

**ORIGINAL** FILED  
COURT OF CLAIMS  
OF OHIO

**IN THE COURT OF CLAIMS OF OHIO**

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**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 POST-TRIAL BRIEF**

A three-week trial exposed the inescapable truth underlying this case: the Ohio School Facilities Commission ("OSFC"), through its agents, Steel Hammond Paul ("SHP") and Lend Lease (US) Construction Inc. ("LL"), utterly and completely failed to furnish a "full and

accurate” set of construction plans and specifications “so drawn and represented as to be easily understood” providing directions that would “enable a competent mechanic or other builder to carry them out and afford bidders all needful information.” This is a patent violation of the most fundamental of Ohio statutes governing public construction, R.C. §153.01, and entitles TransAmerica to the substantial damages it incurred as a result.

Hundreds of documents and weeks of testimony also revealed that the OSFC, through its own actions and inactions and those of its agent architect and agent construction manager advisor, breached its contract with TransAmerica Building Company, Inc. (“TransAmerica”). The OSFC materially breached its contract by failing to provide sufficient plans and specifications to enable TransAmerica to perform, by failing to comply with the implied duty of good faith and fair dealing, by failing to disclose (and at times actively concealing) superior knowledge that was material to TransAmerica’s performance, and by fundamentally altering TransAmerica’s undertaking under its contract.

It is telling that the OSFC spent little time at trial seriously contesting its shortcomings in this case, focusing instead on its theory that construction cases “are not special” and that TransAmerica failed to establish its damages were “proximately caused”<sup>1</sup> by the actions or inactions of the OSFC or its agents. Those arguments failing, the OSFC turned to others more tried-and-true, though not persuasive here. Falling back on arguments to which it is more accustomed, the OSFC relies on technicalities buried in its contract—boilerplate notice provisions—that even the OSFC’s own construction manager, LL, acknowledged in an email sent to SHP that TransAmerica complied with.<sup>2</sup>

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<sup>1</sup> Proximate cause is a tort concept inapplicable to a contract claim.

<sup>2</sup> LL acknowledged to SHP that “TransAmerica has also submitted correspondence to cover themselves if there is a field issue or error.” (TA-0304)

The OSFC's reiteration of those arguments finds little support in the facts of this case. For one, the OSFC's decision to bid this project with wholly inadequate plans and specifications, and failure to promptly remedy those design defects, made it all-but-impossible for TransAmerica, in the midst of construction, to accurately calculate its prospective damages and certify its claim in detail. Further, the dozen or more misrepresentations made by SHP and LL that defects in the original bid documents would be promptly resolved through an updated "construction set" also prevented TransAmerica from providing the earlier notice and certification upon which the OSFC now insists. TransAmerica's ability to comply with Article 8 was continually frustrated by a process of false promises and adversarial project management. The OSFC, through LL, also prematurely denied TransAmerica's Article 8 claim.<sup>3</sup>

The OSFC also cannot legitimately dispute that, at a very minimum, TransAmerica substantially complied with Article 8 and that the OSFC had actual notice of the impacts caused by the lack of "full and accurate" construction drawings and failure to properly coordinate work on the project. TransAmerica notified the OSFC of that potential impact before it even mobilized to the project site.<sup>4</sup> The evidence established that TransAmerica provided notice early and often, and everyone on the project was aware of the problems caused by the defective plans and mismanagement.

The OSFC also overlooks Ohio law. First, the doctrine of first breach precludes the OSFC from insisting on strict compliance with Article 8 notice provisions when its own material breach caused the impact on TransAmerica in the first instance.<sup>5</sup> Second, the Fairness in

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<sup>3</sup> The evidence revealed that LL prevented TransAmerica from substantiating its original Article 8 notice by promising that the "construction set" would be made available on a not-too-distant date (March 1, 2011), which would presumably resolve all of TransAmerica's concerns, and then informing TransAmerica that its notice was "closed at this time." See LL's response to TA's February 17, 2011 notice letter.

<sup>4</sup> See TA's February 17, 2011 notice to LL and SHP notifying them of impacts caused by lack of promised "revised/corrected/updated drawings." (TA-0245/5)

<sup>5</sup> See, e.g., *N.L. Constr. Corp. v. Ohio Dep't of Admin. Servs.*, Ct. of Cl. No. 2011-08318, 2012-Ohio-6328, ¶ 27.

Construction Contracting Act, R.C. 4113.62, precludes the OSFC from relying on boilerplate notice provisions buried in its contract to limit or preclude a delay claim that arose directly out of its own actions and inactions.<sup>6</sup> Finally, the doctrine of waiver by estoppel applies to bar the OSFC's insistence on strict compliance with Article 8 where the OSFC acted in a manner inconsistent with an intent to demand strict compliance.<sup>7</sup>

Similar arguments preclude the OSFC from relying on executed Change Orders to limit TransAmerica's recovery. The OSFC should also be precluded from improperly using the liquidated damages provision in its contract as a set-off against TransAmerica's damages, and the OSFC should not be entitled to rely on allegedly defective roof work where it spoiled evidence relevant to TransAmerica's defense. Finally, TransAmerica's recovery is not precluded by the statute of limitations.

In short, there is an abundance of law that precludes the OSFC from making the arguments it now insists upon to preclude or limit TransAmerica's recovery. That legal authority is provided in the argument that follows.

#### **I. TransAmerica Complied With Article 8.**

TransAmerica complied with Article 8 by providing notice early and often, both through formal notice letters and emails describing TransAmerica's impact as construction progressed, and through mutual extensions of the Article 8 certification requirement per G.C. 8.3.4 which allowed the parties to "reasonably extend the thirty (30) day period for substantiation of a Claim." TransAmerica also submitted additional pricing and multiple requests for additional time through the Article 7 change order process. TransAmerica's pricing submissions under

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<sup>6</sup> *Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Sys.*, 10th Dist. Franklin App. No. 07AP-574, 2008-Ohio-1630, ¶ 19.

<sup>7</sup> *Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-12745, 2012-Ohio-6332, ¶23.

Article 7 and its further compliance with Article 8 is detailed in its Findings of Fact and Conclusions of Law, specifically at ¶¶ 299-349, 353-369, and 372-383.

## II. The OSFC Prevented TransAmerica From Strictly Complying With Article 8.

Even assuming for the sake of argument that TransAmerica failed in some way to strictly satisfy the Article 8 process, the OSFC cannot rely on alleged failures to strictly comply with Article 8 notice and certification requirements when the OSFC, through the mismanagement and misrepresentations of its agent architect and agent construction manager advisor, prevented TA from more-fully complying with Article 8.

The well-established rule in Ohio is that “nonperformance of a condition is excused where performance thereof is prevented by the other party.”<sup>8</sup> As the Tenth District has held, “[a] contracting party who prevents the adverse party from performing under the contract cannot take advantage of the adverse party’s nonperformance.”<sup>9</sup>

This Court has previously applied the prevention-of-performance rule to bar the OSFC’s argument that a contractor waived its claim by failing to strictly follow notice provisions in its contract. In *J&H Reinforcing & Structural Erectors, LLC*, the contractor, J&H, was excused from notice provisions under its contract where the OSFC and its agent construction manager (Bovis Lend Lease, through the actions of Clay Keith and Jim Schwartzmiller) prevented J&H from strictly complying with the Article 8 process by (1) engaging in a “strategy” to prevent

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<sup>8</sup> *Dynes Corp. v. Seikel, Koly & Co., Inc.*, 100 Ohio App. 3d 620, 641, 654 N.E.2d 991 (8th Dist.1994); *see also Fabrication Grp. L.L.C. v. Willowick Partners L.L.C.*, 11th Dist. Lake No. 2011-L-141, 2012-Ohio-4460, ¶ 45; *Wajda v. M&J Auto., Inc.*, 7th Dist. No. 10-MA-7, 2010-Ohio-2583, ¶22; *Blake Homes, Ltd. V. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4604, 877 N.E.2d 1041 (6th Dist.); *First Energy Solutions v. Gene B. Glick Co.*, 9th Dist. No. 23646, 2007-Ohio-7044, ¶35; *Lakes v. Mayo*, 12th Dist. No. CA-2006-01-003, 2006-Ohio-6072, ¶7; *Tucker v. Young*, 4th Dist. No. 04CA10, 2006-Ohio-1126, ¶25; *Stone Excavating, Inc. v. Newmark Homes, Inc.*, 2nd Dist. No. 20307, 2004-Ohio-4119, ¶18; *Nious v. Griffin Constr., Inc.*, 10th Dist No. 03AP-980, 2004-Ohio-4103, ¶16; *Thorn v. Schneiderman-Welch*, 5th Dist. Stark No. 98-CA-00261, 1999 Ohio App. LEXIS 3674, \*17 (Aug. 2, 1999); *Gary Crim, Inc. v. Rios*, 114 Ohio App. 3d 433, 436, 683 N.E.2d 378 (7th Dist. 1996); *Wittrock v. Paragon Paper Co.*, 1st Dist. App. No. C-840883, 1985 Ohio App. LEXIS 9676, at \*11 (Dec. 18, 1985).

<sup>9</sup> *Steve Landis, et al. v. William Fannin Builders, Inc.*, 193 Ohio App.3d 318, 2011-Ohio-1489, 951 N.E.2d 1078 citing *Gary Crim, Inc. v. Rios*, 114 Ohio App.3d 433, 436, 683 N.E. 378 (1996).

J&H from filing a formal claim and (2) expressly directing J&H to stop writing notice letters.<sup>10</sup> By preventing J&H's performance, the OSFC "waived" its ability to assert Article 8 in defense of J&H's claim.<sup>11</sup>

As in *J&H Reinforcing*, to the extent TransAmerica fell short of strict notice and certification requirements in its contract, the OSFC through its agents, SHP and LL, prevented TransAmerica from providing such notice or certification by (1) misrepresenting to TransAmerica the true nature of the design problems and status of the building permits, (2) by managing the project in adversarial manner and without good faith, and (3) by misrepresenting on over a dozen separate occasions that a fully-integrated "construction set" would be issued to TransAmerica and then withholding those promised drawings from TransAmerica.

The OSFC through its agents, SHP and LL (including the exact same people who frustrated J&H's claim in *J&H Reinforcing*), acted to continually prevent TransAmerica from filing a claim. When TransAmerica submitted notice letters or RFIs to SHP and LL describing the impact the lack of complete drawings was having on construction, TransAmerica was placated with promises that an updated construction set would be issued soon that would alleviate TransAmerica's concerns.<sup>12</sup> However, as construction progressed without updated drawings, SHP and LL never followed through on their repeated promises. Instead, TransAmerica was left to construct the project with drawings and specifications far from "full and accurate," which contained serious dimensional errors, and were continually updated in piecemeal fashion as the project was "designed on the fly."

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<sup>10</sup> *J&H Reinforcing & Structural Erectors, LLC*, Ct. of Cl. No. 2010-07644, 2012-Ohio-5298, ¶ 46, affirmed *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 10th Dist. No. 12AP-588, 2013-Ohio-3827.

<sup>11</sup> *J&H Reinforcing*, 2012-Ohio-5298, ¶ 46, affirmed 2013-Ohio-3827, ¶ 87.

<sup>12</sup> This is seen most notably in LL's response to TransAmerica's February 14, 2011 notice letter, in which LL represented that the updated construction set would be issued no later than March 1, 2011. LL indicated that TransAmerica would have no basis for a claim "provided that [the updated drawings] are available as noted on March 1, 2011." LL also wrote that TransAmerica's notice was "closed at this point," effectively denying TransAmerica's claim before it was filed. (TA-0256) Those drawings were never provided.

LL and SHP's misrepresentations continued throughout construction and made it impossible as a practical matter for TransAmerica to provide the additional information-beyond TransAmerica's early notices upon which the OSFC now insists. Indeed, it was not until much later in the project that TransAmerica could fully appreciate the true nature of the design defects and the mismanagement of the project and had complete information to fully-certify its claim under Article 8.<sup>13</sup> By preventing TransAmerica's performance of Article 8 to that point, notice and certification conditions imposed by Article 8 were excused. It follows that the OSFC cannot rely on Article 8 to limit TransAmerica's claim.

### **III. TransAmerica Substantially Complied With Article 8 And The OSFC Had Actual Notice.**

Under Ohio law, "[w]here there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar an action for breach of contract brought against a party that had actual notice."<sup>14</sup> "The long and uniformly settled rule as to contractors requires only a substantial performance in order to recover upon such contract. Merely nominal, trifling, or technical departures are not sufficient to breach the contract."<sup>15</sup>

To the extent notice and certification requirements were important to put the OSFC on notice of TransAmerica's claim, TransAmerica substantially complied with those requirements by submitting numerous notice letters to the OSFC (through its agents) frequently and throughout the project, notifying the OSFC of the basis for its potential claim and of possible additional costs. At a minimum, TransAmerica's substantially complied with Article 8 by

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<sup>13</sup> This Court recognized in *J&H Reinforcing* that "it was impossible for J&H to strictly comply with any requirement to quantify the amount of its damages for labor inefficiency until it could conduct a 'measured mile' analysis." 2012-Ohio-5298, ¶ 45.

<sup>14</sup> *Stonehenge Land Co. v. Beazer Homes Invs., LLC*, 177 Ohio App. 3d 7, 18, 2008-Ohio-148, 893 N.E.2d 855 (10th Dist.), citing *Interstate Gas Supply, Inc. v. Callex Corp.*, 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638.

<sup>15</sup> *Ibid.*, citing *Ohio Farmers' Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922), paragraph two of the syllabus.

providing frequent and repeated notices to the OSFC of its impending claim and by informing the OSFC how it could mitigate potential impact.<sup>16</sup> The OSFC should not benefit from its failure to take appropriate action.

The OSFC cannot dispute the fact that it had notice of the impacts underlying TransAmerica's claim. The OSFC and its agents (unlike TransAmerica) were fully aware of true nature of the problems in the bid documents and of the impact those problems were causing on the project as construction progressed.<sup>17</sup> In reality, when TransAmerica submitted its certified claim in March 2012, there was no surprise to anyone.

To the extent the OSFC relies on technicalities in attempt to defeat TransAmerica's claim, where an owner has actual notice of facts giving rise to a claim, Ohio courts—including the Tenth District—have been willing to overlook minor deviations from boilerplate notice provisions. For example, in *Roger J. Au & Son, Inc. v. Northeast Regional Sewer Dist.*, the Ohio Court of Appeals for the Eighth District held that a contractor's alleged failure to provide written

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<sup>16</sup> The fact that TransAmerica substantially complied with Article 8 is demonstrated by an email sent on September 4, 2012, from Madison Dowlen, the OSFC's project administrator, to several other OSFC representatives including Richard Hickman. Mr. Dowlen identified several "over budget scenarios" all of which listed TransAmerica's claim. Mr. Dowlen wrote that while "[t]he project team understands there is no additional funding available . . . given the above circumstances, I am requesting additional funds." In response, Mr. Hickman explained simply that a "budget adjustment and more money is not possible for this state agency project." At no time was it mentioned in either email that TransAmerica had not complied with the Article 8 process as a basis for denying TransAmerica's Claim.

<sup>17</sup> See, e.g., TA-0146 (LL informs OSFC that they "need to start working on Campus wide portions of work that affect the dorm buildings to assure that we do not have any delays in progress with the dorms as we move forward"); TA-0176 (SHP notes that its consultant, BPI, "will be paying the claim" "[w]hen it is determined that we got the permit review comments in July and we [were] unable to turn them around in five (5) months"); TA-0194 (LL Superintendent Joe Rice refers to drawings as "useless trash"); TA-0731 (OSFC's Project Manager responds to SHP's support for additional compensation by writing in red ink "quality of documents"); TA-0237 (LL writes to SHP on February 15, 2011, in all caps "GET US DRAWINGS WE CAN USE TO BUILD THE BUILDINGS"); TA-0256 (SHP acknowledges drawings are needed to "eliminate confusion"); TA-0292 (LL and SHP discuss campus wide packages and that future casework package cannot be properly coordinated with on-going work); TA-0325 (on May 6, 2011, LL notifies SHP "we are going to get hit with costs for every wall that is wrong on OSSB 5 and it will come back to confusion on the drawings"); JX-H-34 (during May 19, 2011 Core Meeting, noted that campus wide packages will delay the contractors in getting final inspections); TA-0345 (LL notifies that casework portion is "very urgent" and that "casework for the dorms will have a direct impact on the completion of this project and could cause delay claims"); TA-380 (on July 7, 2011, LL writes to SHP "This is not how we should be managing construction and it is going to bite us in the you know what . . . I feel we need to get this train back on track and it starts with clear and accurate drawings"); TA-0410 (LL acknowledges impact of late plan submission approvals by noting that the DIC "is not going to sign off or approve any further inspection requests until revised/updated/stamped drawings are available for review").

notice of its differing soils condition claim did not automatically preclude the contractor's claim.<sup>18</sup> Citing in support a Federal Court of Claims case, *Nelson Bros. Constr. Co.*, 77-2-BCA, ¶ 12660 (1977), the Eight District concluded that "[t]here is no reason to deny the claims for lack of written notice if [the owner] was aware of the differing soil conditions throughout the job and had a proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled."<sup>19</sup>

Similarly, in *Craft Gen. Contractors, Inc. v. City of Urbana*, the Tenth District held that a contractor's delay in submitting a written claim beyond the contractually-required one-week time period did not automatically preclude its claim, "since [the owner] had independent knowledge of the condition complained of and had oral notice of [the contractor's] complaint and [the owner was] not prejudiced by lack of earlier written notice."<sup>20</sup>

This was confirmed most recently in *J&H Reinforcing*, where the Tenth District concurred with this Court that J&H "substantially complied both in the submission and substance of its claims for delays and inefficiencies" and that the OSFC waived its right to demand strict compliance with Article 8 when it failed to comply with the process itself.<sup>21</sup>

Because the OSFC and its agents had actual notice, the purpose underlying the written notice requirements under Article 8 was already fulfilled, and the need for strict compliance was lessened, if not entirely obviated. The OSFC cannot legitimately argue that it was prejudiced by alleged failures to strictly comply with Article 8. In reality, the OSFC and its agents were independently aware of the facts giving rise to TransAmerica's claim, had sufficient opportunity

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<sup>18</sup> *Roger J. Au & Son, Inc. v. Northeast Regional Sewer Dist.*, 29 Ohio App.3d 284, 292, 504 N.E.2d 1209 (8th Dist.1986).

<sup>19</sup> *Roger J. Au* at 292.

<sup>20</sup> *Craft Gen. Contractors, Inc. v. City of Urbana*, 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, at \*23 (Feb. 2, 1982).

<sup>21</sup> *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 10th Dist. No. 12AP-588, 2013-Ohio-3827, ¶¶ 81-87.

to perform their own independent investigation, and could have taken steps to minimize impact and costs. The OSFC should not be allowed to use its own inaction and mismanagement as a basis for limiting TransAmerica's claim.

Notice and certification requirements in a construction contract are important to put the owner on notice of a potential claim and to allow for proper remediation.<sup>22</sup> But it is equally true that owners should not be allowed to rely on technicalities buried in a contract as a one-stop solution to avoiding legitimate claims. Here, the OSFC cannot escape liability for its shortcomings based solely on nominal, trifling, or technical departures from Article 8 where the OSFC and its agents misrepresented important facts and had actual notice of the facts giving rise to TransAmerica's claim.<sup>23</sup> As such, the OSFC should be prohibited from relying on Article 8 to limit TransAmerica's claim.

#### **IV. The OSFC Materially Breached The Contract First Excusing TransAmerica's Further Performance.**

This Court has held that "as a general rule, once there has been a material breach of the contract, the nonbreaching party is not required to fulfill the remaining terms of the contract, and the breaching party is not entitled to collect damages from the nonbreaching party."<sup>24</sup> Indeed, "[u]nder Ohio law, a non-breaching party to a contract is excused from complying with

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<sup>22</sup> See, e.g., *Watson Lumber Co. v. Guennewig*, 79 Ill. App. 2d 377, 226 N.E.2d 270 (5th Dist. 1967).

<sup>23</sup> To name just a few other cases excusing strict compliance with notice requirements based on the owner's actual notice, see, e.g., *Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill*, 652 A.2d 440, 447 (R.I. 1994)(contractor did not waive claim where it provided notice early in the project of a potential claim and the state had the opportunity to monitor and keep account of costs); *Jo-Bar Mfg. Corp. v. U. S.*, 210 Ct. Cl. 149, 535 F.2d 62, 66 (1976) (holding that "where the contracting officer knows, or is properly chargeable with knowledge, that at the time of final payment contractor is asserting a right to additional compensation, even though formal claim therefor has not been filed, the fact of final payment does not bar consideration of a later formal claim"); *Hoel-Steffen Const. Co. v. U. S.*, 197 Ct. Cl. 561, 456 F.2d 760 (1972) (refusing to enforce a 20-day claim notice requirement where the government had actual knowledge of events constituting a constructive suspension of work); *Nippo Corporation/International Bridge Corp. v. AMEC Earth & Environmental, Inc.*, 2013 WL 1311094 (E.D. Pa. 2013) ("where the contracting officer directs work knowing the likely outcome, strict compliance with notice provisions is unnecessary"); *Miller Elevator Co., Inc. v. U.S.*, 30 Fed. Cl. 662, 699, 39 Cont. Cas. Fed. (CCH) ¶76635 (1994), dismissed, 36 F.3d 1111 (Fed. Cir. 1994)("if a contracting officer maintains actual or constructive knowledge of the conditions which caused the constructive change to the contract, in most cases, no prejudice to the Government occurs.").

<sup>24</sup> *N.L. Constr. Corp.*, 2012-Ohio-6328, ¶27 (citations omitted).

conditions of the contract, when the party for whose benefit the condition operates has already materially breached the contract.”<sup>25</sup>

Many jurisdictions have embraced the doctrine of “first breach” to prevent a breaching party from benefiting from its breach.<sup>26</sup> And while this Court has addressed the defense in the context of an owner’s wrongful termination,<sup>27</sup> the doctrine should apply equally whenever an owner breaches its contract earlier in time. Here, the defense applies to (1) prevent the OSFC from relying on a strict interpretation of Article 8 and (2) from recovering damages from TransAmerica for alleged breaches when the OSFC had already materially breached the contract.

The OSFC materially breached its contract by violating R.C. 153.01, failing to provide adequate construction drawings and specifications that would enable TransAmerica to perform, failing to fulfill the implied duty of good faith and fair dealing, and materially altering TransAmerica’s undertaking under its contract, making it much more difficult. To the extent TransAmerica fell short of strict Article 8 notice requirements, the OSFC’s material breach of contract occurred before any alleged shortcoming by TransAmerica with respect to Article 8.

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<sup>25</sup> *Brakefire, Inc. v. Overbeck*, 144 Ohio Misc. 2d 35, 58, 2007-Ohio-6464, 878 N.E.2d 84 (C.P. Clermont), citing *Waste Mgt., Inc. v. Rice Danis Indus. Corp.*, 257 F.Supp.2d 1076, 1084 (S.D. Ohio 2003).

<sup>26</sup> In *Enron Fed. Solutions, Inc. v. United States*, for example, the United States Court of Federal Claims wrote that “[a] basic statement of the law . . . is: a party who materially breaches a contract relieves the non-breaching party from all of the non-breaching party’s contractual obligations to the breaching parties.” 80 Fed. Cl. 382, 398 (2008). The defense of “first breach” has also often been cited with approval in construction cases. For example, in *James Talcott Const., Inc. v. P & D Land Enterprises*, a subcontractor was excused from performing punch list and warranty work when the developer withheld payments from the subcontractor which had already been certified by the developer’s architect. 333 Mont. 107, 2006-MT-188, ¶ 37, 141 P.3d 1200. In *Commonwealth Const. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, a contractor was excused from further performance where, among other breaches, the owner delayed commencement of the project through changes made necessary by inconsistencies in the design documents and the owner’s inexperience in managing a large project. No. C.A. 04L-10-101 RRC, 2006 WL 2567916, at \*19 (Del. Super. Aug. 31, 2006). In *LJL Transp., Inc. v. Pilot Air Freight Corp.*, the Supreme Court of Pennsylvania held that a material breach excuses the non-breaching party from complying with notice and cure provisions in its contract. 599 Pa. 546, 567-568 (Pa. 2009), citing *L.K. Comstock v. United Engineers*, 880 F.2d 219 (9th. Cir. 1989) (contractor excused from serving a subcontractor with a 48-hour cure notice where it would have been a “useless gesture”). The court reasoned that even where the contract explicitly requires notice of a deficiency and an opportunity to cure, where the breaching party’s breach goes directly to the essence of the contract, the non-breaching party is not required to fulfill those conditions.

<sup>27</sup> See *N.L. Constr. Corp.* at ¶27.

The OSFC's material breach also occurred earlier in time than any alleged failure of TransAmerica to adequately construct roofs or fulfill roof-enclosure milestones.

Therefore, by operation of the doctrine of "first breach," the OSFC should be precluded from (1) strictly enforcing Article 8 to limit TransAmerica's claim and (2) from recovering damages from TransAmerica for any alleged breach. To the extent TransAmerica fell short of its obligations under the contract, that conduct took place later in time than the OSFC's material breach, and was precipitated by the OSFC's actions and inactions.

**V. The Ohio Fairness in Construction Contracting Act Precludes The OSFC's Use Of Article 8 To Limit TransAmerica's Claim.**

The OSFC's reliance on Article 8 to limit its liability to TransAmerica for delay damages is plainly inconsistent with R.C. §4113.62(C)(1), which provides:

Any provision of a construction contract . . . that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, **is void and unenforceable as against public policy.**<sup>28</sup>

To the extent the OSFC relies on Article 8 to argue its liability for delay damages is precluded, that argument is in direct conflict with the plain language of R.C. §4113.62(C)(1). In making such an argument, the OSFC relies on strict notice provisions in Article 8—"provision[s]" in TransAmerica's "construction contract"—asserting that those provisions "preclude[]" the OSFC's "liability for delay," even "where the cause of the delay" was the "proximate result" of the OSFC's "act or failure to act." By operation of R.C. 4113.62(C)(1), the OSFC should be prohibited from relying on Article 8 to limit TransAmerica's recovery. As the Supreme Court of Ohio has directed,

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<sup>28</sup> R.C. 4113.62(C)(1)(emphasis provided).

[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom. If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must simply apply it.<sup>29</sup>

Here the Court need only apply the plain meaning of R.C. 4113.62(C)(1).

To be clear, R.C. 4113.62(C)(1) invalidates contract provisions applied by a public owner to limit a contractor's remedy for delay caused by the owner's actions and inactions during the project. The statute applies only when (1) delay damages are at issue, and (2) only where the delay is caused by owner and its agents. But while the statute is narrow in its focus, it is significant in its application. In the circumstances where R.C. 4113.62(C)(1) does apply, it invalidates all contractual provisions that in their application limit a contractor's remedy for delay damages caused by an owner.<sup>30</sup>

This view is shared by the Tenth District, as seen in the leading case interpreting R.C. 4113.62(C)(1), *Cleveland Const.* In *Cleveland Const.*, the Tenth District invalidated two provisions in a construction contract by operation of the Ohio Fairness in Construction Contracting Act. Addressing the first assignment of error on appeal, the Tenth District invalidated a "no damages for delay clause," which limited the contractor's remedy for owner-caused delay to a non-compensable time extension.<sup>31</sup> The Tenth District reasoned that although a similar provision had been upheld by the Supreme Court of Ohio in *Dugan & Meyers*, such provisions were invalidated by passage of R.C. 4113.62(C)(1).<sup>32</sup>

Turning to the appellant's second assignment of error, the Tenth District invalidated a second contract provision which required the contractor to request an extension of time in

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<sup>29</sup> *Howard v. Miami Twp. Fire Div.*, 119 Ohio St. 3d 1, 4 (Ohio 2008)

<sup>30</sup> *Cleveland Constr.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, ¶ 28 ("R.C. 4113.62(C)(1) prohibits a limitation of remedies for delay caused by the owner")

<sup>31</sup> *Cleveland Constr.* at ¶ 10.

<sup>32</sup> *Id.*

writing, or waive its right to additional time.<sup>33</sup> While this second provision was not a “no damages for delay,” the Tenth District still invalidated that provision by operation of R.C. 4113.62(C)(1).

This second holding is particularly instructive here. In *Cleveland Const.*, the owner argued (similar to the OSFC’s argument in this case) that the contractor waived its right to recover delay damages caused by the owner by failing to submit a written request for an extension of time. Rejecting that argument and holding in favor of the contractor, the Tenth District held that “**because R.C. 4113.62(C)(1) prohibits a limitation of remedies for delay caused by the owner,** [the contractor] was not required to request an extension of time as its sole remedy for delay.”<sup>34</sup> In other words, because this “boilerplate” written notice requirement **limited the contractor’s remedy for delay caused by the owner**, that provision was void and unenforceable by operation of R.C. 4113.62(C)(1). Therefore, the contractor’s failure to comply with that provision did not preclude the contractor’s recovery.

Inherent in the Tenth District’s holding in *Cleveland Const.* is the rule that R.C. 4113.62(C)(1) prohibits an owner from limiting by contract a contractor’s remedy for delay caused by the owner.<sup>35</sup> This is consistent with the purpose underlying R.C. 4113.62(C)(1),

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<sup>33</sup> *Cleveland Constr.* at ¶ 23. In the owner’s second assignment of error, it argued that the contractor was precluded from recovery because it failed to request an extension of time. Rejecting that argument, the Tenth District concluded that Dugan & Meyers was “inapposite,” and concluded the contract was not required to submit written notice because that provision was unenforceable by operation of R.C. 4113.62(C)(1).

<sup>34</sup> *Cleveland Constr.* at ¶ 28. The Tenth District also held that while *Dugan & Meyers* had upheld a practically identical written notice requirement that decision was “inapposite” because it was ***decided before the enactment of R.C. 4113.62(C)(1)***.

<sup>35</sup> See also *Acme Contr., Ltd. v. TolTest, Inc.*, 370 Fed. Appx. 647, 655 (6th Cir. Mich. 2010), holding that under *Cleveland Const.* contract provisions limiting the contractor’s remedy for delay, including written notice requirement, were void and unenforceable by operation of R.C. 4113.62.

elucidated by the Tenth District in *Cleveland Const.*, that owners should be prevented from “escaping liability when they have caused a project delay.”<sup>36</sup> As the Tenth District aptly wrote,

[An] owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language. This, the legislature has said, is void as against public policy.<sup>37</sup>

*Cleveland Const.* and Judge McGrath’s more restrictive view of R.C. 4113.62(C)(1)<sup>38</sup> can be reconciled by recognizing that R.C. 4113.62(C)(1) does not necessarily eviscerate the Article 8 dispute resolution process in all respects. That process arguably remains intact and must be followed by any contractor seeking to bring a claim for additional non-delay costs against the OSFC.<sup>39</sup> What R.C. 4113.62(C)(1) does prohibit the OSFC from doing, however, is limiting by contract a contractor’s right to recover delay damages caused by the OSFC and its agents. In that context, R.C. 4113.62(C)(1) operates to invalidate any and all contract provisions that are applied in a manner to insulate the owner from liability for owner-caused delay.

As such, by operation of R.C. 4113.62(C)(1), the OSFC cannot apply an overly-restrictive interpretation of Article 8 to limit TransAmerica’s remedy for delay caused by the OSFC’s actions and inactions and those of its agents.

#### **VI. The Ohio Fairness in Construction Contracting Act Precludes The OSFC From Using General Conditions Section 4.2.1 To Limit TransAmerica’s Claim.**

To the extent the OSFC relies on GC Section 4.1.2, which purports to limit the OSFC’s liability to a non-compensable time extension, the argument is precluded by operation of R.C.

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<sup>36</sup> *Cleveland Constr.* at ¶ 19 (“the statute’s apparent purpose is to prevent owners from escaping liability when they have caused a project delay.”).

<sup>37</sup> *Id.*

<sup>38</sup> Judge McGrath submitted a Judgement Entry on April 9, 2015 in which he chose not to adopt the Referee’s October 1, 2014 decision invalidating Articles 8.1.4, 8.2.2, 8.3.5, 8.4.2, and 8.5.3 by operation of R.C. 4113.62, reasoning that statute is limited exclusively to “no damages for delay” clauses and does not impact the Article 8 claim administration process.

<sup>39</sup> Article 8 is fully enforceable except to the extent it limits the owner’s liability for delay damages caused by the owner’s actions or inactions. An owner is free to create conditions that, if not followed, will waive or preclude its liability for non-delay damages or for damages not caused by its own actions or inactions. For example, a contractor can be required under Article 8 to bring a claim for a differing site condition within a certain time prescribed by contract. If the contractor fails to do so, its (non-delay related) damages can be waived by operation of contract.

§4113.62(C)(1). GC Section 4.1.2 is the same type of “no damages for delay” provision specifically addressed and invalidated by the Tenth District in *Cleveland Constr.*<sup>40</sup> Thus, by operation of R.C. 4113.62(C)(1), General Conditions Section 4.1.2 is void and unenforceable to the extent it limits TransAmerica’s recovery of damages caused by the actions and inactions of the OSFC and its agents.

**VII. The OSFC Is Estopped From Asserting Article 8 To Limit TransAmerica’s Claim.**

The doctrine of waiver by estoppel allows a party’s inconsistent conduct, rather than a party’s intent, to establish a waiver of rights.<sup>41</sup> Waiver by estoppel prevents a party from insisting upon a particular right when he or she acts in a manner inconsistent with an intent to claim that right and, in so acting, misleads the other party to his prejudice.<sup>42</sup>

Here, the OSFC acted in a manner inconsistent with an intent to demand strict compliance with Article 8 by (1) informing TransAmerica that its February 17, 2011 notification was “closed” contrary to the Article 8 process<sup>43</sup>; (2) placating TransAmerica with continual promises that its concerns would be alleviated through a fully-integrated “construction set” which was purposefully withheld; (3) misrepresenting to TransAmerica, through its agents LL and SHP, that TransAmerica would be treated fairly in the claim and change order process; (4) failing to strictly follow Article 8 requirements itself including the OSFC’s failure to schedule the required jobsite resolution meeting within (30) days as required in GC 8.8.2 and waiting 48 days before LL issued its recommendation and analysis regarding TransAmerica’s certified claim despite its obligation to issue that report within 14 days after the jobsite resolution

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<sup>40</sup> *Cleveland Constr.*, 2008-Ohio-1630, ¶ 10.

<sup>41</sup> See *Aggressive Mech.*, 2012-Ohio-6332, ¶¶23-25 (OSFC waived 10-day notice requirement by acting in a manner inconsistent with an intent to claim strict compliance), citing *Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶¶29-30; see also *Tritonservices, Inc. v. Univ. of Cincinnati*, Ct. of Cl. No. 2009-02324, 2011-Ohio-7010, ¶27 (describing law of waiver by estoppel).

<sup>42</sup> *Aggressive Mech.*, at ¶23.

<sup>43</sup> LL wrote that TransAmerica’s notice was “closed at this point,” effectively denying TransAmerica’s claim before it was filed. (TA-0256)

meeting; (5) paying TransAmerica and other contractors for change order work performed before a change order was executed; and (6) paying other contractors' claims without insisting upon strict compliance with Article 8.

TransAmerica reasonably relied on the representations of the OSFC and its agents that it would be provided an updated construction set and that it would be treated fairly in the claims and change order process. Ultimately, TransAmerica relied on those representations to its detriment as the OSFC and its agents failed to make good on any of their promises and continued to incompetently manage the project without good faith.

As in *J&H Reinforcing*, the OSFC should not be entitled to strictly enforce Article 8 to preclude TransAmerica's recovery where the OSFC itself disregarded and failed to follow the Article 8 process. The OSFC should be estopped from asserting strict compliance with Article 8 to limit TransAmerica's claim.

**VIII. The OSFC Cannot Rely On Article 8 To Shield Its Wrongful-Withholding Of Liquidated Damages or Wrongfully-Assessed Back Charges.**

On several occasions during TransAmerica's case-in-chief, witnesses called by TransAmerica testified that the OSFC wrongfully withheld over \$800,000 in liquidated damages from TransAmerica over the course of several years. By way of confronting that point, counsel for the OSFC questioned those same witnesses whether TransAmerica provided ten (10) days' written notice to the OSFC voicing opposition to the OSFC's withholding of liquidated damages.<sup>44</sup>

But these questions presume an obligation under TransAmerica's contract that does not exist. Contrary to the OSFC's suggestion, TransAmerica's contract does not condition

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<sup>44</sup> The issue was addressed directly by questions raised by Referee Wampler during the OSFC's direct examination of Clayton Keith, Project Administrator of Lend Lease, in the afternoon of May 28, 2015. Counsel for the OSFC asked similar questions as to back-charges assessed by the OSFC.

TransAmerica's recovery of wrongfully withheld liquidated damages or wrongfully assessed back-charges on TransAmerica's provision of notice. The OSFC's position also ignores the fact that TA provided multiple written requests for extensions of time.

A careful inspection of TransAmerica's contract will reveal there is no mention anywhere of a requirement to provide notice in the event liquidated damages are wrongfully withheld by the OSFC. Subparagraph 8.7 of the Project's General Conditions provides the OSFC the contractual right of withholding liquidated damages but leaves the issue of recovering (or mitigating) wrongfully withheld liquidated damages completely unmentioned.<sup>45</sup> Similarly, Section 3.3 of the Contract Form, which governs the OSFC's withholding of liquidated damages under the contract, also does not condition TransAmerica's recovery of wrongfully withheld liquidated damages on its provision of notice.<sup>46</sup>

The OSFC's argument is apparently based on the general notice provisions contained in Article 8 of the Contract.<sup>47</sup> But while public owners have used written notice provisions as an affirmative defense to "Claims" in prior cases,<sup>48</sup> that affirmative defense is not available here. Here, unlike those prior cases, TransAmerica (under the current OSFC contract form) was not required to provide notice to preserve its right to recover or mitigate wrongfully withheld liquidated damages.

Two familiar Ohio cases prove the point. The first is *Dugan & Meyers*, 113 Ohio St. 3d 226, 2007-Ohio-1687. There, the general contractor, was precluded from mitigating liquidated

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<sup>45</sup> See JX-B, GC Article 8.7. If the OSFC had intended to make TransAmerica's right to recover wrongfully withheld Liquidated Damages contingent on notice, GC Section 8.7 would have been as good of a candidate as any for such a provision. However, that Section does not hint as to such an obligation.

<sup>46</sup> See Contract Form, Section 3.3 (JX-A)

<sup>47</sup> When questioned on the subject by the Referee, counsel for the OSFC argued on May 28, 2015 that Article 8 required TransAmerica to notify the OSFC of its objection to the OSFC's withholding of liquidated damages within ten days.

<sup>48</sup> See, e.g., *Dugan & Meyers Constr. Co. v. Ohio Dep't of Adm. Servs.*, 2007-Ohio-1687, ¶41, 113 Ohio St. 3d 226, 234, 864 N.E.2d 68, 76; see also *Tritonservices, Inc.*, 2011-Ohio-7010, ¶22-24.

damages because it failed to preserve its claim by providing the required written notice.<sup>49</sup> But what makes the decision informative here is that, worlds apart from TransAmerica's contract, the construction contract in *Dugan & Meyers* unambiguously made the contractor's ability to "mitigate" liquidated damages contingent on its provision of notice:

The contract provided that the contractor's failure to request, in writing, an extension of time within ten days after the occurrence of a condition necessitating an extension of time "shall constitute a waiver \* \* \* of any claim for extension **or for mitigation of Liquidated Damages.**"<sup>50</sup>

The Article 8 notice provision in TransAmerica's contract does not include that same critical language: "**or for mitigation of Liquidated Damages.**" Thus, while the OSFC's argument might have been persuasive in *Dugan & Meyers*, here the argument is misplaced.

The OSFC's current argument might also have been persuasive in *Tritonservices*, 2011-Ohio-7010. There, the court precluded the contractor from mitigating a liquidated damages penalty because the contractor failed to provide adequate notice under Article 8 of its contract.<sup>51</sup> Similar to *Dugan & Myers*, however, the construction contract in *Tritonservices* again unambiguously conditioned the contractor's "**mitigation of liquidated damages**" on the contractor's provision of notice, albeit in even more direct terms:

GC Section 8.1.1 states: "Whenever the Contractor intends to seek additional compensation or **mitigation of Liquidated Damages**, whether due to delay, extra Work, additional Work, breach of Contract, or other causes arising out of or related to the Contract or the Project, the Contractor **shall follow the procedures set forth in this Article.** To the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the

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<sup>49</sup> *Dugan & Meyers*, 2007-Ohio-1687, ¶ 41. Note that *Dugan & Meyers* was decided before the Ohio Fairness in Construction Contracting Act, R.C. 4113.62, was promulgated. The decision has been called into question since it was issued, most notably by an opinion authored by the very same Tenth District Court of Appeals Judge who authored the *Dugan & Meyers* decision later affirmed by the Supreme Court of Ohio. In 2008, Judge Sadler wrote that "where there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar the action for breach of contract brought against a party that had actual notice." *Stonehenge Land Co. v. Beazer Homes Investments, LLC*, 177 Ohio App. 3d 7, 2008-Ohio-148, at ¶24 (10th Dist.).

<sup>50</sup> *Dugan & Meyers*, 2007-Ohio-1687, at ¶31 (emphasis provided).

<sup>51</sup> *Tritonservices*, 2011-Ohio-7010, at ¶ 34.

Contractor of any claim for additional compensation or for mitigation of Liquidated Damages."

GC Section 8.1.2 states, in part: "The Contractor shall make a claim in writing filed with the Associate and prior to Contract Completion, provided the Contractor notified the Associate, in writing, no more than ten (10) days after the initial occurrence of the facts, which are the basis of the claim."<sup>52</sup>

While the OSFC's argument might have been persuasive in *Tritonservices*, where the contract *unambiguously* conditioned the contractor's ability to mitigate liquidated damages on its provision of notice, here the argument is not controlling. Again, TransAmerica's contract does not provide that same language:

<u>Tritonservices Contract</u> <sup>53</sup>	<u>TransAmerica Contract</u> <sup>54</sup>
<p>8.1.1 Whenever the Contractor intends to <b>seek additional compensation or mitigation of Liquidated Damages</b>, whether due to delay, extra Work, additional Work, breach of Contract, or other causes arising out of or related to the Contract or the Project, the Contractor shall follow the procedures set forth in this Article. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the Contractor of any claim <b>for additional compensation or for mitigation of Liquidated Damages.</b></p> <p>8.1.2 The Contractor shall make a claim in writing filed with the Associate and prior to Contract Completion, provided the Contractor notified the Associate, in writing, no more than ten (10) days after the initial occurrence of the facts, which are the basis of the claim.</p>	<p>8.1.1 Except as provided under GC subparagraph 2.14, the Contractor shall initiate every Claim by giving written notice of the Claim to the Architect, through the Construction Manager, within ten (10) days after the occurrence of the event giving rise to the Claim.</p> <p>...</p> <p>8.1.2 The Contractor's written notice of a Claim shall provide the following information to permit timely and appropriate evaluation of the Claim, determination of responsibility, and opportunity for mitigation:</p> <p>...</p> <p>8.1.3 The Contractor shall promptly provide any additional information requested by the Construction Manager or the Architect.</p> <p>8.1.4 The Contractor's failure to provide written notice of a Claim as and when required under this GC paragraph 8.1 shall constitute the Contractor's irrevocable waiver of the Claim.</p>

<sup>52</sup> *Id.* at ¶¶ 20-21 (emphasis provided).

<sup>53</sup> *Ibid.*

<sup>54</sup> See JX-B, GC Section 8.1.

There are several other important reasons to reject the OSFC's argument. First, the ten-day notice requirement in Article 8 pertains only to "Claims" brought by a Contractor—a term-of-art referring only to events or acts by the owner that directly "impact" construction. Contrary to the OSFC's argument, the act of withholding liquidated damages does not give rise to a "Claim" under Article 8.

An examination of the Contract proves the point. The term "Claim" is left undefined by the contract documents. However, when read in context with the surrounding provisions of Article 8 and the remainder of the contract, it becomes evident that a "Claim" relates only to those events or actions on the part of the Owner that interfere, hinder, or "impact" construction activities on the Project:

- Article 8 provides that ten (10) days' notice of a "Claim" must be delivered to the Owner in three specific circumstances: (1) issuance of a Field Work Order (GC 8.1.1.1); (2) issuance of a response to a Request for Information ("RFI") (GC 8.1.1.2); and (3) discovery of a Differing Site Condition (GC 8.1.1.3). While those three specific events directly "impact" construction, thus giving rise to a "Claim" under Article 8 and a corresponding duty to provide Article 8 notice, it is difficult to see how wrongfully withholding liquidated damages would have that same effect. Unlike those three specific events, an owner's wrongful-withholding of liquidated damages would not directly "impact" construction. Withholding liquidated damages does not change the scope of the contractor's work.
- Further, Article 8 requires the contractor to "substantiate" its "Claim" directly in terms of the "impact" the event or action will have on construction activities, and also requires that the Contractor provide a plan-of-action so as to reduce the "impact" of the event or action. While this substantiation requirement makes sense with respect to events and actions that directly impact instruction—for example, an owner's acknowledgement of a Differing Site Condition—it would be awkward to require that same substantiation with respect to an owner's withholding of liquidated damages. What would the contractor's plan-of-action consist of? How would the contractor substantiate its liquidated damages "Claim" in terms of the "impact" on construction?

In summary, the act of wrongfully withholding liquidated damages does not fall within the limited category of events or actions that give rise to a "Claim" under Article 8. A more

consistent and proper reading of Article 8 is that the initiation of a “Claim” is required only as to those events or acts that directly “impact” construction, or alter the contractor’s scope of work under the contract. As such, GC 8.1.1 did not require TransAmerica to initiate a claim based on the OSFC’s withholding of liquidated damages.

Second, to the extent the ten-day notice provision in Article 8.1.1 of TransAmerica’s Contract is open to multiple interpretations, that ambiguity must be construed against the drafter.<sup>55</sup> Here, the drafter of the Contract was the OSFC. At a very minimum, TransAmerica’s contract is ambiguous as to whether TransAmerica needed to submit formal notice regarding the OSFC’s withholding of liquidated damages. That ambiguity easily could have been resolved in Article 8 as it was in both *Dugan & Meyers* and *Tritonservices* with the unequivocal phrase “or mitigation of Liquidated Damages”, discussed *supra*. It was not.

Third, the OSFC’s interpretation of the word “Claim” in Article 8 would lead to unreasonable, absurd, or unintended results on real-world Ohio construction projects. If the OSFC is correct that the OSFC’s wrongful withholding of liquidated damages gave rise to a “Claim,” TransAmerica also needed to bring a Claim under Article 8 (and comply with notice and substantiation requirements) every time additional monies were due—including draws that were only slightly late, small back-charges, or any other time nominal amounts were wrongfully-withheld by the OSFC. While this interpretation may be convenient to the OSFC in the courtroom, contracts should be construed by Ohio courts to avoid such absurdities or other consequences clearly not intended by the parties.<sup>56</sup>

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<sup>55</sup> See, e.g., *Albert v. Shiells*, 10th Dist. No. 02AP-354, 2002-Ohio-7021, ¶20 (“where the meaning of a contract is ambiguous, the ambiguity should be construed against the drafting party.”), citing *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413, 406 N.E.2d 515 (1980).

<sup>56</sup> See, e.g., *Mediclinics Family Practice, Inc. v. Village Med. Ctr.*, 1986 Ohio App. LEXIS 6006, \*5 (10th Dist. Mar. 18, 1986)(rejecting appellant’s construction of the contract as it produced “absurd” consequences); *Wolfer Enters. v. Overbrook Dev. Corp.*, 132 Ohio App. 3d 353, 356-357 (1st Dist. 1999)(rejecting Appellant’s

Fourth, through its unreasonable interpretation of Article 8, the OSFC attempts to justify its withholding of hundreds-of-thousands of dollars of liquidated damages based on delay caused by the OSFC's own shortcomings. The OSFC again cannot rely on technicalities to avoid responsibility for causing delay on the project.<sup>57</sup>

Finally, to the extent any notice requirement exists, the OSFC waived that requirement through (1) the OSFC's inconsistent use of the Article 8 process which it now seeks to use defensively; (2) by failing to strictly follow the liquidated damages provisions provided in the Contract, including the OSFC's assessment of liquidated damages based on the incorrect time periods and incorrect amounts; (3) through the doctrine of first breach; and (4) through its misrepresentations that deficiencies and impact caused by the OSFC's initial shortcomings on the Project would be resolved with a forthcoming "construction set." For any or all of the foregoing reasons, the OSFC should be precluded from relying on Article 8 to limit TransAmerica's recovery of wrongfully-withheld liquidated damages.

**IX. The OSFC's Liquidated Damages Provision Is Unenforceable And Was Unlawfully Applied.**

Liquidated damages provisions are enforceable in Ohio where (1) damages would be uncertain as to amount and difficult to prove, (2) the contract "as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties" and (3) the "contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof."<sup>58</sup>

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interpretation of the contract because it rendered the contract "internally inconsistent, does not harmonize all of its provisions, and allows for [an] absurd result.").

<sup>57</sup> *Cleveland Constr.*, 2008-Ohio-1630, ¶19 ("an owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language.").

<sup>58</sup> *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), paragraph one of the syllabus.

The liquidated damages provision here fails under the second and third prongs of the *Samson Sales* test, as the liquidated damages provisions relies on a fundamentally flawed and ambiguous milestone schedule, and thus is both “unreasonable” (second prong) and is not sufficiently clear to conclude that it was the intention of the parties that liquidated damages should flow from a breach (third prong).

While the OSFC argues its assessment of liquidated damages is based on a “Roof and Window Enclosure” milestone date included in LL’s project schedules, that milestone is not included in the “Schedule of Milestones” incorporated into the project’s bid documents. Assuming that LL was entitled to craft and enforce its own milestone schedule (without consent or input from TransAmerica), LL’s self-created “roof and window enclosure complete” milestone was also fundamentally flawed in that it (1) did not provide a definition for the all-important-term, “enclosure”; (2) made two separate prime contractors responsible for the completion of the same milestone; and (3) applied to OSSB/OSD buildings #4 and #8, which were never built. These fundamental defects render the liquidated damages provision vague and ambiguous, as they left TransAmerica to guess as to its potential liability and also opened-the-window for schedule manipulation. Such liquidated damages provisions are “unreasonable” and are not sufficiently clear to be enforceable.<sup>59</sup>

Assuming the liquidated damages provision is enforceable despite its fundamental flaws, the OSFC should be precluded from enforcing that provision here as the OSFC and its agents acted without good faith. Rather than an approximation of the OSFC’s actual damages, the

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<sup>59</sup> In *Lake Ridge Acad. v. Carney*, 66 Ohio St. 3d 376, 613 N.E.2d 183 (1993), the Supreme Court of Ohio upheld a liquidated damages provision under the third prong of the *Samson Sales* test where it concluded the “contract [was] so clear that we can only conclude that it represents the intention of the parties.” The Court continued, “[w]hen parties make mutual promises and integrate them ‘into an unambiguous written contract, duly signed by them, courts will give effect to the parties’ expressed intentions.” It follows that both clarity and the lack of ambiguity are important (if not essential) to an enforceable liquidated damages provision.

OSFC and its agents employed the liquidated damages provision as a weapon against TransAmerica “to get its attention” and to subjugate TransAmerica as SHP and LL patrolled an extensive punch list process.

At trial, it was revealed that the true reason for the OSFC’s assessment of liquidated damages was to get TransAmerica’s attention and to penalize TransAmerica for its alleged delay in producing roofing certifications.<sup>60</sup> With that aim, LL manipulated the project schedule. For example, in February 2012, all of the activities that served as a basis for assessing liquidated damages to TransAmerica were retroactively adjusted back and given completion dates that preceded the OSFC’s initial liquidated damages notice letter. TransAmerica’s scheduling expert, Don McCarthy, testified that this retroactive adjustment was proof that the liquidated damages issue was manufactured by LL.

Mr. McCarthy also testified that because TransAmerica had already installed ice, water shield and roofing felt, all of the buildings were dry and follow-on work was progressing. Mr. McCarthy concluded that a review of weekly meeting minutes for the weeks leading up to and after LL’s liquidated damages notice letter did not reference delays, impacts to other prime contractors, or impacts to the project schedule. This proves that LL’s assessment of liquidated damages was less about actual delay than it was to force TransAmerica to comply with the demands of LL and SHP.

LL’s enforcement of the liquidated damages provision was also inconsistent with the contract documents. For instance, Specification Section 01500 “Temporary Facilities and Controls,” provided that “[t]he facility shall be considered **enclosed** when the permanent building shell is **essentially completed** with exterior openings, windows, and doors close by

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<sup>60</sup> Note that neither the Project’s “Schedule of Milestones” nor LL’s project schedules included a requirement that TransAmerica submit certification paperwork by a specific date.

permanent or temporary enclosures.” But LL insisted on much more than temporary enclosure or substantial completion, and conditioned its liquidated damages assessment against TransAmerica on activities that were never included in TransAmerica’s scope of work (e.g. doors). Moreover, the OSFC also withheld liquidated damages from TransAmerica at a per diem rate \$1,000 more than it was contractually entitled, and only repaid TransAmerica the \$240,000.00 in improperly-withheld amounts months after the Project was complete and as litigation progressed.

The OSFC’s assessment of liquidated damages is rendered even more suspect by the fact that TransAmerica received a pricing proposal for Recovery Schedule 3 (which offered to extend the completion date) the day before the OSFC began assessing liquidated damages. Recovery Schedule 3 was referenced in LL’s December 6, 2011 letter as the basis for assessing liquidated damages against TransAmerica, but TransAmerica never signed that recovery schedule and never agreed to it.

Because the liquidated damages provision is unenforceable, and because the OSFC’s liquidated damages assessment was made in bad faith, the OSFC should be precluded from relying on liquidated damages provisions to limit TransAmerica’s recovery

**X. The Executed Change Orders Do Not Limit TransAmerica’s Claim.**

*A. Limitations In The Change Orders Are Not Enforceable As The Change Orders Were Not Signed By A Licensed Architect.*

Through its Agreement for Professional Design Services, SHP contracted with the OSFC that it would “provide and maintain a licensed architect to oversee Contract Administration and Close-out Phases” “until completion of the entire project.”<sup>61</sup> Josh Predovich served as SHP’s representative on the project and oversaw construction and contract administration. But Mr.

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<sup>61</sup> Appendix D in the SHP/OSFC Agreement No. 3 for Professional Design Services (JX-N-03/40))

Predovich was not a licensed architect throughout the project.<sup>62</sup> Indeed, Mr. Predovich was not a licensed architect at the times he signed numerous change orders, including Change Orders 25 and 26.

A contract for architectural services is invalid where an architect is not duly licensed.<sup>63</sup> It follows then that the Change Orders signed by Josh Predovich on behalf of SHP were not properly executed, and thus cannot limit TransAmerica's recovery.

*B. Limitations In The Change Orders Are Not Enforceable As The Change Orders Did Not Include Full and Detailed Plans Required By R.C. 153.10.*

R.C. §153.10 requires that when a change in the work is approved by the OSFC through a Change Order or through other means, "plans of the proposed change, with detail to scale and full size, specifications of work, and bills of materials shall be filed" with the original plans and specifications. In violation of R.C. 153.10, the OSFC through its agents, SHP and LL, directed numerous changes in the work through Proposal Requests and Change Orders without including a full set of detailed plans and dimensions.

Rather than provide TransAmerica a full set of drawings "with detail to scale and full size," the OSFC and its agents instead provided piecemeal sketches which lacked key dimensional information and which were not integrated into the project drawings. TransAmerica was then expected to price those "sketches" without full and accurate drawings.

Accurate drawings would have eliminated confusion and resolved key dimensional problems before they occurred during construction. As such, language in these Change Orders

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<sup>62</sup> Mr. Predovich did not become a licensed architect until December of 2012, while occupancy permits were issued in August.

<sup>63</sup> *O'Kon and Co., Inc. v. Riedel*, 588 So. 2d 1025 (Fla. 1<sup>st</sup> DCA 1991)(contract for architectural services was invalid since architect was not registered or licensed in Florida); *Ransburg v. Haas*, 224 Ill. App. 3d 681, 167 Ill. Dec. 23, 586 N.E.2d 1295 (3d Dist. 1992)(architectural agreement was invalid as architect was practicing without a valid license); *Wheeler v. Bucksteel Co.*, 73 Or. App. 495, 698 P.2d 995 (1985)(engineering contract unenforceable where engineer was unregistered).

and Proposal Requests—issued in violation of R.C. 153.10—should not limit TransAmerica’s recovery.

*C. Even If The Executed Change Orders Were Effective, Everyone Agreed That They Were For Discrete Issues Not Included In TransAmerica’s Claim.*

Executed Change Orders were for discrete items only and were never intended to include the significant time-based impact and costs TransAmerica incurred as a result of the OSFC’s failure to produce full and accurate bid documents. Each Change Order included a limited description which TransAmerica was asked to price as a discrete change in the work. Time-based costs and time extensions were specifically excluded when TransAmerica priced each Change Order and when LL marked up TransAmerica’s price submissions.

Each Change Order was also executed by TransAmerica without full knowledge of the true nature of the design problems and defects in the permitting process, which TransAmerica came to appreciate only after it received the OSFC’s response to TransAmerica’s public records requests in the summer of 2012. TransAmerica was also directed to proceed with work before several Change Orders were executed only to later have its pricing marked down by SHP and LL to conform with their interpretation that each Change Order was for a discrete change.

As such, language in these Change Orders and Proposal Requests—issued in violation of R.C. 153.10—should not limit TransAmerica’s recovery.

*D. The Change Order Disclaimers Do Not Limit TransAmerica’s Recovery Of Time-Based Impact.*

Even if the Court were to conclude that the Change Order disclaimer provisions are enforceable, the language of those disclaimers does not waive TransAmerica’s right to recover time-based impacts caused by the OSFC’s breach. The would-be operative portion of the disclaimer provides, “[t]he compensation or time extension provided by this Change Order constitutes full and complete satisfaction **for all direct and indirect costs**, and interest related

thereto, which has been or may be incurred in connection with this change to the work . . . .”

While this boilerplate disclaimer purports to waive TransAmerica’s right to recover direct and indirect costs “incurred in connection with this change to the work,” the provision does not waive TransAmerica’s right to additional time and time-based impacts caused by the OSFC’s failure to provide buildable plans. The disclaimer is limited to costs arising out of a discrete change in the work; it cannot be reasonably interpreted to be a complete release of all of TransAmerica’s rights against the OSFC.

Further, to the extent this disclaimer purports to waive TransAmerica’s right to recover time-based impacts which resulted from the OSFC’s breach, such disclaimers are made void and unenforceable by R.C. 4113.62(C)(1), which voids “[a]ny provision of a construction contract . . . or other documentation that is made a part of a construction contract . . . that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act.” R.C. 4113.62(C)(1) would also invalidate GC Section 7.3.2 to the extent it is interpreted to preclude TransAmerica from either recovering or reserving its right<sup>64</sup> to receive additional compensation for the delays caused by the owner.

## **XI. The OSFC Spoiled Evidence Relevant To TransAmerica’s Defense.**

Ohio law recognizes the sanction of exclusion of evidence as a remedy for a party’s spoliation of evidence.<sup>65</sup> The proponent of a motion for exclusion of evidence based on

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<sup>64</sup> TransAmerica reserved its right for additional time on a number of change orders, including Change Order 25 and 26, which was acknowledged by the OSFC with representations that such time would be addressed through the Article 8 process. However, TransAmerica’s additional time requests were never granted nor did it receive compensation for its time requests.

<sup>65</sup> See, e.g., *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 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

spoliation must establish (1) that the spoiled evidence is relevant; (2) that the plaintiff had an opportunity to examine the unaltered evidence<sup>66</sup>; 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.<sup>67</sup> Those three things established, the proponent enjoys a rebuttable presumption that it is was prejudiced by the destruction of relevant evidence, and the burden shifts to the plaintiff (counterclaimant OSFC here) to persuade the trial court that “there is no reasonable possibility that lack of access to the unaltered or intact product deprived the proponent of favorable evidence.”<sup>68</sup>

Because the OSFC did not meet this burden at trial, the OSFC should not be entitled to use allegedly defective roof work as a set-off or counterclaim to limit TransAmerica’s recovery.

## **XII. The Statute of Limitations Does Not Preclude TransAmerica’s Recovery.**

Pursuant to R.C. 153.12(B), TransAmerica was required to exhaust all administrative remedies before TransAmerica could file a formal action against the OSFC for filing suit on a claim.<sup>69</sup> In turn, R.C. 153.16(B) provides a time limit on the required administrative remedies, stipulating that administrative remedies are deemed exhausted after a one-hundred-twenty (120)

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had an opportunity to examine it); *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶90 (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>66</sup> It is the opportunity, not the capitalization on that opportunity, which is relevant for the purposes of spoliation. See *Watson*, 2007-Ohio-6374, ¶55. The OSFC had the opportunity to have their expert review the roof underlayment during remediation. The OSFC deprived TransAmerica of that same opportunity by not informing TransAmerica it is was about to self-perform the work, despite multiple notices and requests that TransAmerica be present at the time of the roof remediation to collect important evidence.

<sup>67</sup> *Watson*, 2007-Ohio-6374, ¶51; *Loukinas*, 2006-Ohio-3172, ¶¶ 11-13.

<sup>68</sup> *Id.*

<sup>69</sup> R.C. 153.12(B) requires a plaintiff to exhaust its administrative remedies before bringing suit. *Cleveland Constr.*, 2008-Ohio-1630, ¶37; see also *Painting Co. v. Ohio State Univ.*, 10th Dist. Franklin App. No. 09AP-78, 2009-Ohio-5710, ¶¶ 10, 13.

day period elapses after a contractor's initial filing of a claim.<sup>70</sup> The Tenth District has explained that through these two statutes, "the state is aware it must resolve disputes within 120 days or face legal action." R.C. 153.12(B) and R.C. 153.16(B) act together to provide that "any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120-day statutory period."<sup>71</sup>

TransAmerica's claim was submitted on March 8, 2012, and thus—by operation of R.C. 153.12(B) and R.C. 153.16(B)—would not have accrued until July 10, 2012, or 120 days after its claim was initially filed. Because TransAmerica brought its action against the OSFC on June 14, 2013, well within the two year period set forth in R.C. 2743.16(A), the OSFC cannot rely on the statute of limitations to limit TransAmerica's recovery.<sup>72</sup>

TransAmerica's breach of contract action based on the OSFC's failure to comply with R.C. 153.01 could not have accrued earlier than July 18, 2011, when TransAmerica first learned that the OSFC and its agents had no real intention of producing the updated construction set as repeatedly promised which was needed to avoid substantial cost overruns and delay, amounting to a material breach. Alternatively, TransAmerica's breach of contract claim accrued on September 5, 2012, when LL issued its formal recommendation and analysis rejecting TransAmerica's certified claim, revealing that the OSFC and its agents had never actually intended to fairly compensate TransAmerica or equitably resolve TransAmerica's repeated requests for additional time through the Article 8 process. All of these events occurred less than two years before the filing of this case, and therefore within the statute of limitations.

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<sup>70</sup> *Painting Co.*, 2009-Ohio-5710, ¶ 11.

<sup>71</sup> *Id.* at ¶ 14.

<sup>72</sup> Alternatively, if TransAmerica's February 17, 2011 letter is what triggered the accrual of TransAmerica's breach of contract action, TransAmerica's action would not have accrued until July 18, 2011, incorporating the thirty (30) days TransAmerica had to substantiate its claim plus 120 days to exhaust its administrative remedies.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing TransAmerica Post Trial Brief was sent via e-mail and by regular U.S. mail, postage prepaid, this 20<sup>th</sup> day of July, 2015 to:

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