

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 APR 22 PM 12: 08

TRANSAMERICA BUILDING COMPANY, :
INC., :

Plaintiff/Counter Defendant :

v. :

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

Defendant/Counter Plaintiff/ :
Third-Party Plaintiff/Counter :
Defendant :

Case No. 2013-00349

v. :

LEND LEASE (US) CONSTRUCTION, :
INC., :

Judge McGrath

Third-Party Defendant/Counter :
Plaintiff/Fourth-Party Plaintiff :

Referee Wampler

and :

STEED HAMMOND PAUL INC., etc., :

Third-Party Defendant/Fourth- :
Party Plaintiff :

v. :

BERARDI PARTNERS, INC., et al., :

Fourth-Party Defendants. :

TRANSAMERICA BUILDING COMPANY, INC.'S MOTION TO EXCLUDE
EVIDENCE DUE TO SPOILIATION OF EVIDENCE
BY DEFENDANT OHIO SCHOOLS FACILITIES COMMISSION

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby moves the Court to exclude certain evidence related to water infiltration and alleged roof defects which may be

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offered by the Defendant Ohio State Facilities Commission ("OSFC") at trial. By precluding TransAmerica from observing roof repairs while they were performed in late 2014, and by violating R.C. 153.17, the OSFC destroyed, altered, or made unavailable evidence that TransAmerica could have otherwise used in its defense. Therefore, the OSFC should be precluded from offering evidence related to water infiltration or alleged roof defects.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION.

At trial, TransAmerica expects the OSFC will seek to hold TransAmerica responsible for the costs of replacing shingle roofs on various dormitories on both the Ohio School for Deaf and the Ohio State School for Blind (the "Project"). In prior correspondence, the OSFC and its agent Construction Manager, Lend Lease, have alleged that TransAmerica's installation of the roofs in question was deficient and, thus, that costs incurred by the OSFC in replacing those roofs must be paid for by TransAmerica. While these allegations lack factual merit from the beginning, the Court should prohibit the OSFC from attempting to introduce evidence on this subject as a matter of law. On multiple occasions, TransAmerica formally requested that if remedial work was to be performed on the roofs in question, TransAmerica should be provided advance notice and an opportunity to observe the remedial work in progress. Despite formal requests, and without notice to TransAmerica, the OSFC conducted remedial work on at least one of the roofs in question in November 2014. In doing so, the OSFC destroyed or altered key evidence to TransAmerica's defense. Because of the OSFC's spoliation of evidence, this Court should impose a proper sanction prohibiting the OSFC from offering evidence at trial as to water infiltration or alleged roof defects.

II. BACKGROUND.

In June of 2014, the OSFC retained an outside roofing consultant, Mays Consulting & Evaluation Services, Inc. ("Mays Consulting"), to investigate alleged water infiltration problems the schools were experiencing in the winter months of January and February. Mays Consulting issued its report on June 27, 2014 (the "Mays Report"). The Mays Report recommended that the shingle roofs on all twelve roofs on the Project should be replaced. The Mays Report also alleged that TransAmerica failed to install the roofs in accordance with the Project's contract documents.

Shortly after the Mays Report was distributed to TransAmerica on July 3, 2014¹, on Friday, August 1, 2014, Clayton Keith, Senior Project Manager and Lend Lease employee, wrote a brief e-mail addressed to TransAmerica representatives Bill Koniewich and Josh Wilhelm.² Clayton Keith explained that the email served as the “required 96 hour notification” and put TransAmerica on notice “that the Owner is moving forward with the roof replacement.” Mr. Keith continued, “TransAmerica has the opportunity, per contract, to correct the work per the Mays Recommendation” but “[i]f TransAmerica intends to do this work, a firm commitment and plan of action with proposed schedule must be submitted to the Owner within 96 hours.” Mr. Keith warned that if he did not receive a response, the Owner would move forward with the work at TransAmerica’s expense.

The following Wednesday, August 6, 2014, Joshua Wilhelm responded on behalf of TransAmerica.³ Mr. Wilhelm noted the impending mediation between TransAmerica and the OSFC (less than two weeks away) and that counsel for TransAmerica had not been able to reach counsel for the OSFC despite attempts on August 1. Mr. Wilhelm wrote that it was TransAmerica’s position that nothing further should be done until after the August 18th mediation. Mr. Wilhelm then explained that if this was not acceptable to the OSFC, TransAmerica requested access to the job site and advance notice of any remedial work on the roofs so that TransAmerica could observe the remedial work as it occurred. TransAmerica also requested any and all correspondence between the OSFC and any replacement contractor.⁴ In response, Matthew L.

¹ Josh Wilhelms’s Affidavit in Support, attached hereto as Exhibit A, ¶2.

² A true and accurate copy of Mr. Keith’s August 1 email is attached as Exhibit A-1 to Josh Wilhelms’s Affidavit in Support which is attached hereto as Exhibit A, ¶3.

³ A true and accurate copy of Mr. Wilhelm’s August 6 email is attached as Exhibit A-2 to Josh Wilhelms’s Affidavit in Support which is attached hereto as Exhibit A, ¶4.

⁴ Josh Wilhelms’s Affidavit in Support, attached hereto as Exhibit A, ¶4.

Westerman, counsel for the OSFC, stated that there were no responsive documents, and that he would talk to Michael Madigan, counsel for TransAmerica, the following morning.⁵

Following the unsuccessful August mediation, the roof remediation issues remained unresolved. Thus, on September 12, 2014, Mr. Wilhelm followed-up on his previous email to Clay Keith with a more detailed letter addressed to "Members of the Project Team" including Clay Keith, Josh Predovich (SHP Leading Design representative), and Madison Dowlen (representative of the OSFC).⁶ Mr. Wilhelm first stressed that the allegation that TransAmerica was responsible for water infiltration problems was in conflict with had transpired to date on the Project. Mr. Wilhelm cited the OSFC's failure to produce a complete set of plans and specifications despite its duty to do so under R.C. 153.01. Without complete plans, Mr. Wilhelm explained that it was misleading to suggest that roofing problems were the sole responsibility of TransAmerica.

Mr. Wilhelm then explained that the OSFC had not presented empirical evidence nor a quantitative analysis establishing that the water infiltration problems were caused by TransAmerica's work. While the OSFC had provided the Mays Report, Mr. Wilhelm cited to the investigation of TransAmerica's own roofing consultant, Jim Luckino, performed in June of 2014.

Mr. Luckino took issue with many of the conclusions in the May's Report.⁷ Rather than deficiencies in TransAmerica's work, Mr. Luckino first found the water intrusion problems were the result of ice accumulation (or "ice damming") on the roofs in question during the winter. Supporting his analysis, Mr. Luckino noted that water intrusion was reported only during the

⁵ A true and accurate copy of Mr. Westerman's August 6 email is attached as Exhibit A-3 to Josh Wilhelms's Affidavit in Support which is attached hereto as Exhibit A, ¶6.

⁶ A true and accurate copy of Mr. Wilhelm's September 12 letter attached as Exhibit A-4 to Josh Wilhelms's Affidavit in Support which is attached hereto as Exhibit A, ¶7.

⁷ A true and accurate copy of Mr. Luckino's "Report of Findings" is attached as Exhibit A-5 to Josh Wilhelms's Affidavit in Support which is attached hereto as Exhibit A, ¶8.

winter months of January and February, when the roofs in question would be subject to significant snow accumulation and ice damming.⁸ Further, Mr. Luckino noted that there had been no water intrusion during the significant rains experienced in June of 2014.⁹ Mr. Luckino also explained that the roofs that experienced the worst water intrusion (Blind 1, Blind 2, and Blind 3) all had a northern exposure in the area of the alleged infiltration, and were the only roofs on which ice damming occurred.¹⁰ Mr. Luckino reasoned that north-facing roofs would have significantly less exposure to sunlight during shorter winter days, and that he would expect those roofs to have a greater potential for the formation of ice damming.

Mr. Luckino also found that the ice damming was caused by improper roof design, rather than TransAmerica's defective work.¹¹ In support, Mr. Luckino noted that the attic space below the roofs in question experiences unusually high temperatures, even during winter months. Mr. Luckino concluded that high attic temperatures were caused by the placement of the HVAC system within the attic space, and the loss of conditioned air through the roof due to a defective design.¹² Mr. Luckino's on-site investigation revealed that the 8-inch (R-30) insulation installed in the attic areas directly below the rooftop had been compressed to fit a 4-inch space as designed and specified in the roofing plans. By compressing the insulation material out of necessity to fit the roof design, the R-value of the insulation material was reduced by as much as 43%.¹³ This meant that the roofs in question would experience uncontrolled heat loss during the heating season.

⁸ See Mr. Luckino's "Report of Findings," pg. 5.

⁹ Id. at pgs. 3-4.

¹⁰ Id. at pg. 7.

¹¹ Id. at pgs. 5-10.

¹² Id. at pgs. 5-6.

¹³ Id.

Mr. Luckino concluded that higher attic temperatures, acting together with improper roof insulation, would cause the formation of ice damming.¹⁴ Mr. Luckino explained that elevated interior temperatures and improper roof design resulted in uncontrolled heat loss, increasing snow melt on the roof which in turn caused the formation of ice dams. When heat loss is uncontrolled, the bottom layer of the snow is melted. As melt-water seeps down the roof, it re-freezes as it migrates away from warmer areas, typically at the eave. This re-freezing process causes the formation of ice dams similar to the ones experienced on the Project.¹⁵

Mr. Wilhelm also noted that the Mays Report failed to locate the specific point of bulk water intrusion. This is important, because the architectural plans for the roofs in question required only "24-inch wide ice guard underlayment" at the "roof perimeter and valleys."¹⁶ Thus, the construction plans produced by SHP for the rooftop were in direct conflict with the Mays Recommendation, that the entire roof should have been covered with ice-guard underlayment.¹⁷

In light of these inconsistencies, Mr. Wilhelm requested direction from the OSFC as it was not clear what the OSFC expected from TransAmerica.¹⁸ Mr. Wilhelm also emphasized that any remedial action by the OSFC without giving advance notice to TransAmerica would prejudice TransAmerica's rights to mitigate its damages and would create issues of spoliation.

The OSFC did not respond to Mr. Wilhelm's letter.¹⁹ Instead, on November 11, 2014, counsel for TransAmerica sent a follow-up email to counsel for the OSFC, calling for the same

¹⁴ High roof temperatures increase snow melt on the roof, which in turn leads to ice damming. As ice is melted by higher roof temperatures, water seeps down the roof and then re-freezes as it migrates away from the warmer areas. That re-freezing leads to the formation of ice dams similar to the ones experienced on the Project. See Handbook of Accepted Roofing Knowledge ("HARK"), National Roofing Contractors Association, pg. 58, definition of "Ice Dam."

¹⁵ Id.

¹⁶ See Plate #BS-006, referenced in Mr. Luckino's "Report of Findings," Exhibit A-5, pg. 7.

¹⁷ See Mr. Luckino's "Report of Findings," Exhibit A-5, pg. 7.

¹⁸ See Mr. Wilhelm's September 12 letter, Exhibit A-4, pg. 5.

¹⁹ Josh Wilhelms's Affidavit in Support, attached hereto as Exhibit A, ¶9.

correspondence between the OSFC and a potential replacement contractor. Less than one hour later, Mr. Westerman responded advising Mr. Madigan that there was “no replacement contractor.”²⁰ Mr. Westerman then represented that he would look to see if there were any emails regarding the roof replacement exchanged between himself and Mays Consulting.

It was not until January 15, 2015 when the OSFC finally produced documents responsive to TransAmerica’s public records request.²¹ The OSFC’s response revealed that from June to November of 2014, Matthew Westerman and William C. Becker (counsel for the OSFC) and Mr. Jim Mays (of Mays Consulting) were in contract regarding the water infiltration issues.²² Importantly, the documents produced by the OSFC also included one email exchanged between Matthew Westerman and Patrick Hayden, Chief Operating Officer of the Ohio School for the Deaf/Ohio State School for the Blind. In that email, dated January 5, 2015, Patrick Hayden forwarded Mr. Westerman an email chain between himself (Mr. Hayden) and Brian Hammen, Senior Facilities Manager of the Ohio Department of Administrative Services. In an email dated November 20, 2014, Mr. Hammen reported that remedial work on one of the roofs on the Blind School “was completed last Friday,” meaning on November 14, 2014.²³ Mr. Hammen also

²⁰ A true and accurate copy of Matthew Westerman’s November 11 email is attached hereto as Exhibit B. Mr. Westerman’s email is self-authenticating under Ohio Evid.R. 901(1), 901(7), 902(4), and 902(7) as it is a public record, produced by a public office, was sent from Mr. Westerman’s personal email address, and bears Mr. Westerman’s electronic signature.

²¹ A true and accurate copy of the OSFC’s Public Records Response including all documents produced therein, labeled “TA-PRR-000001-000040” is attached hereto as Exhibit C. The OSFC’s Public Records Response including all documents therein are documents from a public office and are self-authenticating under Ohio Evid.R. 901(7) and 902(4). See *Stumpff v. Harris*, 2nd Dist. Montgomery No. 26214, 2015-Ohio-1329, ¶35 (“Numerous courts, both state and federal, have held that items produced in discovery are implicitly authenticated by the act of production by the opposing party.”).

²² On June 3, 2014, Mays Consulting submitted its proposal to perform visual and destructive testing and inspection to investigate moisture intrusion and other related deficiency issues related to roofs on the Project, and to provide recommendations for corrective action. Mays Consulting’s June 3 Proposal can be found at pg. “TA-PRR-000027-000030” in the OSFC’s Public Records Response, Exhibit C.

²³ Mr. Hammen’s email is at pg. “TA-PRR-000039” in the OSFC’s Public Records Response, Exhibit C. As part of the OSFC’s Public Records Response, Mr. Hammen’s email is self-authenticating under Ohio Evid.R. 901(7) and 902(4). Mr. Hammen’s email is also admissible under Ohio Evid.R. 803(5), (6) and (8).

informed Mr. Hayden that the remedial project was completed "4 days ahead of schedule." Despite TransAmerica's formal requests on at least two separate occasions, TransAmerica had not received advance notice of the remedial work or any opportunity to observe the work in progress.

III. LAW AND ARGUMENT

At trial, TransAmerica expects the OSFC will seek to hold TransAmerica responsible for the costs of replacing shingle roofs on various dormitories on the Project. However, before the remedial work was performed, the OSFC refused to grant TransAmerica access to the Project despite receiving multiple requests and clear notice that performing remedial work in the absence of TransAmerica would prejudice TransAmerica's defense and lead to the spoliation of evidence. Moreover, the OSFC commenced remedial work without providing TransAmerica the notice or opportunity to self-perform required in R.C. 153.17. In doing so, the OSFC precluded TransAmerica from conducting its own complete investigation to determine the true cause and extent of alleged water infiltration. Without an opportunity to observe the remedial work, the OSFC prevented TransAmerica from obtaining evidence that TransAmerica could have otherwise used in its defense. Therefore, TransAmerica moves for an appropriate sanction that would preclude the OSFC from offering evidence as to the alleged roof defects and water infiltration.

A. Because The OSFC Spoiled Evidence Important to TransAmerica's Defense, The OSFC Should Be Barred From Introducing Evidence Regarding Water Infiltration.

By preventing TransAmerica from observing the remedial work while it was in progress, the OSFC spoiled key evidence and prejudiced TransAmerica's defense. Thus, the doctrine of spoliation should prevent the OSFC from offering evidence against TransAmerica. As the Court of Appeals of Ohio for the First District has explained,

[t]he doctrine of spoliation, when applied in a defensive manner, [allows] a defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence necessary to prove the existence or absence of essential elements of the claim.”

...

A trial court may exclude expert testimony as a sanction for spoliation of evidence if it determines that the evidence has been intentionally altered or destroyed by a party or its expert before the defense has had an opportunity to examine the evidence.

Loukinas v. Roto-Rooter Svc. Co., 167 Ohio App.3d 559, 567, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist.) (internal citations and quotation marks omitted).

Because *Loukinas* involved similar facts to those at issue here, the case is particularly relevant and thus merits closer examination. *Loukinas* involved a negligence claim brought against a plumbing company, Roto-Rooter, who allegedly crushed a clay drain line during its installation of an oil interceptor. Through counsel, Roto-Rooter requested that the plaintiff provide advance notice of any excavation of the oil interceptor so that Roto-Rooter’s experts could view the excavation in progress. Disregarding that request, and without notice to Roto-Rooter, the plaintiff hired a third-party to excavate the area where the gas interceptor was buried underground. The excavation revealed that the drain line had indeed been crushed. An expert for the plaintiff opined that the drain line was damaged by a backhoe used by Roto-Rooter when installing the interceptor.

Before trial, Roto-Rooter moved to exclude any expert opinion based upon the plaintiff’s excavation. Agreeing that the doctrine of spoliation applied, the trial court granted Roto-Rooter’s motion. On appeal, the First District held that that because the plaintiff ordered the excavation eleven months after the lawsuit commenced, and “well after receiving correspondence from the defendant’s counsel requesting that its expert be present at any excavation,” the plaintiff “intentionally altered or destroyed relevant evidence.” *Id.* at 569. Therefore, the defendant had made a “threshold showing” of spoliation. The First District then explained,

If a threshold showing of spoliation is made, the burden then shifts to the proponent of the evidence to prove that the other side was not prejudiced by the alteration or destruction of the evidence. The test for prejudice is whether there is a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered, and which was not otherwise obtainable, would produce evidence favorable to the objecting party.

Loukinas, 167 Ohio App.3d at 568 (emphasis added).

Applying that rule, the First District concluded the plaintiff could not meet its burden of proof and thus its evidence should be excluded—including the expert opinion that the drain pipe had been crushed by Roto-Rooter's backhoe. The First District reasoned that because Roto-Rooter's expert was denied an opportunity to view the drain line at the time of the excavation, the plaintiff had deprived Roto-Rooter of evidence that it may have otherwise used in its defense:

Without observing the excavation, Roto-Rooter's expert was prevented from verifying the condition of the drain line as it was being revealed by the Jacobs excavation. It could not otherwise produce evidence to rebut the contention that its backhoe had caused the hole. The excavation also destroyed the opportunity to produce evidence of the line's condition or placement that would have been favorable to Roto-Rooter, such as any damage caused by Jacobs's work. Jacobs's own stricken affidavit indicated that he also had used some type of power-assisted digger to excavate to within two feet of the drain line before proceeding by hand.

Loukinas, 167 Ohio App. 3d at 568. As such, the First District upheld the trial court's decision to exclude the plaintiff's evidence.²⁴

Describing that same rule, the Sixth District has explained further,

[T]he proponent of a motion for sanctions based on spoliation of evidence must establish (1) that the evidence is relevant; (2) that the plaintiff's expert had an opportunity to examine the unaltered evidence; and (3) that, even though the plaintiff was contemplating litigation against the defendant, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the defense.

...

²⁴ While the defendant in *Loukinas* had not made a formal request for an order to preserve evidence, and had not sought discovery sanctions under Civ.R. 37, the First District explained that such formal demands were not necessary. *Loukinas*, 167 Ohio App. 3d at 569.

Thereafter, the defendant "enjoys a rebuttable presumption that it was prejudiced by the destruction of relevant evidence," and the burden shifts to the plaintiff to persuade the trial court "that there is no reasonable possibility that lack of access to the unaltered or intact product deprived the defendant of favorable evidence."

Watson v. Ford Motor Co., 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51 (internal citations omitted) (emphasis added).²⁵

Applying this rule in *Watson*, the Sixth District upheld a trial court's decision to exclude expert testimony offered by a plaintiff. *Watson* involved an allegedly defective "control module" in a 1989 Ford Thunderbird. After the plaintiffs settled their claim with their insurance carrier, but before the plaintiff filed suit, the insurance company had the car destroyed by a third-party. Neither the plaintiffs' experts nor the experts for the defendant had an opportunity to examine the car or the control module before it was destroyed. *Id.* at ¶53.

On motion of the defendants, the trial court granted a motion *in limine* excluding the expert testimony offered by the plaintiffs as to the cause of the accident and, consequentially, granted summary judgment in favor of the defendant. Upholding the trial court's decision, the Sixth District explained a plaintiff "is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." *Id.* at ¶50, citing *Cincinnati Ins. Co. v. GM Corp.*, 6th Dist. Ottawa No. 94OT017, 1994 Ohio App. LEXIS 4960, 9 (Oct. 28, 1994) (emphasis added). While the plaintiffs had not destroyed the car with the purpose of harming the defendant's case (i.e. they had not acted intentionally), the Sixth District explained that "negligent or inadvertent

²⁵ For a Tenth District case discussing the remedy of exclusion of evidence as a result of spoliation, see *RFC Capital Corp. v. EarthLink, Inc.*, 2004-Ohio-7046, P90 (Ohio Ct. App., Franklin County 2004) (reversing trial court's exclusion of evidence where employee purged documents after litigation began but presumption of prejudice was rebutted by admission that no relevant documents existed and, thus, employee's purge of documents "did not deprive RFC of favorable evidence"). Unlike *RFC Capital Corp.*, the evidence destroyed here would have been important to TransAmerica's defense. Unlike *RFC Capital Corp.*, the OSFC cannot rebut the presumption of prejudice.

destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss.” *Id.* at ¶50, citing *Simeone v. Girard City Bd. of Edn.*, 171 Ohio App. 3d 633, 2007 Ohio 1775, ¶71, 872 N.E.2d 344 (11th Dist) (emphasis added).²⁶

Applying the doctrine of spoliation here, the Court should prevent the OSFC from presenting evidence as to water infiltration and alleged roof defects in this case. First, TransAmerica has established that the evidence destroyed by the OSFC conduct was “relevant” to its defense. Removal of the shingle roof would have exposed existing conditions under the roof—conditions not observable through a simple visual inspection. This in turn would have shed light on the true cause of the water infiltration.

- For instance, exposure of the plywood sheathing under the shingle roof would have revealed the specific point of bulk water intrusion, if any existed. This would have been useful to TransAmerica’s defense: if water intrusion had occurred at points of the roof where ice-guard was not specifically noted in the roofing plans, TransAmerica would have objective evidence that the true cause of the infiltration was a defective roof design rather than TransAmerica’s defective insulation.²⁷
- Also, as explained in Mr. Luckino’s report, the construction documents required TransAmerica to place 24-inch wide ice-guard underlayment along the perimeter of the roof and in the valleys.²⁸ Exposure of the shingle underlayment would have revealed whether TransAmerica fulfilled that obligation under its contract.²⁹

²⁶ The Sixth District rejected several arguments against the trial court’s decision. First, the appellants argued that the trial court should not have excluded the evidence because its own experts were also precluded from examining the car. Since the plaintiffs’ experts had not examined the car, the plaintiffs argued, the defendant was no worse of a position to determine the cause of the accident. In response, the Sixth District explained that it was “not convinced that the lost opportunity for the plaintiffs’ expert to inspect the car cancels out the prejudice to the defendants’ defense.” *Id.* at ¶55. The appellant also argued that the trial court should have imposed the “least severe sanction” available, arguing that exclusion of the plaintiff’s expert testimony was too extreme of a remedy. However, the Sixth District held that it is the trial court’s duty “to impose a sanction which effectively removes the prejudice caused by the sanctioned party’s wrongdoing.” *Id.* at ¶56, citing *Loukinas supra* pgs. 7-9 (emphasis added).

²⁷ See Mr. Luckino’s Affidavit in Support which is attached hereto as Exhibit D, ¶11.

²⁸ See again Plate #BS-006, referenced in Mr. Luckino’s “Report of Findings,” Exhibit A-6, pg. 7, calling for “24-inch wide ice guard underlayment” at the “roof perimeter and valleys.”

²⁹ See Mr. Luckino’s Affidavit in Support which is attached hereto as Exhibit D, ¶11.

- TransAmerica cannot determine whether the changes made were necessary and if so, when these changes were made. TransAmerica cannot determine whether additional ice shield was included and whether any changes were done to the original design.³⁰
- Without performing invasive testing, TransAmerica is not able to determine the extent of the remedial work or whether design changes, including betterments, were implemented.³¹

Second, the OSFC's experts had an opportunity to examine the roof underlayment, while TransAmerica's experts did not. The OSFC cannot justify its actions by arguing that they did not conduct their own examination of the underlayment of the roof.³² Rather, it is the *opportunity*, not whether the party capitalized on that opportunity, which is relevant for the purposes of determining a motion to exclude. *See Watson, supra* fn. 26. The OSFC's actions deprived TransAmerica of an opportunity to obtain evidence that would have been useful in its defense.³³

Finally, TransAmerica has established that the OSFC "intentionally or negligently destroyed or altered [evidence], without providing an opportunity for inspection by the defense." Here, the OSFC knew, or should have known, that TransAmerica would be prejudiced by any unilateral act on the OSFC's part to conduct remedial roof work without TransAmerica being present. Thus, it had a duty to preserve that evidence. *See Watson, supra* pgs. 10-11. Despite that duty, and despite TransAmerica's multiple notices reminding the OSFC of its duty to preserve evidence important to TransAmerica's defense, the OSFC unilaterally performed the remedial work anyway, without informing TransAmerica. By performing work without providing notice to TransAmerica, the OSFC "intentionally or negligently destroyed or altered" evidence that could have been favorable to TransAmerica. *See Loukinas, supra* pgs. 8-9.

³⁰ See *Id.* at ¶¶ 10-11.

³¹ See *Id.* at ¶13.

³² Whether the OSFC conducted its own examination of the roof underlayment is not clear.

³³ Mr. Luckino has not been provided any pictures of the remedial work in progress and is not able to determine the specific scope of the work that was performed in November 2014. See Mr. Luckino's Affidavit in Support which is attached hereto as Exhibit D, ¶12.

With these three elements established, the burden shifts to the OSFC to persuade this Court "that there is no reasonable possibility that lack of access to the unaltered or intact product deprived the defendant of favorable evidence." *Watson, supra* pgs. 9-10. That cannot be the case. The OSFC forces TransAmerica to defend itself against defective workmanship claims in the absence of any objective or empirical proof that TransAmerica's work was to blame for the water infiltration. Exposure of the roof underlayment would have all-but proved, one way or the other, whether TransAmerica's defective workmanship was to blame for the water infiltration, or whether the problem was instead the result of defective roof design. The OSFC cannot establish there is "no reasonable possibility" that it deprived TransAmerica of favorable evidence. In light of these facts, this Court should issue an appropriate sanction that would prohibit the OSFC from offering evidence attempting to shift responsibility to TransAmerica for the cost of the roof replacement.

B. The OSFC Should Be Precluded From Offering Evidence Against Transamerica As To Roof Repairs Because The OSFC Violated R.C. 153.17.

The OSFC also failed to meet its statutory obligations under R.C. 153.17 to provide TransAmerica an opportunity to self-perform remedial work when requested by a public owner.³⁴ Pursuant to R.C. 153.17, when a public owner believes a private contractor has neglected to perform work under its contract, or failed to prosecute such work with the diligence and forced specified in the contract documents, Ohio law requires that public owner to make a requisition (demand) upon the contractor to complete the work. R.C. 153.17 provides in relevant part,

Not less than **five days' notice in writing** of such action shall be served upon the contractor or the contractor's agent in charge of the work. If the contractor fails to comply with such requisition within fifteen days, such owner with the written consent of the Ohio facilities construction commission, may employ upon the work

³⁴ R.C. 153.17 regulates the conduct of the OSFC here. R.C. 153.01 provides that "each officer, board, or other authority" that is part of a "state agency authorized by law to administer a project" is the "owner" "referred to in sections 153.01 to 153.60 of the Revised Code." Here, there is no dispute that the OSFC acted as a state agency "authorized by law to administer a project." See R.C. 3318.30 (creating OSFC). As such, the OSFC was required to comply with R.C. 153.17.

the additional force, or supply the special materials or such part of either as is considered proper, and may remove improper materials from the grounds.

While R.C. 153.17 is phrased permissively, the statute also operates to protect the contract from an over-eager public owner. R.C. 153.17 provides that before the owner self-performs work, that the owner “shall” serve at least five (5) days written notice upon the contractor.³⁵ The next sentence of the statute clearly conditions the public owner’s decision to “employ upon the work the additional force” upon the contractor’s “fail[ure] to comply” with the demand “within fifteen days.”³⁶ Faced with similar language, Judge Travis of the Court of Claims recently found that the “issuance of a 72-hour notice is a condition precedent to the termination of the contract.” *See N.L. Constr. Corp. v. Ohio Dep’t of Admin. Servs.*, 2012-Ohio-6328, at 5 (emphasis added).³⁷ Judge Travis’s logic applies equally here. R.C. 153.17 clearly provides that if, and only if, the contractor fails to cure, may the owner intervene and self-perform the work. That is, (1) proper notice and (2) an opportunity to cure are conditions precedent to the owner’s ability to self-perform.

The OSFC failed to fulfill those conditions precedent here. First, the OSFC failed to make a proper 5-day demand on TransAmerica. Mr. Keith’s “96 hour notice” sent on August 1, 2014 is ineffective. There was no basis to issue the notice as TransAmerica never “neglected” or failed to prosecute work with the “diligence and force specified or intended in the contract.” Mr. Keith did not even allege in his email that TransAmerica “neglected” or failed to prosecute its work.³⁸

³⁵ It is well-settled that the word “shall” “shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage.” *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, ¶9.

³⁶ R.C. 153.17.

³⁷ Because the State failed to comply with the mandatory 72-hour notice, let alone the “5/15 notice” required by R.C. 153.17, “without permitting [the contractor] to cure any deficiencies in its performance”, the *N.L. Construction* court found the state’s termination of the contract to be invalid. Furthermore, under the doctrine of first breach, the Court found that the state’s counterclaims for remedial work were barred as a matter of law. *N.L. Constr. Corp. v. Ohio Dep’t of Admin. Servs.*, 2012-Ohio-6328, at 5, citing *Software Clearing House, Inc. v. Intrack, Inc.*, 66 Ohio App.3d 163 (1st Dist. 1990); *Kersh v. Montgomery Dev. Ctr.*, 35 Ohio App.3d 61,62 (10th Dist. 1987)).

³⁸ See again Mr. Keith’s August 1 email, *supra* fn. 2.

Further, while Mr. Wilhelm formally requested direction from the OSFC on September 11, 2014, the OSFC never responded. Finally, the notice authored by Mr. Keith, and sent on a Friday, provided TransAmerica “96 hours” or **four** days to respond—one full day less than the statutorily required five (5) days. From the beginning, the OSFC demand did not comply with Ohio law.

The OSFC also did not provide the requisite fifteen (15) days to cure before it self-performed the work. Rather than cooperating with TransAmerica, the OSFC performed the remedial work on its own. In doing so, the OSFC failed to satisfy conditions precedent to self-performance. Thus, the OSFC should be precluded from attempting to hold TransAmerica liable for the costs of the remedial work. The OSFC is not entitled to those costs.

IV. CONCLUSION

By repairing at least one of the roofs in question in late 2014, without any advance notice to TransAmerica, and in violation of R.C. 153.17, the OSFC destroyed, altered, or made unavailable important evidence that TransAmerica could have otherwise used in its defense. In light of the authority described above, this Court should issue a proper sanction prohibiting the OSFC from presenting evidence as to the alleged roof defects and water infiltration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing TRANSAMERICA BUILDING COMPANY, INC.'S MOTION TO EXCLUDE EVIDENCE DUE TO SPOILIATION OF EVIDENCE BY DEFENDANT OHIO SCHOOLS FACILITIES COMMISSION was sent via e-mail and by regular U.S. mail, postage prepaid, this 22nd day of April, 2015 to:

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