

**ORIGINAL**

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COURT OF CLAIMS  
OF OHIO

IN THE COURT OF CLAIMS OF OHIO 2015 MAR -5 PM 3: 21

TRANSAMERICA BUILDING COMPANY, INC.,	:	Case No. 2013-00349
	:	
Plaintiff,	:	Judge McGrath
	:	
v.	:	Referee Wampler
	:	
OHIO SCHOOL FACILITIES COMMISSION, nka Ohio Facilities Construction Commission,	:	
	:	
Defendant.	:	

**PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S  
REPLY BRIEF IN SUPPORT OF ITS RENEWED MOTION TO SEPARATE**

Scrambling for a way to avoid the clear and unambiguous mandate of Civ.R. 14(A), the Ohio School Facilities Commission (“OSFC”) filed its Memorandum in Opposition to Plaintiff TransAmerica Building Company Inc.’s Renewed Motion to Separate. Because the OSFC’s Memorandum in Opposition raises new (albeit unpersuasive) arguments that TransAmerica has not yet had a chance to address, and because recent developments in the case require the attention of the Court, TransAmerica hereby files a short Reply Brief in support of its Renewed Motion to Separate.

First and foremost, TransAmerica’s Renewed Motion to Separate is just that—a renewed motion. It is not, as the OSFC suggests, a “Motion for Reconsideration.” (See OSFC’s Memo in Opp., pgs. 2-3). On January 28, 2015, the Referee issued its Order granting the OSFC’s Motion for Leave to file its third-party complaint *instanter* against its architect, Steed Hammond Paul, Inc. (“SHP”), and its construction manager advisor, Lend Lease (US) Inc. (“Lend Lease”).<sup>1</sup> In that same Order, the Referee also addressed TransAmerica’s alternative argument that the

<sup>1</sup> Lend Lease acknowledges its role as a “CMA” or construction manager advisor. See Lend Lease’s Answer, Counterclaim and Third-Party (Fourth-Party) Complaint, ¶¶11-13.

**ON COMPUTER**

OSFC's third-party claims must be separated from TransAmerica's claims pursuant to the clear and unambiguous mandate of Civ.R. 14(A). Rather than deciding TransAmerica's alternative argument once and for all, the Referee's decision instead denied TransAmerica's alternative motion "without prejudice." (See Order of the Referee, January 28, 2015, pg. 2). Put another way, the Referee simply left open the door for TransAmerica to present additional evidence and support before the Referee would make its "final decision." TransAmerica's response to the Referee is not, as the OSFC suggests, a "Motion for Reconsideration." Indeed, because the Referee has not yet decided this issue with finality, there is simply nothing to "reconsider."

Moreover, an order issued "without prejudice" on a collateral matter is not a "final decision." "[A] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *DeAscentis v. Margello*, 10th Dist. No. 04AP-4, 2005-Ohio-1520, P16 (Mar. 31, 2005) (internal citation omitted). The Referee's Order was not final at all; it did not end the litigation, nor did it even conclude the matter at hand. Rather, the Order simply provided the opportunity for TransAmerica to produce additional evidence and support. Thus, *C.f.*, *Duncan v. Capital Community Urban Redevelopment Corp.*, 10th Dist. No. 02AP-653, 2003-Ohio-1273 is inapposite.

Second, the OSFC's analysis under *State ex rel. Jacobs v. Municipal Court of Franklin Co.*, 30 Ohio St.2d 239, 241 (1972), while perhaps useful in the typical case, is simply not relevant here. While trial courts generally have discretion to separate third-party claims, Civ. R. 14(A) removes that discretion in the specific circumstance where a defendant, as a third-party plaintiff, brings an action for indemnity and/or contribution against its "employee, agent, or servant." Civ.R. 14(A) is unambiguous. The Rule provides, "If the third-party defendant is an employee, agent, or servant of the third-party plaintiff, **the court shall order a separate trial**

**upon the motion of any plaintiff.”** Civ.R. 14 (A) (emphasis added). “The word ‘shall’ establishes a mandatory duty, absent a clear and unequivocal intent that it receive a construction other than its ordinary meaning.” *Perkins v. Ohio DOT*, 65 Ohio App. 3d 487, 493 (10th Dist. 1989), citing *Dorrian v. Scioto Conserv. Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971). Therefore, it is the Court’s mandatory duty here to separate the OSFC’s third-party claims against its agents from TransAmerica’s.

It bears repeating that both SHP and Lend Lease were agents of the OSFC at all times relevant to this dispute. Indeed, Lend Lease all but concedes its status as an “agent” of the OSFC in its Answer. (See Lend Lease’s Answer, Counterclaim and Third-Party (Fourth-Party) Complaint, ¶13, admitting that “actions of Lend Lease were all subject to the direction, agreement, control, approval, supervision, and consent of OSFC and its employees.”). Indeed, agency is the very nature of the Construction Manager-advisor’s role on a construction project. Notably, the OSFC presents no evidence to the contrary in its Memorandum in Opposition.

Likewise, SHP acted as the OSFC’s agent at all times relevant to this dispute. As shown in TransAmerica’s Renewed Motion to Separate, the OSFC controlled the manner and means of SHP’s work by requiring SHP to follow strict protocols throughout its work on the Project, including the detailed directions set forth in the Ohio School Design Manual. (See TransAmerica’s Renewed Motion to Separate, pgs. 13-14). SHP was also required to report directly to the OSFC throughout the Project. (See *Id.*, pg. 14). And while SHP had limited authority to interpret the Contract Documents, the OSFC retained authority to make final determinations. (*Id.*).

SHP was not left to determine on its own the manner and means of how it was to accomplish the OSFC’s project goals. Rather, through the Project’s General Conditions and

through SHP's Contract, the OSFC gave SHP explicit direction on how SHP was to act on the Project, what SHP had authority to do, and how SHP was to use its authority to represent the OSFC's interests. A decision that SHP acted as an agent of the OSFC would also be consistent with a long list of Ohio case law and case law from around the country. SHP was an agent of the OSFC at all times relevant to this dispute and should be treated as an agent here.

**The OSFC has acknowledged its agency relationship between itself and SHP in the past.** For instance, in its Motion for Summary Judgment, the OSFC argued that the State could not be held liable for the intentional torts of its agent CM or AE. (See OSFC's Motion for Summary Judgment, pg. 10). The OSFC argued: "a principal cannot be held liable for the intentional acts of its agent when those acts are outside the scope of the agency . . . the CM's or AE's agency is limited by its contract with OSFC." The OSFC should not be allowed to have it both ways.<sup>2</sup>

The OSFC implores the Court to abandon its mandatory duty under Civ.R. 14(A) and refuse to separate the trial of the OSFC's third-party claims. Of course, to follow that request would be a clear abuse of discretion. More than that, however, abandoning Civ.R. 14(A) would actually hinder, rather than advance, principles of judicial efficiency.

Because Lend Lease is admitted to be an agent of the OSFC, Civ.R. 14(A) requires the Court to separate the trial of the OSFC's third-party claims against Lend Lease regardless of the Court's decision as to the relationship between SHP and the OSFC. Put simply, there must be two separate trials regardless of whether the Court decides SHP is an "agent" of the OSFC or

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<sup>2</sup> As set forth in TransAmerica's Renewed Motion, the OSFC also took the position that its construction manager was an agent in *Converse Electric, Inc. v. OSFC*, Case No. 2011-09571, pg. 5 (OSFC argued its Construction Manager was "indisputably" an agent of the OSFC). Also worthy of note, the Ohio Department of Transportation (ODOT), in its Construction and Material Specifications, expressly defines its "Engineer" as its "Duly authorized agent of the Department acting within the scope of its authority for purposes of engineering and administration of the Contract." Likewise, here, SHP is the State's recognized design professional, who acted as the State's agent on the Project, and should be treated accordingly.

not. **Placing SHP in that separate trial would *further* judicial efficiency.** First, separating SHP would unclutter the first trial and allow TransAmerica to proceed directly against the OSFC, with only two sets of lawyers and only one issue to resolve: the OSFC's liability to TransAmerica. Second, there would be no need to involve SHP or Lend Lease (and all of their witnesses and lawyers) in a second trial at all unless TransAmerica can establish that the OSFC is liable to TransAmerica. If TransAmerica is not successful in the first trial, a second trial will not be needed. That second trial could also take place at a later point in time, allowing both Lend Lease and SHP sufficient opportunity to prepare. There would be no need to delay the currently scheduled trial date.

Finally, recent developments in the case also point in favor of granting TransAmerica's Renewed Motion. On March 4, 2015, both SHP and Lend Lease, through their attorneys, moved to continue the trial to a later date. Both SHP and Lend Lease also previously added their own fourth-party defendants to the case—further complicating the litigation and burdening TransAmerica. These developments prove what TransAmerica has known all along: the risk of prejudice to TransAmerica by adding SHP and Lend Lease this late in the litigation is both real and substantial.

Indeed, exactly what TransAmerica warned of has come to pass. The third- and fourth-party defendants—who were added to these proceedings after much procrastination by the OSFC, and solely for the OSFC's benefit so that it could pass along its losses in this case—have now asserted their predictable requests for a continuance and additional discovery which put TransAmerica at risk of another continuance of the trial date, and innumerable additional duplicative depositions. This prejudice to TransAmerica—which it did nothing to create—and clear error can still be avoided if the court simply grants TransAmerica's Renewed Motion as

required by Civ.R. 14(A). Once this is done, the third- and fourth-party defendants can have their continuance, and the case by the OSFC against its agents can proceed at its own pace without prejudice to TransAmerica, who had nothing to do with hiring or administrating them.

Therefore, TransAmerica respectfully requests that the Court avoid that prejudice to TransAmerica by ordering a separate trial to address the OSFC's third-party claims, thereby preserving the current trial date.

Respectfully submitted,



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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S REPLY BRIEF IN SUPPORT OF ITS RENEWED MOTION TO SEPARATE was sent via e-mail and by regular U.S. mail, postage prepaid, this \_\_\_ day of March, 2015 to:

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