

2015 MAY -6 PM 0 21

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES
COMMISSION

Defendant.

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Case No. 2013-00349

Judge McGrath

Referee Samuel Wampler

**STATE OF OHIO'S MEMORANDUM CONTRA
PLAINTIFF'S SPOILIATION OF EVIDENCE MOTION IN LIMINE**

I. INTRODUCTION.

It seems more and more that Plaintiffs are willing to casually plead an allegation of spoliation of evidence. And yet, these are serious charges. They come with a high burden of proof – to prove that a Defendant destroyed evidence to intentionally damage the Plaintiff's case. Once made, these allegations need to be thoroughly discovered and defended.

Plaintiff has no good faith basis to make such allegations against the State of Ohio in this case. However, if this Court is going to entertain them following due consideration of this Memorandum Contra, then this case needs to be continued so that Plaintiff can plead the allegations and Defendant can discover the facts surrounding these allegations.

II. STANDARD FOR SPOILIATION OF EVIDENCE.

The Supreme Court of Ohio has set forth the following factors that need to be proven to prevail on a case of spoliation of evidence:

The elements of a claim for spoliation of evidence are (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the Plaintiff's case; (4) disruption of the Plaintiff's case; and (5)

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damages proximately caused by the Defendant's acts. *Smith v. Howard Jonson Co., Inc.*, 67 Ohio St.3d 28, 29, 1993-Ohio-229, 615 N.E.2d 1037.

Plaintiff does not have a good faith basis to make the allegations that would support a claim of spoliation of evidence.

III. **PROCEDURE FOR DECIDING PLAINTIFF'S CLAIMS OF SPOLIATION OF EVIDENCE.**

If Plaintiff believes that they have a good faith basis to allege spoliation of evidence, then they need to plead it. Defendant then has the right to discover the facts surrounding these allegations. You can't try a case of spoliation of evidence on paper. And, such serious allegations cannot be made on the eve of trial. Thus, this case needs to be continued to allow the State of Ohio to defend itself against these serious allegations.

IV. **NO SPOLIATION OCCURRED.**

It can't be overlooked that the Plaintiff is the one who installed the defective roofing over the new dorms of the Deaf and Blind School which now leaks. They had firsthand knowledge of this installation (although the State came to learn that it was done by a roofing contractor that wasn't certified by the roofing manufacturer.)

Despite having this firsthand knowledge, the State of Ohio gave notice and opportunity to the Plaintiff to observe the invasive and destructive testing of these roofs. Defendant had their own roofing consultant on these roofs on multiple occasions. The parties have exchanged expert reports from these inspections and investigations. Repair of these roofs followed the protocol outlined in the State's expert report. Due to the Deaf and Blind Schools limited budget, only one of the twelve roofs has been repaired.

From the exhibits attached to Plaintiff's Motion in *Limine*, the Court can see that Plaintiff was put on notice and a demand was made that they repair the defective roofs to these new

dorms. (Exh. A-1) Plaintiff's response was to blame the architect (Exh. A-4). And now, Plaintiff claims that the repairs performed by the State were unnecessary (Exh. D). Plaintiff hasn't presented a legitimate claim for spoliation of evidence. Rather, Plaintiff is attempting to use this as an excuse to escape their poor workmanship.

Given the notice and opportunity that Plaintiff had to inspect and investigate their defective workmanship, and given that no evidence has been destroyed, Plaintiff can't escape the liability for their defective workmanship by raising a false claim of spoliation of evidence.

V. DEFENDANT'S REFERENCE TO R.C. 153.17 IS NOT CONTROLLING.

R.C. 153.17 does not apply to this situation where the contractor has left the project site and latent defects are left behind. Rather, the statute applies where the contractor is still on site and the owner either needs to supplement its work force or provide a replacement contractor in the event of default. And the statute is discretionary in terms of the owner making a demand that the contractor supplement its work force or remove improper materials.

To the extent that this Court thinks the statute has any relevance, it does not require the owner to provide any notice to the contractor that it is performing repairs once the initial notice and demand has been made upon the contractor to fix the latent defects.

VI. CONCLUSION.

Plaintiff does not have a good faith basis to allege spoliation of evidence in this case. Rather, it is just a feckless attempt for them to avoid the responsibility for their defective workmanship.

However, if Plaintiff persists on pursuing such a claim, then they should plead it to give the State of Ohio notice of what they alleged was spoiled and how that was done with the intent to harm their case so that the State of Ohio can answer, discover, and defend. This will

necessitate a continuance of the trial of this matter. Alternatively, the Court can decide now that there is no good faith basis for such a claim and overrule Plaintiff's Motion in *Limine*.

Finally, even if this Court were to grant Plaintiff's Motion, it would only apply to the 1 of 12 dorms where the roof was fixed.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



William C. Becker (0013476)
Craig D. Barclay (0023041)
Jerry Kasai (0019905)
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, OH 43215-3130
Phone: (614) 466-7447 / Fax: (614) 466-9185
william.becker@ohioattorneygeneral.gov
craig.barclay@ohioattorneygeneral.gov
jerry.kasai@ohioattorneygeneral.gov
COUNSEL FOR DEFENDANT
OHIO SCHOOL FACILITIES COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *State Of Ohio's Memorandum Contra Plaintiff's Spoliation of Evidence Motion in Limine* was sent by regular U.S. mail, postage prepaid, this 6th day of May, 2015 to:

Donald Gregory
Michael Madigan
Peter A. Berg
Kegler Brown Hill Ritter
65 East State Street, Suite 1800
Columbus, Ohio 43215
*Counsel for Plaintiff
Transamerica Building Co., Inc.*

David M. Rickert
Dunlevey, Mahan & Furry
110 North Main Street, Suite 1000
Dayton, Ohio 45402
*Counsel for Third-Party Defendant
Steed Hammond Paul, Inc., d/b/a SHP
Leading Design*

Bradley J. Barmen
Mannion & Gray Co., LPA
1375 E. 9th Street, 16th Floor
Cleveland, Ohio 44114
*Counsel for Fourth-Party Defendant
Berardi Partners, Inc.*

Craig B. Paynter
James D. Abrams
Celia M. Kilgard
Taft, Stettinius & Hollister, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
*Counsel for Third-Party Defendant
Lend Lease (US) Construction, Inc.*

Steven G. Janik
George H. Carr
Janik, L.L.P.
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521
*Counsel for Third-Party Defendant
G. Stephens, Inc.*



WILLIAM C. BECKER
Principal Assistant Attorney General