

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO

2015 MAY 18 AM 11:04

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 :

Case No. 2013-00349

Judge McGrath

v. :

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

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. :

**MOTION TO SET ASIDE REFEREE WAMPLER'S MAY 8 ORDER DENYING  
TRANSAMERICA'S MOTION TO EXCLUDE AND MOTION IN LIMINE**

Pursuant to Civ.R. 53(D)(2)(b), Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby moves to set aside the Order of Referee Wampler issued on May 8, 2015 ("Order") which (1) denied TransAmerica's Motion to Exclude Evidence Due to Spoliation

filed on April 28, 2015 (“Motion to Exclude”) and (2) denied TransAmerica’s Motion in Limine filed on April 14, 2015. For the reasons that follow below, Referee Wampler’s May 8 Order should be set aside and this Court should grant TransAmerica’s Motions.

To be clear, the Referee may be reserving final judgment on these key issues until trial after he has heard all relevant evidence. If so, any prejudice to TransAmerica could be eliminated or at least minimized by appropriate rulings on these issues at trial. However, TransAmerica wishes to exercise great care to preserve its objections so as to avoid any waiver argument OSFC may make later in this case.

**I. TransAmerica’s Motion to Exclude Should Be Granted.**

As set forth in TransAmerica’s Motion to Exclude, by ignoring TransAmerica’s repeated requests to observe remedial work on the Project as it occurred, OSFC (1) spoiled evidence that could otherwise been valuable to TransAmerica’s defense and (2) violated R.C. 153.17. As such, this Court should set aside Referee Wampler’s Order and should award a proper sanction that would prohibit OSFC from introducing evidence (expert or otherwise) attempting to shift to TransAmerica costs for roof repairs.

*i. Transamerica Established OSFC’s Spoliation Of Evidence.*

The Referee correctly concluded that Ohio law recognizes the sanction of exclusion of evidence as a remedy for an opposing party’s spoliation of evidence. (Order of Referee, pgs. 9-10). As described in TransAmerica’s Motion to Exclude, the First District, the Sixth District, and the Tenth District have established that spoliation can be asserted defensively to exclude evidence offered by a party who spoiled evidence.<sup>1</sup> But while Referee Wampler correctly

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<sup>1</sup> *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 567, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist.) (affirming trial court’s exclusion of evidence as a sanction where spoiling party ignored repeated requests of moving party to be present at time of an excavation); *Watson v. Ford Motor Co.*, 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51 (affirming trial court’s exclusion of expert testimony where car was destroyed before moving party had an

recognized the doctrine of spoliation, Referee Wampler erred in denying TransAmerica's assertion of that defense here. As the Sixth District has explained,

[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.

...

**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 at ¶51* (internal citations omitted) (emphasis added); *see also Loukinas and Earthlink*, f.n. 1.

Here, TransAmerica established (1) that without an opportunity to observe the remedial work in progress despite multiple requests, TransAmerica lost evidence relevant to its defense<sup>2</sup>; (2) while OSFC had an opportunity to observe that evidence, TransAmerica did not<sup>3</sup>; and (3) OSFC destroyed or altered evidence without providing TransAmerica an opportunity for inspection<sup>4</sup>. Here, the OSFC spoiled evidence important to TransAmerica's defense by performing remedial work on the roofs without providing notice to TransAmerica, despite TransAmerica's repeated requests for such notice, and despite OSFC's duty to preserve evidence relevant to TransAmerica's defense.

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opportunity to examine it); *RFC Capital Corp. v. EarthLink, Inc.*, 2004-Ohio-7046, ¶90 (10th Dist. 2004) (explaining that spoliation can be used as a defense but 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").

<sup>2</sup> See Motion to Exclude, pgs. 11-12.

<sup>3</sup> See Motion to Exclude, pg. 12.

<sup>4</sup> See Motion to Exclude, pg. 12.

With a preliminary showing of spoliation made, TransAmerica should “enjoy[] a rebuttable presumption that it was prejudiced by the destruction of relevant evidence, and the burden shifts to [OSFC] to persuade the trial court that there is **no reasonable possibility** that lack of access to the unaltered or intact product deprived [TransAmerica] of favorable evidence.” *Watson* at ¶51 (internal citations and quotation marks omitted) (emphasis provided). Because OSFC has not met—and cannot meet—that high burden in this case, Referee Wampler erred by not issuing an appropriate sanction. As such, TransAmerica requests that this Court set aside Referee Wampler’s Order and that this Court award an appropriate sanction precluding OSFC from offering evidence as to alleged roof defects.<sup>5</sup>

*ii. Transamerica Established OSFC’s Violation of R.C. 153.17.*

Referee Wampler erred in interpreting R.C. 153.17. While a public owner has the option of using R.C. 153.17 to self-perform work, the plain language of R.C. 153.17 mandates that once an owner chooses to exercise its rights under that statute, the owner “**shall**” “serve[]” “[n]ot less than five days’ notice in writing . . . upon the contractor” and “[i]f the contractor fails to comply with such requisition within fifteen days, such owner . . . may [self-perform].” R.C. 153.17(A). 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.

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<sup>5</sup> While Civ.R. 37 does provide a mechanism for a defendant (or counter-defendant) to raise the defense of spoliation, such a motion is not required. In *Loukinas*, the First District explained that neither a Civ.R. 37 motion nor a request of an order for preservation of evidence are prerequisites to asserting a spoliation-of-evidence defense. A party who spoils evidence cannot hide behind procedural technicalities. Rather, “Even prior to the commencement of any litigation, a plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.” *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 569, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist.). By breaching that duty in *Loukinas*, as OSFC did here, the trial court correctly precluded the plaintiff from offering evidence in support of its claims, and properly dismissed the plaintiff’s claims. No formal pleading or motion requirements were necessary to reach that result.

Thus while the owner's ability to exercise its rights under R.C. 153.17 may be optional (the statute uses the word "may" in regard to the owner's choice of whether to employ additional forces or not), once the owner acts upon the opportunity to self-perform provided in R.C. 153.17, the statute becomes mandatory in that imposes two conditions precedent (notice and an opportunity to cure) that the owner must fulfill before it self-performs. This Court said as much recently in *N.L. Constr. Corp. v. Ohio Dep't of Admin. Servs.*, Ct. of Cl. No. 2011-08318, 2012-Ohio-6328, where the Court interpreted similar language to preclude the State's counterclaims for remedial work where the State failed to provide the "5/15 notice" required by R.C. 153.17. As in *N.L. Constr. Corp.*, the State's failure to fulfill either of these two conditions precedent establishes the State's violation of R.C. 153.17. (See Motion to Exclude, pgs. 14-15).

The OSFC's violation of R.C. 153.17 serves as an additional basis for TransAmerica's Motion to Exclude. As such, TransAmerica respectfully requests this Court to set aside Referee Wampler's Order and that this Court award an appropriate sanction precluding OSFC from offering evidence as to alleged roof defects.

## **II. TransAmerica's Motion In Limine Should Be Granted.**

Referee Wampler correctly recognized that both parties to this case are subject to L.C.C.R. 7(E). That Rule precludes a party from attempting to elicit expert opinion testimony during trial when that expert testimony is not reflected in a written report previously disclosed to the opposing party. (See Order, pg. 5, citing L.C.C.R. 7(E)). But while L.C.C.R. 7(E) applies in this case, Referee Wampler erred in not applying the Rule here, where TransAmerica has established through its Motion in Limine (and the evidence attached to its Motion) that OSFC has not produced any expert schedule analysis, critical path method or otherwise, setting forth delay TransAmerica allegedly caused on the Project. (See Motion in Limine, pgs. 3-6). With

that fact established, any testimony offered by the OSFC that purports to apportion delay to TransAmerica **would not** be reflected in a previously disclosed expert report. Thus, any attempt to elicit expert testimony on delay allegedly caused by TransAmerica would violate L.C.C.R. 7(E). As such, Referee Wampler erred in not issuing an Order *in limine* making it clear (from the beginning of trial) that OSFC will be precluded from offering evidence purporting to ascribe delay to TransAmerica. Such an order would have ensured an evenhanded and expeditious trial, consistent with the fundamental purpose of a motion in limine. See *Indiana Insurance Co. v. General Electric Co.*, 326 F.Supp.2d 844, 846 (N.D. Ohio 2004).

Further, without an expert report to rely upon, testimony offered by OSFC attempting to shift delay on the Project to TransAmerica would be nothing more than a “best-guess,” inconsistent with Ohio Rules of Evidence which preclude speculative testimony. (See Motion in Limine, pgs. 7-9).

Finally, OSFC was required under the terms of its contract to perform a critical path analysis of the schedule before it asserted liquidated damages against TransAmerica.

**6.3 CRITICAL PATH**

6.3.1 Notwithstanding any other provision of the Contract Documents, time extensions shall depend upon the extent to which the Work on the critical path of the Construction Schedule is affected, if applicable.

(See Motion in Limine, pgs. 10-11, citing Project’s General Conditions at Section 6.3.1). However, rather than comply with that obligation under its contract, OSFC denied TransAmerica’s requests for time extensions and assessed liquidated damages against TransAmerica based simply on internal discussions about the “best course of action” and reliance on its Construction Manager, Lend Lease, who also did not perform a schedule analysis. (See Motion in Limine, pg. 11).

Without a schedule analysis, any testimony offered by OSFC (expert or otherwise) attempting to apportion delay to TransAmerica would violate L.C.C.R. 7(E), would be speculative at best, irrelevant, and its probative value would be outweighed by its potential prejudice to TransAmerica. Therefore, TransAmerica respectfully requests that this Court set aside Referee Wampler's Order and grant TransAmerica's Motion in Limine.

### **III. Conclusion**

TransAmerica respectfully requests this Court to set aside Referee Wampler's May 8 Order pursuant to Civ.R. 53(D)(2)(b), and issue an Order granting TransAmerica's Motion to Exclude and Motion in Limine, consistent with TransAmerica's arguments above.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing PLAINTIFF TRANSAMERICA'S MOTION TO SET ASIDE REFEREE WAMPLER'S MAY 8 ORDER DENYING TRANSAMERICA'S MOTION TO EXCLUDE was sent via e-mail and by regular U.S. mail, postage prepaid, this 18<sup>th</sup> day of May, 2015 to:

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