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COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

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 v. **LEND LEASE (US) CONSTRUCTION, INC.,** Third-Party Defendant/Counter Plaintiff/Fourth-Party Plaintiff and **STEED HAMMOND PAUL INC., etc.,** Third-Party Defendant/Fourth-Party Plaintiff v. **BERARDI PARTNERS, INC., et al.,** Fourth-Party Defendants.	Case No. 2013-00349 Judge McGrath Referee Wampler

TRANSAMERICA'S REPLY TO OSFC'S MEMORANDUM CONTRA

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") makes this reply to the Ohio School Facilities Commission's ("OSFC") "Memorandum Contra Plaintiff's Spoliation of Evidence Motion In *Limine*" ("Memo Contra"). The OSFC's Memo Contra was filed in opposition

to TransAmerica's Motion To Exclude Evidence Due To Spoliation Of Evidence ("Motion"), filed on April 22, 2015.

TransAmerica's Motion seeks to preclude the OSFC from putting forth evidence related to water infiltration and alleged roof defects **as a sanction** for (1) the OSFC's destruction or alteration of evidence that could have been important to TransAmerica's defense and (2) for the OSFC's failure to comply with R.C. 153.17. As explained at length in TransAmerica's Motion, 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. TransAmerica made these requests so that it could make observations and collect evidence important to its defense. However, despite TransAmerica's formal requests, the OSFC conducted remedial work on at least one of the roofs in question in November 2014 without providing notice to TransAmerica. In doing so, the OSFC destroyed or altered evidence that TransAmerica could have used to rebut the OSFC's allegations. Moreover, by not providing TransAmerica notice or an opportunity to self-perform the work, the OSFC violated R.C. 153.71.

In these circumstances, Ohio law provides litigants like TransAmerica the right to seek an appropriate sanction. One such sanction is the exclusion of witness testimony and other evidence offered by the spoliator, which might have otherwise been rebutted by evidence now destroyed or altered by the spoliation. As explained in *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 567, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist.),

> [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."
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> . . .
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> 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.

Id. 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 plaintiffs 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.
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> . . .
>
> **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 provided).[1]

As in *Loukinas* and *Waston*, TransAmerica made a threshold showing of spoliation here by demonstrating that TransAmerica requested, on multiple occasions, an opportunity to observe the remedial work in progress. (See Motion, pgs. 2-7). TransAmerica also showed that the OSFC simply disregarded those requests and self-performed the work without providing notice to TransAmerica. (See Motion, pgs. 7-8). In its Motion, TransAmerica demonstrated that (1) the evidence destroyed by the OSFC was relevant, if not critical, to TransAmerica's defense; (2) that the OSFC had an opportunity to review the destroyed or altered evidence during the remedial work, while TransAmerica did not; and (3) that even though the OSFC had notice that its unilateral performance of the remedial work would destroy important evidence, and even though the OSFC

[1] 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, if not critical, to TransAmerica's defense. And, unlike *RFC Capital Corp.*, the OSFC has not rebutted the presumption of prejudice upon a threshold showing of spoliation.

had a duty to preserve evidence important to TransAmerica's defense, the OSFC intentionally or (at a very minimum) negligently destroyed that evidence without providing an opportunity for TransAmerica's inspection. (See Motion, pgs. 11-12). In ignoring both (1) TransAmerica's requests and (2) the OSFC's duty to preserve evidence important to TransAmerica's defense, the OSFC spoiled key evidence.

Because TransAmerica has satisfied its burden to make an initial showing of spoliation, the burden shifts to the OSFC to "prove that [TransAmerica] was not prejudiced by the alteration or destruction of the evidence." *Loukinas,* 167 Ohio App.3d at 568. To meet its burden, the OSFC would need to prove that there is no "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 [TransAmerica]." *Id.*

But rather than even attempt to meet its burden here, the OSFC instead ignores Ohio law on the subject entirely, and mischaracterizes TransAmerica's Motion as asserting a new affirmative theory of recovery.[2] Indeed, the OSFC's Memo Contra fails to provide any excuse for not providing TransAmerica an opportunity to observe the remedial work.

- While the OSFC suggests there was no spoliation because TransAmerica's roofing consultant was allowed to view the roofs on multiple occasions, the OSFC fails to mention that no such opportunity was provided at the **most crucial moment**: when the underlayment of the roof was exposed (for the first and only time post-construction) during the performance of the remedial work. Exposure of the underlayment would have shed light on the important question of whether TransAmerica's work was to blame for the alleged water infiltration, or instead if that alleged water infiltration was caused by a defective roof designed produced by the OSFC's agent architect, SHP. (See Motion, pgs. 11-12, describing importance of the spoiled evidence).

[2] The OSFC's citation of *Smith v. Howard Jonson Co., Inc.*, 67 Ohio St.3d 28, 29, 1993-Ohio-229, 615 N.E.2d 1037 is misplaced. While Ohio law does provide a remedy for a defendant's spoliation in the form of a tort, Ohio law also allows litigants to use the doctrine of spoliation to exclude evidence offered by an adverse party when that adverse party unfairly deprives the movant of evidence it could have used in its defense. No formal pleading requirements exist. See *Loukinas*, 167 Ohio App. 3d at 569 (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 <u>not</u> necessary).

- And while the OSFC claims that the repairs "followed the protocol outlined in the State's expert report," (See OSFC's Memo Contra, pg. 2), the OSFC does not provide evidence to substantiate that statement. Indeed, whether the OSFC complied with the State's expert's recommendation or not has no bearing on the issue of spoliation. What matters here is that the OSFC precluded TransAmerica from an opportunity to observe the remedial work as it occurred, thereby preventing TransAmerica from collecting evidence that could have been important to its defense.

Because the OSFC has failed to rebut the presumption of prejudice, this Court should issue an appropriate sanction. The Court should prevent the OSFC from setting forth evidence or witness testimony attempting to shift blame onto TransAmerica for alleged water infiltration. Because the OSFC's conduct left TransAmerica without evidence that could have been important, if not critical, to its defense, such a sanction is warranted here.

Further, while the OSFC has made a habit of requiring contractors like TransAmerica to ***strictly comply*** with the notice provisions of their contracts, including Article 8 dispute resolution provisions relevant in this case, the OSFC is now only-too-eager to attempt to evade application of the notice provisions in the Ohio Revised Code.

R.C. 153.17 explains that when a public owner is of the opinion that the contractor has neglected its work, not prosecuted its work with the diligence intended in the contract, or has placed improper materials onto a project, that public owner "**shall**" provide not less than five (5) days' notice in writing and provide the contractor fifteen (15) days to comply with the owner's requisition. 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.[3] Judge Travis's logic

[3] 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 *NL. 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 (lst

applies equally here. R.C. 153.17 clearly provides that if, and only if, the owner provides notice and the contractor fails to cure after being provided an opportunity to do so, 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.

Rather than attempt to show that the OSFC satisfied those conditions precedent, the OSFC suggests that R.C. 153.17 does not apply because the repair work took place after TransAmerica left the jobsite. **But the OSFC provides no language of R.C. 153.17 supporting this unique interpretation; nor does any exist.** Indeed, R.C. 153.17 requires public owners to provide five (5) days' notice and fifteen (15) days to cure when making a requisition upon a contractor to "remove improper materials from the grounds as in [the owner's] judgment the contract and its faithful fulfillment requires." R.C. 153.17(A). Such a request could easily occur after the contractor, like TransAmerica, has demobilized from the project. Moreover, the OSFC has never issued a Certificate of Contract Completion and continues to withhold a significant amount of TransAmerica's contract balance. While TransAmerica might not have been on the Project in late 2014, the need to have notice and an opportunity to cure contemplated in R.C. 153.17 was still as present as ever.

Finally, R.C. 153.17 is clearly **not** discretionary.[4]

The OSFC's violation of R.C. 153.17 is an additional ground for the Court to issue an appropriate sanction which would prohibit the OSFC from attempting to shift blame to TransAmerica for alleged water infiltration and subsequent repair costs.

Dist. 1990); *Kersh v. Montgomery Dev. Ctr.*, 35 Ohio App.3d 61,62 (l0th Dist. 1987)).

[4] 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, 2012-0hio-781, ¶9. No clear and unequivocal legislative intent exists here that would suggest that Ohio's legislature, in using the word "shall" in R.C. 153.17, meant to depart from that word's ordinary meaning.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *TransAmerica's Memorandum in Opposition to Motion in Limine regarding OSFC's Liquidated Damages* was sent via e-mail and by regular U.S. mail, postage prepaid, this 8th day of May, 2015 to:

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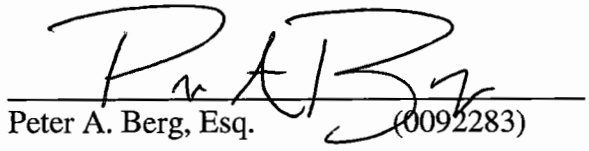

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