date or extension of earnest money payment deadlines, and included a ratification provision.[3] Amendment 2 increased the purchase price to $79,750,000; and Amendment 3 further increased the purchase price to $82,125,000. Beginning with Amendment 7, Purchaser agreed that no further extensions for the delivery date of the earnest money or of the closing date would be granted "for any reason (including without limitation as a result of any factor relating to the current COVID-19 pandemic or related circumstance, it being understood that time is of the essence) and any further requests for extensions . . . shall result in immediate forfeiture of the Earnest Money to Seller." Beginning with Amendment 14, executed on August 12, 2020, Howard Wu and Taylor Woods[4] agreed "to join in as parties to the [Agreement] for the purposes of agreeing to the terms of Section 2.2(e)[5] of the [Agreement]." In Amendment 23, UNI assigned the Agreement to SH Nashville, but UNI, Wu, and Woods were still to "remain fully liable for all obligations of Purchaser under the [Agreement]."[6] Across the twenty-four amendments, Purchaser deposited a total of $18,917,500 in earnest money.

On October 21, 2020, Purchaser learned that a new, Hilton-branded, on-airport hotel was scheduled to open in late 2023. According to Purchaser, this announcement was a surprise and led to concerns about the impact of the on-airport hotel on the ability to have a profitable Hilton hotel nearby. Still, the parties executed two additional amendments to the Agreement, including the final amendment on December 23, 2020. Purchaser was unable to close by the agreed upon date of January 11, 2021. Seller then notified Purchaser that the Agreement was automatically terminated. In May and June 2021, Purchaser sent letters to Seller indicating that Purchaser had acquired a replacement lender and asking Seller to either refund the earnest money or proceed with the sale.

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[3] Beginning with Amendment 7, the ratification provision was titled "Ratification and No Other Changes."

[4] Howard Wu and Taylor Woods are members of SH Nashville, LLC and UNI Nashville Airport Hotel, LLC.

[5] Section 2.2(e) provided that "Seller and Purchaser acknowledge and agree that if Purchaser does not terminate this Agreement as set forth in Section[] 1.3(g), the Earnest Money will be deemed earned by Seller and non-refundable to Purchaser for any reason except as otherwise specifically set forth in this Agreement."

[6] The assignment was again acknowledged in Amendment 24.

Purchaser filed suit on April 22, 2022, seeking a declaratory judgment that Seller's retention of the earnest money was an unenforceable penalty.[7] Shortly after the initial complaint was filed, the suit was transferred to the "Davidson County Business Court Pilot Project."[8] After Purchaser filed its Second Amended Complaint, Seller counter-claimed for breach of contract and attorneys' fees. As litigation proceeded, Purchaser sought discovery "related to those circumstances including, but not limited to, what [Seller's] knowledge was of this new . . . on-airport hotel development during the process of [the] contract negotiations at issue" and "the circumstances surrounding the formation of the Agreement and amendments thereto." Seller opposed, arguing that the four corners of the Agreement and amendments were sufficient to decide whether the provision at issue was intended as an unenforceable penalty. The trial court found a stay of discovery appropriate. Seller then moved for summary judgment on Purchaser's remaining declaratory judgment claim and Seller's counterclaims for breach of contract and award of attorneys' fees.

The trial court granted Seller's motion, finding no issues of material fact relating to the enforceability of the damages provision. It reasoned that "enforcement of this provision is appropriate because it was a reasonable prediction of the actual damages Seller would suffer if Purchaser[] breached the contract and does not violate public policy." Accordingly, it dismissed Purchaser's declaratory judgment claim and awarded Seller a judgment against Purchaser for breach of contract and attorneys' fees.

The Court of Appeals reversed the grant of summary judgment. The panel determined that Seller had presented no evidence "upon which the trial court could base a determination as to whether the amount of liquidated damages 'was a reasonable estimate of potential damages.'" *SH Nash.*, 2024 WL 3880089, at *14 (quoting *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 100 (Tenn. 1999)). It reasoned that "[t]he language of the contracts stating that the parties agreed that the liquidated damages amounts were a reasonable estimate [was] not sufficient." *Id.* We granted permission to appeal.

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[7] Purchaser also brought a claim for conversion. The trial court granted Seller's motion to dismiss the conversion claim based upon the economic loss doctrine. The Court of Appeals reversed the dismissal of this claim. *SH Nash., LLC v. FWREF Nash. Airport, LLC*, No. M2023-01147-COA-R3-CV, 2024 WL 3880089, at *5, *15 (Tenn. Ct. App. Aug. 20, 2024), *perm. app. granted* No. M2023-01147-SC-R11-CV, 2025 WL 668823, at *1 (Tenn. Feb. 26, 2025). Seller now concedes that the economic loss doctrine does not bar the conversion claim but maintains that the enforceability of the liquidated damages provision is dispositive. We agree that the enforceability of the liquidated damages provision is dispositive.

[8] The Business Court Docket Pilot Project entered into Phase 2 by order of this Court on April 4, 2017. Order Establishing the Davidson County Business Court Docket Pilot Project – Phase 2, ADM2017-00638 (Tenn. Apr. 4, 2017). We explained that the specialized docket "provide[s] expedited resolution of business matters by a judge who is experienced and has expertise in handling complex business and commercial disputes, and who will continue to provide proactive, hands-on case management with realistic, meaningful deadlines and procedures adapted to the needs of each case for customized, quality outcomes." *Id.*

II. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary judgment de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Thus, we must make a "fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.* (citing *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013)). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Likewise, interpretation of a contract is a question of law subject to de novo review. *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 465 (Tenn. 2012).

III. ANALYSIS

The question before us is whether the provision at issue is an enforceable liquidated damages provision or an unenforceable penalty. Seller argues that the provision is an enforceable liquidated damages provision because (1) the parties agreed that actual damages were difficult to measure at the time the parties entered into the contract and the liquidated sum was a reasonable estimate of damages; and (2) Purchaser has not presented evidence that would create a genuine issue of material fact that the provision was intended as a penalty. Purchaser's position is that the language of the provision alone is insufficient to establish its enforceability and the burden should be on Seller to show the number was a reasonable estimate.

We hold that where parties agree that actual damages are indeterminable or difficult to ascertain and further agree that a liquidated sum is a reasonable estimate of damages, their agreement creates a presumption that the provision is enforceable. To overcome this presumption, the party seeking to avoid enforcement of the provision must show, by a preponderance of the evidence, that the provision is actually a penalty.

This standard does not alter the parties' burdens at the summary judgment stage. As we explained in *Rye*,

> when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. . . . [T]he nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and . . . "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." . . . The

> nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.

477 S.W.3d at 264–65 (quoting Tenn. R. Civ. P. 56.06) (second alteration in original). "[S]ummary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial." *Id.* at 265 (citing Tenn. R. Civ. P. 56.04, 56.06). Applied here, that standard requires Purchaser, the non-moving party, to show that there is a genuine issue for trial, i.e., that there are facts in the record which could lead a rational trier of fact to find in favor of Purchaser.

A. The Presumption of Enforceability and the Burden of Proof

The presumption of enforceability prioritizes two important principles: "the intentions of the parties and . . . the freedom to contract." *Guiliano*, 995 S.W.2d at 100. As to the former, we reaffirm our precedent that the intentions of the parties are best understood through their written words. *Pharma Conf. Educ., Inc. v. State*, 703 S.W.3d 305, 316 (Tenn. 2024) ("[T]he 'written words' of the contract should remain 'the lodestar of contract interpretation.'" (quoting *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 694 (Tenn. 2019))). We have previously explained that "[t]he central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. The intent of the parties is presumed to be that specifically expressed in the body of the contract." *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002) (citation omitted). As to the latter, we reiterate our high view of the freedom of contract as articulated in *Guiliano*:

> [P]arties to a contract are free to agree upon liquidated damages and upon other terms that may not seem desirable or pleasant to outside observers. In that respect, courts should not interfere in the contract[] but should carry out the intentions of the parties and the terms bargained for in the contract, unless those terms violate public policy.

995 S.W.2d at 100 (citation omitted). The presumption of enforceability upholds these longstanding principles of Tennessee law by first looking to the words originally agreed to by the parties and presuming, unless shown otherwise, that the parties meant what they said.

It bears mentioning that, when interpreting contractual provisions that claim to provide for liquidated damages, we employ the prospective approach. We explained this approach in *Guiliano*:

> Under [the prospective] approach, courts must focus on the intentions of the parties based upon the language of the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages. However, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

Id. at 100–01 (footnote and citation omitted).

The prospective approach has long been the standard. *See Tenn. Homes v. Welch*, 664 S.W.3d 1, 12–13 (Tenn. Ct. App. 2022). Our state courts and federal courts applying Tennessee law have consistently applied this approach to alleged liquidated damages provisions in various contexts and procedural postures. *See, e.g.*, *Kendrick v. Alexander*, 844 S.W.2d 187, 188, 191 (Tenn. Ct. App. 1992) (agreement for the sale of real property); *United States v. Ponnapula*, 246 F.3d 576, 584 (6th Cir. 2001) (real estate contract); *Unifirst Corp. v. Lane*, No. M2000-00357-COA-R3-CV, 2001 WL 8791, at *1, *4 (Tenn. Ct. App. Jan. 4, 2001) (uniform rental contract); *Eatherly Constr. Co. v. HTI Mem'l Hosp.*, No. M2003-02313-COA-R3-CV, 2005 WL 2217078, at *6, *8 (Tenn. Ct. App. Sept. 12, 2005) (construction contract); *Anesthesia Med. Grp., P.C. v. Buras*, No. M2004-01599-COA-R3-CV, 2006 WL 2737829, at *1, *6 (Tenn. Ct. App. Sept. 25, 2006) (student loan and employment agreement); *Anesthesia Med Grp., P.C. v. Chandler*, No. M2005-00034-COA-R3-CV, 2007 WL 412323, at *1, *7 (Tenn. Ct. App. Feb. 6, 2007) (same); *Bachour v. Mason*, No. M2012-00092-COA-R3-CV, 2013 WL 2395027, at *1, *4–5 (Tenn. Ct. App. May 30, 2013) (real-estate contract); *Shoney's N. Am., LLC v. Smith & Thaxton, Inc.*, No. 3:12-cv-00625, 2014 WL 7369987, at *1, *13 (M.D. Tenn. Dec. 29, 2014) (licensing agreements). The prospective approach keeps our focus on what the parties understood at the time they made their agreement: actual damages would be difficult or impossible to ascertain and the agreed upon liquidated sum is a reasonable estimate of actual damages.

To this point, it has remained unclear which party bears the burden of showing a provision is enforceable as liquidated damages or, in the alternative, is an unenforceable penalty. *See, e.g.*, *Eatherly Constr. Co.*, 2005 WL 2217078, at *9 (placing the burden on the party seeking to enforce the provision); *Unifirst Corp.*, 2001 WL 8791, at *4 (placing the burden on the party seeking to avoid enforcement of the provision); *Kendrick*, 844 S.W.2d at 191 (leaving unclear which party bore the burden); *Ponnapula*, 246 F.3d at 584 (same); *Buras*, 2006 WL 2737829, at *7–8 (same); *Chandler*, 2007 WL 412323, at *12

(same); *Shoney's N. Am., LLC*, 2014 WL 7369987, at *15 (same). We clarify today that the burden of showing a provision is an unenforceable penalty lies with the party seeking to avoid enforcement of the provision.

Placing the burden on this party, like the adoption of the presumption of enforceability, is consistent with upholding the intentions of the parties and the freedom to contract. When we rejected the retrospective approach in *Guiliano*, we explained that it

> undermines the certainty and other benefits afforded by liquidated damages. Under that approach, the parties are allowed to fully litigate actual damages following a breach of contract. If the nonbreaching party fails to prove actual damages, then he or she is barred from recovering the liquidated sum originally agreed upon in the contract. We find that it is unfair to require the nonbreaching party to prove actual damages in cases where the parties agreed in advance to a liquidated damages provision. Such a requirement ignores the original intentions of the parties and defeats the purposes of stipulating in advance to potential damages.

995 S.W.2d at 100. Just as a requirement for the nonbreaching party to prove actual damages is unfair where the parties agreed in advance to a liquidated damages provision, so would it be unfair to require the nonbreaching party to show the provision was not a penalty when the parties agreed that the sum was a reasonable estimate.

Other jurisdictions likewise place the burden on the party seeking to avoid enforcement of the provision. *See, e.g.*, *Rohauer v. Little*, 736 P.2d 403, 410 (Colo. 1987); *Schroeder v. Partin*, 259 P.3d 617, 622 (Idaho 2011); *Pav-Saver Corp. v. Vasso Corp.*, 493 N.E.2d 423, 427 (Ill. App. Ct. 1986); *Proulx v. 1400 Penn. Ave., SE, LLC*, 199 A.3d 667, 673 (D.C. 2019); *Carrothers Const. Co., L.L.C. v. City of S. Hutchinson*, 207 P.3d 231, 241 (Kan. 2009); *Cummings Props., LLC v. Hines*, 217 N.E.3d 604, 608 (Mass. 2023); *Loomis v. Lange Fin. Corp.*, 865 P.2d 1161, 1164 (Nev. 1993); *Orr v. Goodwin*, 953 A.2d 1190, 1195 (N.H. 2008); *Heikkila v. Carver*, 378 N.W.2d 214, 216 (S.D. 1985); *Atrium Med. Ctr., LP v. Houston Red C LLC*, 595 S.W.3d 188, 192–93 196 (Tex. 2020); *Boots, Inc. v. Prempal Singh*, 649 S.E.2d 695, 697 (Va. 2007). *But see Pacheco v. Scoblionko*, 532 A.2d 1036, 1038–39 (Me. 1987) (placing the burden on the party seeking enforcement); *Coldwell Banker-First Realty, Inc. v. Meide & Son, Inc.*, 422 N.W.2d 375, 377 (N.D. 1988) (explaining that the burden is on the party seeking to enforce liquidated damages to show it is valid as an exception to the general prohibition against such provisions under North Dakota statute).

In order to overcome the presumption of enforceability, the party seeking to avoid enforcement of the provision must show, by a preponderance of the evidence, that the provision is an unenforceable penalty. "[A] penalty is 'a sum inserted in a contract, not as

the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and it involves the idea of punishment.'" *Guiliano*, 995 S.W.2d at 98 n.9 (quoting 22 Am. Jur. 2d *Damages* § 684 (1988)); *see also Penalty*, Black's Law Dictionary (12th ed. 2024) ("Excessive stipulated damages that a contract purports to impose on a party that breaches.").

To show an unenforceable penalty, the party seeking to avoid enforcement of the damages provision might offer, for example, affidavits and declarations, testimony of witnesses, admissions of a party opponent, internal documents, or expert testimony, all of which might go to show that the clause was meant to punish, not compensate, i.e., that the actual damages were really *not* indeterminable or difficult to measure at the time the parties entered into the contract or that the liquidated sum was actually *not* a reasonable estimate of potential damages. *Guiliano*, 995 S.W.2d at 98 n.9, 100–01; *see, e.g.*, *Eatherly Constr. Co.*, 2005 WL 2217078, at *6, *9 (concluding that liquidated damages provision imposing a $500 payment per each day the construction project was late was a penalty); *Bachour*, 2013 WL 2395027, at *5 (finding that forfeiture provision based on failure to complete project by a certain date was an unenforceable penalty). In accordance with the preponderance of the evidence standard, a party's evidence must show it is "more probable than not" that the provision is actually an unenforceable penalty. *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005) ("Generally, in civil cases, facts are proved by a mere preponderance of the evidence." (first citing *Endowment Rank of Order of K.P. v. Steele*, 63 S.W. 1126, 1128 (Tenn. 1901); and then citing *Burchett v. Stephens*, 794 S.W.2d 745, 748 (Tenn. Ct. App. 1990))).

We caution that the inquiry regarding whether a damages provision is an unenforceable penalty should be objective rather than subjective. That is, the focus should be on whether the provision was in fact a penalty given the objective circumstances that existed at the time the contract was entered, not on whether the parties subjectively believed the provision to be a penalty. *Cf. Pharma Conf. Educ.*, 703 S.W.3d at 317 (explaining that "[e]vidence concerning a party's subjective understanding of a contract's terms—untethered from industry practice, the parties' course of dealing, or other potentially relevant context—is irrelevant to" determining the contract's meaning).

In summary, we hold that once enforceability is presumed from the terms of the contract, the burden rests with the party seeking to avoid enforcement to show by a preponderance of the evidence that the provision is actually a penalty.

B. Application

1. The Presumption

We turn to the language of the provision at issue to first determine whether the contractual language gives rise to a presumption that the language of Section 6.1 is enforceable as liquidated damages. The provision states, in relevant part, that

> [d]ue to the fluctuation in land values, the unpredictable state of the economy and of governmental regulations, the fluctuating money market for real estate loans of all types, and other factors which directly affect the value and marketability of the Property, the parties recognize that it would be extremely difficult and impracticable, if not impossible, to ascertain with any degree of certainty the amount of damages which would be suffered by Seller in the event of Purchaser's failure to perform its obligation to purchase the Property under this Agreement. Accordingly, the parties agree that a reasonable estimate of Seller's damages in such event is the amount of Earnest Money[.]

The parties acknowledged in this provision that due to factors out of their control, there would be significant difficulty in determining the amount of actual damages in the event of a breach. Thus, they agreed on an amount both perceived as a reasonable estimate of damages. This language, in and of itself, is agreement enough to raise the presumption. But in this case these sophisticated parties reaffirmed this acknowledgement by ratification provisions when each of the twenty-four amendments was adopted. Plainly said, they agreed on an amount of liquidated damages twenty-four more times. Accordingly, this provision is presumed to be an enforceable liquidated damages provision.

To be clear, a requirement of a metric or other explanation as to how the parties arrived at the amount of liquidated damages is unnecessary to raise the presumption of enforceability. Although penalties are against public policy, parties are free to stipulate as to damages. Parties need not provide a metric for their calculation for a court to find that the contract evinces a stipulation as to damages rather than a penalty. To require parties to provide a metric would be particularly illogical in situations where the reason for stipulating as to damages is that there is no reliable way to estimate damages. In real estate transactions, for example, there may be no way to know "what price (if any) [a seller] would get for the property if the initial sale fell through." *Ponnapula*, 246 F.3d at 584.

2. Overcoming the Presumption

The presumption having been raised, the burden is now on Purchaser to demonstrate a question of fact as to whether the provision is actually a penalty. For example, Purchaser could show that the land values were not fluctuating, that the state of the economy was not

unpredictable, that the money market for real estate loans was not fluctuating, or that it was not difficult to ascertain Seller's damages.

Purchaser argues that because the agreement and its amendments "should be read together and construed as a whole with reference to each other," *Equitable Real Estate Inv. Mgt., Inc. v. Davinco, Inc.*, 1986 WL 1656, at *7 n.6 (Tenn. Ct. App. Feb. 5, 1986), the trial court erred when it "appeared to treat the [Agreement] and its amendments as separate contracts." Put simply, Purchaser urges us to look at the earnest money sum in the aggregate and find the aggregated sum is unreasonable on its face.

Purchaser's argument is thoughtful but not persuasive. First, we do not find that the trial court erred in not considering the amounts in the aggregate. The prospective approach requires us to evaluate the parties' intentions at the time they agreed to each additional earnest money deposit. Though *Guiliano* states that the relevant inquiry concerns "the time the parties entered into the contract," 995 S.W.2d at 100–01, the true aim of this approach is to evaluate the circumstances at the time the parties agreed to the amount of damages. *See id.* at 100 ("When parties agree to a liquidated damages provision, it is generally presumed that they considered the certainty of liquidated damages to be preferable to the risk of proving actual damages in the event of a breach."). Applied in this summary judgment context, Purchaser would need to demonstrate a genuine issue of fact that at least one of the stated reasons given for the parties' damages agreement—fluctuating land values, an unpredictable economy, a fluctuating money market for real estate loans or difficulty ascertaining Seller's damages—was not true at the time of the extension. Instead, the parties continually agreed through ratification provisions that each of the additional deposits were a reasonable estimate of Seller's damages.

A total of twenty-four amendments were signed over a fifteen-month period. With each amendment, the parties ratified Section 8.14, which provided that "[f]ollowing the mutual execution of this Agreement, Seller agrees not to solicit, discuss, accept, grant or otherwise communicate in any way with any other party a right to purchase the Property or any portion thereof." When Seller agreed to each extension it lost the ability to seek out other purchasers. And in return, Purchaser received consideration in the form of exclusivity. Additionally, in Section 8.9 the parties explained why time was of the essence, "it being acknowledged and agreed by and between the parties that any delay in effecting a closing pursuant to this Agreement may result in loss or damage to the party in full compliance with its obligations hereunder." Seller had no way of estimating what potential purchase price it might secure for the property in the case of a breach by Purchaser, or even if it would be able to sell the property at all. *See Ponnapula*, 246 F.3d at 584.

Second, even if we did consider the amounts in the aggregate there is no question of fact as to reasonableness in this matter. In total, Purchaser deposited $18,917,500 in earnest money, or approximately 23% of the hotel purchase price, in accordance with the

terms of the Agreement and its numerous amendments. No doubt, courts have found amounts lower than 23% to be unreasonable. *See, e.g.*, *Kimbrough & Co. v. Schmidt*, 939 S.W.2d 105, 109 (Tenn. Ct. App. 1996) (finding "15% of the purchase price, reduced by 1% each year that payments are satisfactorily made, is not a reasonable forecast of damages likely to occur in the event of a default by the buyer. If [the buyer] missed even the first payment, he would suffer the unconscionable consequences of both forfeiting the property and having to pay 15% of the entire purchase price"), *overruled in part by Guiliano*, 995 S.W.2d at 99–100; *Patterson v. Anderson Motor Co.*, 319 S.W.2d 492, 493, 501 (Tenn. Ct. App. 1958) (finding that $2,000 deposited as earnest money for a total $20,000 purchase price was an unenforceable forfeiture in the absence of proof it was a reasonable estimate of damages); *Am. Senior Dev. L.L.C. v. Parkside of Collierville, L.L.C.*, 102 F. App'x 890, 896–97 (6th Cir. 2004) (finding that developer who sought full development fee as compensation despite terminated contract to be "not only highly inequitable[] but . . . also essentially transform[ed] the 6% [development] fee into a liquidated damages provision disfavored under Tennessee law" (citing *Guiliano*, 995 S.W.2d at 98)). But the facts of these cases are completely different. Neither *Kimbrough* nor *Patterson* nor *American Senior Development* involved the kind of incremental increases to the stipulated sum based on contract extensions like those present here. Rather, they involved a one-time earnest money deposit that was deemed unconscionable, unreasonable, or inequitable and found to be a penalty. *Kimbrough*, 939 S.W.2d at 109; *Patterson*, 319 S.W.2d at 501; *Am. Senior Dev., LLC*, 102 F. App'x at 896–97. Here, as the timeframe for closing incrementally increased, so did the potential for damages. Thus, that the sum purported to reasonably represent those damages *also* incrementally increased does not by itself suffice as a per se rebuttal of the presumption of enforceability. There are no questions of fact to suggest that any of the incremental agreed upon sums were not a reasonable estimate of Seller's damages for each agreed extension.

We also note that the relevant clause in these cases did not explain any circumstances that made the damages "difficult to ascertain." *See Kimbrough,* 939 S.W.2d at 107; *Patterson*. 319 S.W.2d at 494; *Am. Senior Dev., LLC*, 102 F. App'x at 893 (acknowledging merely that "time [was] of the essence"). In contrast, the provision at issue explicitly listed the circumstances that led to the parties agreeing to the fixed sum: "the fluctuation in land values, the unpredictable state of the economy and of governmental regulations, the fluctuating money market for real estate loans of all types, and other factors which directly affect the value and marketability of the Property."

Accordingly, Purchaser has not created a genuine issue of fact that the aggregated amount constitutes a penalty.

3. Discovery

Purchaser makes two final arguments in support of reversal related to the trial court's denial of discovery before ruling on Seller's motion for summary judgment. First, Purchaser contends that the trial court abused its discretion in not allowing discovery "about the circumstances of the formation of the [Agreement] and the twenty-four amendments leading to such a dramatic increase in the amount of liquidated damages." Second, Purchaser contends that it abused its discretion in denying "any discovery into whether Seller had advance knowledge regarding the New On-Airport Hotel," because such discovery would support its economic duress defense. We address each in turn.

We review a trial court's ruling on discovery matters for an abuse of discretion. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Id.* Thus, a reviewing court must determine "(1) whether the factual basis for the decision is properly supported by the evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Id.*

First, Purchaser seeks discovery "about the circumstances of the formation of the [Agreement] and the twenty-four amendments leading to such a dramatic increase in the amount of liquidated damages." But these circumstances are clear from the record. As we have explained, the parties agreed that various factors out of the control of either party, fluctuating land values, an unpredictable economy and governmental regulations, and a fluctuating money market for real estate loans, "directly affect the value and marketability of the Property." Purchaser has not identified any shift in these circumstances over the fifteen-month period, and, indeed, the parties' continual ratification of these circumstances indicates no shift. Even as the parties' recognized the effect of the COVID-19 pandemic on the real estate market, they agreed that they would continue to pursue closing the sale. Any discovery into the formation of the Agreement is unlikely to lead to any relevant information on the penalty issue.

We also acknowledge that the parties requested their case be transferred to the Business Court Docket. By order of this Court, the Business Court was given "broad discretion . . . to develop case management procedures to allow for more efficient handling of cases and produce quicker resolutions with reduced litigation." Order Establishing the Davidson County Business Court Docket Pilot Project – Phase 2, ADM2017-00638 (Tenn. Apr. 4, 2017). The trial court recognized these interests in the order staying discovery: "The Court finds that [staying discovery] serves goals of judicial economy inherent in the Business Court Pilot Project." We agree. While discovery may often be helpful at the

summary judgment stage, we cannot say that the trial court abused its discretion in denying discovery in this case.

Second, Purchaser contends that the trial court abused its discretion in not allowing discovery relevant to its argument that the last two of the twenty-four amendments were signed under economic duress. Economic duress is the

> imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another; the theory under which relief is granted being that the party profiting thereby has received money, property or other advantage, which in equity and good conscience he ought not to be permitted to retain.

Johnson v. Ford, 245 S.W. 531, 539 (Tenn. 1922) (quoting Ann. Cas. 1918 B 516 (William M. McKinney & H. Noyes Green eds., 1918)).[9]

Paragraphs 22 through 24 of the complaint allege that Purchaser signed amendments 23 and 24 under economic duress. Paragraph 22 provides that "[h]aving already submitted almost $18 million in earnest money, Purchaser was compelled under severe economic duress to enter into further amendments to the Purchase Agreement, to provide additional substantial earnest money deposits, and to provide certain personal guaranties." Purchaser also introduced the Declaration of Mr. Wu stating that Purchaser "felt [it] had no realistic choice but to sign [the] extensions under economic duress."

Having only this declaration to support its economic duress claim, Purchaser seeks discovery of "whether Seller had advance knowledge regarding the New On-Airport Hotel plans." Purchaser contends that any failure to disclose by Seller would have "caused Purchaser[] such severe economic duress that they had to agree to amend the [Agreement] at great cost." But whether or not Seller had advance knowledge of the "New On-Airport Hotel" would shine no light on the theories of economic duress put forth by Purchaser. Even if the discovery sought had been allowed and Purchaser had obtained evidence that Seller knew about the "New On-Airport Hotel" before the announcement was made, that evidence would not create a material issue of fact regarding Purchaser's economic duress defense. Therefore, we find that the trial court did not abuse its discretion in denying this discovery.

[9] Though used to define "duress of property" in *Johnson*, there is no substantive difference between the terms. *See* 21 Tenn. Practice Series: Contract Law and Practice § 6.6. (Oct. 2025 Update).

CONCLUSION

For the above reasons, we find no issue of material fact. The presumption that the provision is enforceable as liquidated damages has not been overcome. Therefore, we uphold the grant of summary judgment in favor of Seller. As a result, we also uphold the dismissal of the conversion claim.[10]

We reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

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DWIGHT E. TARWATER, JUSTICE

[10] We do not address Seller's alternative argument that Purchaser was precluded from objecting to the purported liquidated damages provision because it released or waived all claims against Seller because such argument is pretermitted.