

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-1065-FT
STATE OF WISCONSIN**

Cir. Ct. No. 02-CV-000329

**IN COURT OF APPEALS
DISTRICT IV**

STANSFIELD VENDING, INC.,

PLAINTIFF-RESPONDENT,

V.

OSSEO TRUCK TRAVEL PLAZA, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
DALE T. PASELL, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Osseo Truck Travel Plaza, LLC, (Osseo) appeals the circuit court's judgment in favor of Stansfield Vending, Inc. The issue is whether a stipulated damage clause in the agreement between the parties is

enforceable. Pursuant to WIS. STAT. RULE 809.17 (2001-02),¹ we placed this case on the expedited appeals calendar. We affirm.

¶2 Osseo and Stansfield Vending entered into an agreement allowing Stansfield Vending to place video machines on Osseo's premises in return for a share of the income from the machines. A stipulated damage clause in the "memorandum of agreement" provided:

If [the] Proprietor shall breach any provision of this agreement, the Operator shall be entitled to recover as damages, all of the revenues which it would otherwise have earned during the term remaining as of the breach of this agreement. The Operator's expenses are fixed and its damages shall not be reduced by its expenses, or any part thereof, or by any amounts that it may earn from other Proprietors. In calculating the loss of revenues, it shall be assumed that the average weekly revenues earned by the Operator prior to the breach would have continued during the remaining term of the Agreement.

¶3 Osseo argues that the stipulated damages clause is not enforceable. A stipulated damages clause is enforceable if it is reasonable. See *Wassenaar v. Panos*, 111 Wis. 2d 518, 526, 331 N.W.2d 357 (1983). To determine reasonableness, a court must consider: (1) whether the parties intended to provide for damages or for a penalty; (2) whether the injury caused by the breach would be difficult or incapable of accurate estimation at the time of entering into the contract; and (3) whether the stipulated damages are a reasonable forecast of the harm caused by the breach. *Id.* at 529-30. A stipulated damages clause may include consequential damages and damages that would not usually be awarded for breach of contract. *Koenings v. Joseph Schlitz Brewing Co.*, 126 Wis. 2d 349,

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

365, 377 N.W.2d 593 (1985). Whether a stipulated damages clause is reasonable presents a mixed question of fact and law. *Wassenaar*, 111 Wis. 2d at 524-25. Where, as here, the facts are undisputed, “only legal issues remain and our review is *de novo*.” *Kernz v. J.L. French Corp.*, No. 02-1292, ¶29 (Wis. Ct. App. June 12, 2003, ordered published July 30, 2003).²

¶4 We conclude that the stipulated damages clause is reasonable. The injury that would be caused by any breach was difficult to ascertain at the time the contract was entered because neither party knew how much income the machines would generate at the location in question. Due to the difficulty in determining the exact amount of income the machines would produce, the stipulated damages clause provides a formula for determining damages based on the revenues generated by the machines prior to any breach. Since the formula is based on the actual income of the machines at the truck stop, it is a reasonable forecast of the harm caused by a breach of the contract. Given the circumstances of the parties’ arrangement, we conclude the stipulated damages clause is reasonable.

¶5 Osseo argues that the clause is unreasonable because it overestimates the likely damages to Stansfield Vending by failing to take into account Stansfield’s ability to mitigate damages. Osseo contends that Stansfield Vending was able to place the machines in other locations after the machines were removed from its premises, thus mitigating the income lost. We reject this argument because the undisputed facts show that Stansfield Vending had more machines than places in which to put them, and rotated the machines as necessary. When

² The trial court granted Stansfield’s motion for summary judgment. Osseo does not argue that disputed issues of material fact preclude summary judgment.

Stansfield lost its location in the Osseo Truck Travel Plaza, it lost one of the streams of income it would have otherwise had. Osseo also argues that the “memorandum of agreement” is a leasing agreement for the machines and that damages should therefore be calculated according to the Uniform Commercial Code provisions regarding leases, WIS. STAT. ch. 411. Like the circuit court, we do not read the agreement as a lease of specific machines, but as a contract giving Stansfield Vending the right to this location to earn money from its machines for the period in question.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

