

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO

**IN THE COURT OF CLAIMS OF OHIO**

2014 NOV 13 PM 3: 28

**TRANSAMERICA BUILDING COMPANY,  
INC.,**

**Plaintiff,**

v.

**OHIO SCHOOL FACILITIES  
COMMISSION,  
nka Ohio Facilities Construction Commission,**

**Defendant.**

Case No. 2013-00349

Judge McGrath

Referee Wampler

**TRANSAMERICA’S RESPONSE TO DEFENDANT’S OBJECTIONS TO THE  
REFEREE’S RECOMMENDATION OF NOVEMBER 4, 2014**

TransAmerica hereby replies to Defendant OSFC’s Objections to Referee’s Recommendation, dated November 4, 2014, wherein the OSFC objected to the Referee’s Decision to deny the OSFC’s Motion in Limine. Because the Referee’s Decision was consistent with the law and was equitable in this case, the OSFC’s objections should be overruled.

**I. Relevant Facts**

On October 14, 2014, the OSFC filed a Motion in Limine to preclude TransAmerica from presenting additional expert witness testimony regarding schedule analysis at trial. (OSFC’s Motion in Limine, pg. 1) The OSFC objected because in the OSFC’s opinion, the supplemental expert report and accompanying schedule analysis was “nine months late.” *Id.* Alternatively, the OSFC argued that TransAmerica should be ordered to pay any cost the OSFC incurs in responding to TransAmerica’s supplemental expert report and accompanying schedule analysis. *Id.*

At the request of the Referee, counsel for both parties held a teleconference with the Referee on the morning of October 21, 2014. During that teleconference, the Referee made it

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clear that he preferred to let both parties “try their case,” using all evidence reasonably available to both parties. TransAmerica argued against the OSFC’s Motion in Limine. Three days after the teleconference, TransAmerica provided Don McCarthy’s Supplemental Report to the OSFC on the morning of October 24, 2014—a full forty-five (45) days before the scheduled trial date of December 8, 2014.

On Monday, October 27, 2014, the Court issued an Order denying the OSFC’s Motion in Limine. The order also provided four key instructions. It allowed TransAmerica to use the McCarthy Supplemental Report, it required TransAmerica to make its expert witness available to the OSFC for deposition if necessary, and it ordered TransAmerica to pay the costs associated with that deposition. The Order also gave the OSFC three weeks to prepare a response to McCarthy’s supplemental report (if one was needed) from its own expert, to be submitted no later than November 17, 2014.

On October 28, 2014, the OSFC moved to continue the trial to a later date, asserting that it “has no choice but to ask for a continuance of the trial date if Plaintiff insists on going forward and introducing evidence from this nine month late expert report.” *See* Motion for Continuance pg. 1. TransAmerica opposed that motion through its response filed on October 31, 2014.

In the most recent development of this case, on November 7, 2014, counsel for both parties participated in another teleconference with the Referee to address the OSFC’s motion for an extension of time. Over TransAmerica’s objection, the Referee granted the OSFC’s motion and extended the trial to May 18, 2015. This is the second delay in the trial, originally scheduled to begin on August 4, 2014. The Referee also extended the period in which the OSFC has to respond to McCarthy’s supplemental report into January of 2015.

## II. TransAmerica's Response to OSFC's Objections

To the extent the OSFC's objections are not rendered moot by the Referee's decision to extend the trial date, TransAmerica hereby responds to the OSFC's objections. TransAmerica takes issue with the OSFC's assertion that the McCarthy Supplemental Report is "nine months late" when the report does not introduce a new theory about the case and does not change the methodology as to how the damages were calculated. Instead, the McCarthy Supplemental Report identifies additional scheduling and management flaws by Lend Lease, which were discussed at length during the parties' mediation session in July, 2014.

As such, the OSFC's objections to the Referee's decision to deny the OSFC's Motion in Limine should be overruled. As the Referee correctly recognized, TransAmerica has simply supplemented its previous expert report. TransAmerica is allowed to do so under the Court of Claims local rules at least thirty days before trial as a matter of right. Further, TransAmerica's supplemental expert report does not create any "unfair surprise disproportionate to its probative value." Indeed, TransAmerica's supplemental report results in a **reduction** in TransAmerica's claim against the OSFC, was submitted over five weeks (forty-five days) before the December 8, 2014 trial date, and is of substantial probative value to TransAmerica's case. Finally, the OSFC's argument that TransAmerica should not be allowed to supplement its expert report after the January 2014 discovery deadline is inconsistent with the OSFC's own conduct. In fact, the OSFC introduced a new expert report related to allegations of defective roof work on July 3, 2014—months after Court's expert report submission dates that the OSFC now insists upon. For all of these reasons, the Referee was correct in denying the OSFC's Motion in Limine and the OSFC's objections should be overruled.

i. *The McCarthy Supplemental Report Is Not “Nine Months Late.”*

The McCarthy Supplemental Report is not “nine months late” as claimed by the OSFC. Under the applicable Court of Claims Local Rule 7(E), parties may submit expert supplemental reports up until thirty (30) days before trial as a matter of right. Court of Claims Local Rule 7(E) states that “unless good cause is shown, all supplemental reports must be supplied no later than thirty days prior to trial.” Here, TransAmerica provided Don McCarthy’s supplemental expert report on October 24, 2014, a full **forty-five** days before the scheduled December 8, 2014 trial date.

Further, the Ohio Rules of Civil Procedure clearly allow parties to supplement previously disclosed expert reports before trial. *See* Ohio Civ. R. 26(E). While the Ohio Rules clearly allow supplementation, the rules do not establish a firm cut-off date. Instead, some Ohio courts have suggested that supplementary evidence may be offered on the eve of trial, so long as the “supplementary information [does not] result in unfair surprise disproportionate to its probative value.” *See, e.g., Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St. 3d 367, 504 N.E.2d 44; *Cox v. Metro Health Med. Ctr. Bd. of Trustees* (2012), 2012-Ohio-2283971 N.E.2d 1026, 1036 (8<sup>th</sup> Dist.); *Laster v. Light* (1995), 1995 WL 116852 (8<sup>th</sup> Dist.). If supplementary evidence is admissible this late in the pre-trial stage of litigation, it should be clear that TransAmerica’s supplemental report, submitted forty-five days before trial, can be admitted without reservation.

- ii. *The OSFC Defense That TransAmerica's Supplemental Expert Report is "Nine Months Late" Is Inconsistent with The OSFC's Own Introduction of the Mays' Expert Report, Submitted Months After the Court's Expert Report Scheduled Deadlines.*

Finally, the OSFC fails to provide a satisfactory answer as to why the OSFC should be allowed to issue a new expert report months after the January 2014 discovery deadline, but TransAmerica should not have the same opportunity. On July 3, 2014, shortly before the parties conducted another mediation session, the OSFC submitted its "Asphalt Shingle Roof System Construction Review Report," written by one of the OSFC's experts, Gary Mays. The Mays report attempts to blame on TransAmerica for problems the OSFC has alleged regarding the shingle roofs of the dormitories. TransAmerica responded to this new evidence with its own expert report dated October 20, 2014, written by James Luckino. Luckino's report rebuts the assertions made in the Mays' report and establishes that the roof problems were caused by faulty design not by TransAmerica's workmanship.

What's relevant here is that the OSFC submitted the Mays' report, suggesting an **entirely new** theory/affirmative defense, six months after the January 17, 2014 the "plaintiff/counter defendant" deadline the OSFC now insists upon and three months after the "defendant/counter plaintiff" deadline imposed on the OSFC from the start of the litigation. TransAmerica suggests that if the OSFC is allowed to "supplement" its expert report with new evidence after these deadlines, TransAmerica should be allowed to introduce additional detail and analysis to support McCarthy's expert report. The Referee recognized this, making clear that both parties should be able to "try their case," and correctly held that the OSFC's Motion in Limine should be overruled.

iii. *Three Weeks Was Not An Unreasonable Amount of Time For The OSFC To Prepare A Response To McCarthy's Supplemental Report.*

The OSFC also objects to the Referee's decision to give the OSFC three weeks to formally respond to McCarthy's Supplemental Report. TransAmerica points out that the OSFC has devoted three full-time attorneys to its defense and that three weeks is not an unreasonably short amount of time to respond to McCarthy's Supplemental Report, which again, merely supplements McCarthy's expert report produced in January of 2014. The OSFC has already had nine months to work on its defense; three additional weeks is a sufficient amount of time to address the minor modifications to the OSFC's defense that may stem from the supplemental report. This notwithstanding, the OSFC's objections are rendered moot by the Referee's recent decision to extend the time for response into January of 2015.

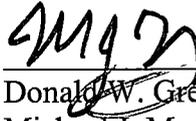
iv. *Finally, The Referee's Has Authority to Decide Pre-Trial Matters.*

The OSFC cites no support in favor of its argument that "the Referee in this case appointed by statute to hear the construction case and not appointed pursuant to the Magistrate Rule" has no authority to "decid[e] any pre-trial matters." As such, TransAmerica feels it is sufficient at this time to respond, simply, that the OSFC is wrong on this point and that the Referee has authority to decide all pre-trial matters as it has done in similar construction disputes in the past. *See, e.g., J & H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm'n*, 2012-Ohio-5298, 2012 Ohio Misc. LEXIS 171 (Ohio Ct. Cl.).

**Conclusion**

TransAmerica therefore requests that this Court overrule the OSFC's Objections to the Referee's Recommendation and allow trial in this case to be based on the full extent of the facts known to the parties.

Respectfully submitted,



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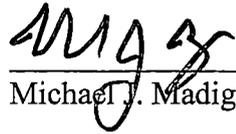
*TransAmerica Building Company, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true copy of the foregoing was served via U.S.

Mail, postage prepaid, this 13th day of November, 2014 upon:

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