

IN THE OHIO COURT OF CLAIMS

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TransAmerica Building :
 Company, :
 Plaintiff, :
 vs. : Case No. 2013-00349
 Referee Samuel Wampler
 :
 Ohio School Facilities :
 Commission NKA OFCC, :
 Defendant. :

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EXCERPT OF TRIAL

VOLUME 13

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Before Referee Samuel Wampler
 Taken at Court of Claims of Ohio
 65 South Front Street, 3rd Fl.
 Columbus, OH 43215-4131
 June 4, 2015, 9:03 a.m.

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exhibit C

A P P E A R A N C E S

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2
3 ON BEHALF OF PLAINTIFF:

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7 By Donald W. Gregory, Esq. and
8 Michael J. Madigan, Esq.

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10 ON BEHALF OF DEFENDANT:

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16 Craig D. Barclay, Esq. and
17 Jerry K. Kasai, Esq.
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P R O C E E D I N G S

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(The following testimony was excerpted from the main transcript.)

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THE COURT: Back on the record in TransAmerica Building Company versus Ohio School Facilities Commission, Case No. 2013-00349.

Mr. Becker, your closing argument.

MR. BECKER: Thank you, Your Honor.

I'll end where I began, and that is I told you at the very outset that this was a case in search of cause. I will now add to that: This is also a case in search of reasonable and reliable damages.

You know, I hear and I read arguments that somehow construction cases are different. They're different than any other sort of litigation. There's something special about them. And that's simply not true. Under the law, these are breach of contract cases and, accordingly, a plaintiff is going to have to prove that there was

1 a duty breached and that there were damages that
2 were a proximate cause of that breach.

3 I draw an analogy to medical
4 malpractice, and I draw an analogy, frankly,
5 between construction and the human body. There's
6 a lot, of course, that goes on with construction.
7 There's a lot that goes on behind the walls.
8 There's a lot to the anatomy of a building, but
9 it's no more complicated than a human being.

10 So in the medical malpractice case, as
11 a plaintiff would bring such a case, and let's say
12 that there is a bad result on the surgery table.
13 As we know, there are multiple medical specialties
14 that are involved in that operation. You have an
15 anesthesiologist. Let's say you also have the
16 surgeon, and then you have the hospital providing
17 the nurses. In that case, it wouldn't be
18 sufficient for the plaintiff to simply come in and
19 say I had a bad result. I've been damaged. I
20 can't tell you whether it was the
21 anesthesiologist, the surgeon, or the nurses, but
22 I know I got a bad result.

23 This case is no different. The
24 plaintiff in a construction case can't come in and

1 say I've lost a lot of money, can't tell you
2 exactly why or how, who was responsible, but,
3 nonetheless, I'm going to present my claim and I'm
4 going to ask that there be a lot of money
5 returned.

6 I know we had an argument similar to
7 this in the motion to dismiss. I am not going to
8 reargue the apportionment issue, but I still think
9 what stands and what you'll have to consider is
10 for these alleged breaches what were the damages
11 that were proximately caused to the plaintiff.
12 They cannot escape that fundamental legal duty
13 that they have.

14 I know, too -- and this is where things
15 do get a little bit different in construction.
16 It's a little bit different, of course, that
17 you're here. That's different in this process.
18 But it's also different in that this is State
19 public construction, and the legislature has
20 actually spoken when it comes to how State
21 construction shall proceed.

22 153 not only establishes, if you will,
23 a duty with regard to the State, whether it's the
24 plans or the process or the bidding procedure, but

1 it also establishes a duty on a contractor.
2 Article 8 doesn't stand alone in the contract.
3 Article 8 finds its basis within the Revised Code.
4 The legislature has spoken in 153.12(B), and it
5 says that the contractor who wishes to make a
6 claim against the State for public construction,
7 additional dollars, is going to have to follow the
8 process and procedure that's laid out in the
9 contract for resolving the claim. It's a
10 threshold that they must meet before they can then
11 present the claim.

12 And I know as you go through this
13 project record and as you look at the claim as
14 presented by TransAmerica, you will be asking
15 yourself did they follow the contract. It starts
16 really initially with a change order. Did they
17 start that process? Did they put the State on
18 notice that we've been impacted, be it days or
19 dollars? We've suffered an impact. We're giving
20 you that notice within 30 days. We're giving you
21 the certified claim and proof of those damages
22 with - I'm sorry - ten days notice, and then the
23 certified claim within 30 days after that.

24 You know, I think it's interesting in

1 almost every case one can benefit by doing a
2 timetable. You saw this from me in the opening
3 and I've now gone back and made some changes to
4 reflect the evidence that you heard. But one
5 thing that was sort of staring me in the face, and
6 I probably didn't fully appreciate it at the time
7 of opening, is the timetable of TransAmerica's
8 claim.

9 On March 8th, 2012, they submitted
10 their first claim of \$2.1 million. Where is the
11 run up to that? Where is the notice within ten
12 days? Where is the certified claim within 30?
13 You can't tell me that in a 40-day period they
14 lost \$2.1 million. We know that didn't happen.

15 In fact, it's particularly telling,
16 they went out of their way to ask Alan Starr,
17 their chief financial officer, to do a calculation
18 of the labor behind the change orders that were at
19 least approved. That labor figure was only
20 \$41,000. The proposed change orders don't come
21 close to \$2.1 million. So -- and, frankly, if you
22 look at the difference between their first claim
23 on March 8th of 2012 and their second claim eight
24 months later of November 7th, 2012, it goes up by

1 nearly a million dollars. Where's the ten-day
2 notice of impact? Where's the 30-day notice of
3 supplementing the claim?

4 These losses -- now, perhaps
5 TransAmerica didn't fully appreciate it, although
6 that's hard to understand, because you remember,
7 too, the testimony of Mr. Starr and Mr. Koniewich
8 and even I think a little bit from Mr. Wilhelm,
9 they were looking at this project on a weekly
10 basis. They had the job cost report in front of
11 them from the very beginning. And, in fact, from
12 the very beginning they had in their job cost
13 report they were tracking the rough carpentry. If
14 you look at the job cost report, you'll see the
15 detail by building as to what they were spending.

16 Now, I think it's also pretty clear
17 from the evidence why they were doing that. They
18 found themselves in the unfortunate situation that
19 they didn't lock down their bids. This project
20 was nothing like what they had planned. You heard
21 just in fact today Mr. Koniewich told you our plan
22 was to sub out all of the work. We were going to
23 have one project manager, one superintendent, and
24 one laborer who would help clean up and fetch

1 things as necessary. That's literally what he
2 said. You go from that plan that was in their bid
3 to a situation that all of a sudden their subs
4 back out and they find themselves self-performing
5 the entirety, for the most part, most of the
6 construction on this project.

7 We're going to talk more about their
8 bid here shortly, but I know as I leave this
9 particular topic that as you review what they
10 claim to be impacts, you have the right to ask the
11 question. We have the right to have the answer.
12 Where is the notice? Where is, first of all, the
13 start of the change order process? Where did they
14 submit that to us? And then if it didn't get
15 resolved in a change order, where is the Article 8
16 claim? Where is the notice within ten days of
17 impact and the support for that claim 30 days
18 later?

19 Now, I'm going to actually
20 start -- Mr. Gregory on behalf of TransAmerica
21 didn't spend a lot of time talking about damages,
22 and I'm going to spend more time, certainly much
23 more time, talking about the damages and then
24 working back towards proximate cause and into the

1 liability issues of this particular case.

2 Now, in essence, this is a delay claim.
3 It's a six-month delay claim. Mr. McCarthy tried
4 to capture that in a visual which I'm putting up
5 in front of you, which is TransAmerica 1201/4.
6 Here's what's particularly telling about this
7 visual: And, again, it may have taken me three
8 weeks sitting here listening to the evidence to
9 fully appreciate this, but, you know, the first
10 report that Mr. McCarthy came out with there was a
11 197-day delay. That's represented by the blue bar
12 there. He then decided he needed to actually do a
13 schedule analysis to support that, and that's
14 after Mr. Englehart came along and criticized him
15 for not doing that. And that was his exact
16 testimony. That's what caused him to do a second
17 report in this case.

18 What changed between the first and
19 second report is actually quite a bit. First of
20 all, another expert came in, Mr. Calvey, to assist
21 Mr. McCarthy, and as a result of that, the
22 schedule delay shrunk and for the first time, you
23 know, TransAmerica wants to talk about accepting
24 responsibility. They didn't do it. Mr. McCarthy,

1 through his schedule analysis, found 14 days of
2 self-inflicted impact. Not a lot, not a lot by
3 any means, but at least some. He had none before.
4 He also did not factor in weather, so he had to do
5 that. And then he, frankly, missed the time
6 extension that had been granted to the project of
7 some 30 days. So between the first and the second
8 report, the delay went from 197 days to 148 days,
9 and that, quite honestly, seems fairly
10 significant.

11 But what is interesting between his
12 first report and his second report is that the
13 damages didn't all go down. It's like, wait a
14 minute, how's that possible? How did the damages
15 not go down if the delay wasn't as long? And, in
16 particular, drywall and painting didn't go down.
17 And now Mr. McCarthy came into Court and tried to
18 explain that and said well, actually it was
19 still -- that work was still being done within the
20 same period of time, within that same shortened
21 period of time. Well, here's the problem that he
22 has. In his first report, that's not what he
23 said. That's not what he put down. He put down a
24 period of time from February 14th to --

1 THE COURT: August 2nd.

2 MR. BECKER: Pardon me?

3 THE COURT: August 2nd.

4 MR. BECKER: August 2nd. Well, I think
5 August 2nd was the revised number.

6 THE COURT: Revised, right. The first
7 one was August 31 or the September --

8 MR. BECKER: Right; the end of August.
9 Right.

10 So, you know, that -- I mean, if that's
11 what happened, then his first report is, frankly,
12 a little bit misleading, because that's the delay
13 period he put down for those two activities,
14 drywall and painting.

15 Secondly --

16 THE COURT: Are you saying, then, you
17 should expect at least a proportional movement in
18 the dollars?

19 MR. BECKER: Well, for those two
20 categories.

21 THE COURT: That's the logic?

22 MR. BECKER: Yeah. Absolutely.
23 Absolutely. Because the other time-sensitive
24 categories like general conditions did go down.

1 So I was surprised that the others didn't;
2 inconsistency.

3 The other thing is that the schedule
4 analysis is a complete denial of the problems that
5 TransAmerica was having with the roofer, with
6 their subconsultant, AAA. And I think that's
7 where you can go back to the timetable.

8 And, again, this is a very conservative
9 timetable. It takes out -- or, I'm sorry, it
10 accounts for time that's not in dispute, certainly
11 does not even try to capture all of the entries
12 that, frankly, you now have before you.

13 You can go through them yourself and
14 make your own timetable. You'll see that there
15 were roofing problems for a long time on a
16 repeated, consistent basis. The first one that I
17 picked up, and I'm not sure it's even the first
18 one, was on August 11th of 2011, the note that the
19 roofer is behind schedule. A month later, a
20 little less than a month later, lack of roofers is
21 a major issue. A month later, roofers maintaining
22 schedule is a major issue. Lend Lease, the
23 construction manager, on October 11th of 2011
24 issues the 96-hour notice, only -- well, 96-hour

1 notice. Nine of the twelve roofs are incomplete
2 as of that point in time. Lend Lease is
3 starting -- I'm sorry. TransAmerica is starting
4 to get the message, and on November 3rd they talk
5 about replacing their roofer. By December 1st we
6 realize that we're not going to get a roof
7 warranty here. And, finally, LDs are assessed on
8 December 6th. The roofer was removed two days
9 later.

10 Let's talk about LDs for just a minute.
11 There's some criticism that the milestone date
12 includes both roofing and windows. Windows were
13 not within TransAmerica's scope. I don't know
14 exactly what's wrong with that. The fact of the
15 matter is windows were a milestone. The fact that
16 another contractor's scope was included doesn't
17 change the fact that TransAmerica is substantially
18 and significantly behind with the roof at that
19 point in time.

20 I would tell you if TransAmerica was
21 assessed LDs for window enclosure not being in
22 their scope, that would have been wrong. There
23 would be no support or defense for that. But
24 TransAmerica can't simply say well, the milestone

1 date included other activities and so it's okay to
2 overlook the fact that we're totally woefully
3 behind with regard to the roof.

4 And I think it's telling there are a
5 lot of things that, frankly, are also unique in my
6 career in terms of trying construction cases, and
7 I've never really had a situation where the prime
8 contractor, if you will, has entered into
9 litigation and actually completed that litigation
10 with their subcontractor and has alleged fraud on
11 behalf of the subcontractor.

12 And, in particular, as it relates to
13 liquidated damages, here's what TransAmerica said
14 in their legal pleading in their lawsuit with
15 their roofing subcontractor. Taking a look at the
16 certified Complaint, which is at Exhibit G in this
17 case, on paragraph 14, "As a result of Hanna,"
18 which we know now is AAA, "stopping, vacating, and
19 otherwise abandoning the project without
20 completing its scope of work, TransAmerica has
21 incurred and will continue to incur significant
22 additional expenses and damages, including
23 liquidated damages, assessed by the owner
24 proximately resulting from Hanna's breach of

1 contract."

2 There's an admission by TransAmerica
3 that they knew that the liquidated damages
4 assessment was made as a result of the failures of
5 their subcontractor roofer and the fact -- the
6 fact that he was behind schedule, as he was.

7 Now, for Mr. McCarthy -- and I like
8 Mr. McCarthy. As you've heard, we've used
9 Mr. McCarthy in the past. But for Mr. McCarthy to
10 do a scheduling analysis in this case which seems
11 to have zero impact by such a significant failure
12 on the part of TransAmerica through its roofing
13 subcontractor simply makes the scheduling analysis
14 unreliable.

15 You've heard from the beginning, there
16 was a certain mantra, there was a certain repeat
17 from the witnesses that TransAmerica controlled
18 the schedule of this project, and indeed they did.
19 And I don't have to tell you -- although for the
20 sake of the record I will say that we all know how
21 critical roofing enclosure is to schedules and to
22 all the follow-on work and how problems with the
23 roof or enclosing the roof can result in
24 significant delays and damages. In this case,

1 it's significant delays and damages to
2 TransAmerica and also caused by TransAmerica to
3 other prime contractors on this project.

4 Just a quick side note on that:

5 There's been some criticism of the deduct change
6 order for the other two prime contractors who said
7 that they were impacted by TransAmerica and
8 criticism to the fact that that didn't go through
9 the Article 8 process. Well, it didn't need to.

10 One doesn't need to exhaust the entire Article 8
11 process to otherwise satisfy what the contract
12 calls for. So, in a multiple prime situation -- I
13 don't know if this is my last multiple prime
14 litigation, but in that type of situation --

15 THE COURT: It's not.

16 MR. BECKER: That's unfortunate.

17 But, in that situation, the owner,
18 through the assistance of the architect and the
19 construction manager, can come to an agreement
20 with the contractor, as was frankly done here with
21 TransAmerica, and the matter can be resolved at a
22 change order level. It's only when there's a
23 disagreement -- let's say Vaughn or T.P. didn't
24 agree with either the days or dollars compensation

1 they received. At that point in time there's a
2 remedy for them. There's a presuit remedy for
3 them to pursue the Article 8 process. But you
4 can't say simply because there's no certified
5 claims here under the Article 8 umbrella that
6 somehow that's a failure on the contract or any
7 sort of waiver by the State when it comes to
8 TransAmerica's claim. All that does is reflect
9 the fact that the State and these two prime
10 contractors came to an agreement at the early
11 stages of the contractual claim review process.
12 That's all it tells you. It doesn't tell you
13 anything about waiver.

14 And, frankly, I firmly believe that in
15 order for the State to waive a contractual
16 provision, especially one which the General
17 Assembly has said we must have in our contracts
18 and otherwise honor, you're going to need a change
19 order for that. And, frankly, even if you had a
20 change order for that, I don't believe the State
21 has the authority to enter into that contract
22 given the statutory basis for such of the Article
23 8 claims process.

24 Now, let's go ahead and get into the

1 damages. And let's start with maybe some of the
2 easier categories here, and let's take additional
3 painting as an example, because when I make the
4 argument with regard to additional painting, then
5 I don't have to make the argument for all the
6 other similar approaches to the calculation of
7 damages. Once will be enough.

8 THE COURT: I've learned not to look at
9 that until you're done.

10 MR. BECKER: Yeah, I know.

11 THE COURT: My eyes are going --

12 MR. BECKER: It makes me a little bit
13 dizzy as well.

14 So we know that this is a
15 time-sensitive, to some extent, delay claim when
16 it comes to the painting and the drywall and then
17 some of the other categories of damages that we'll
18 look at briefly. But, you know, it's not
19 entirely, because what it says here under the
20 description is additional painting cost for
21 out-of-sequence work. Out-of-sequence work, as
22 Mr. McCarthy admitted and Mr. Englehart confirmed,
23 is going to include scope work.

24 By the way, this is kind of

1 interesting, and you probably picked up on it at
2 the time, and I'll say it again: I asked
3 Mr. McCarthy quite bluntly did they really need
4 your expertise to do this, and he said no. And we
5 all know that they didn't. TransAmerica could
6 easily -- and I don't know why they didn't. They
7 could easily have had Mr. Starr do what
8 Mr. Englehart did, which is to simply take this
9 delay period, go into that period, pull out all
10 the painting expenditures under their job cost
11 code of paint and say this is our bill to you.

12 The problem, of course, with that is
13 that this is just scope work that got shifted.
14 This is not a time-sensitive issue. What we have
15 here, and Mr. McCarthy had to admit that, is that
16 with the out-of-sequence work, that scope work
17 being performed in the delay period. So that's
18 not damages. They had to do that work anyway.
19 And so -- and, again, without a breakdown between
20 how much of this nearly half a million is
21 out-of-sequence work versus excessive construction
22 damages or extended punch list, we'll never know.
23 They haven't proven that. And that's a perfect
24 example where you have a breakdown in the

1 proximate cause and damages.

2 And this has nothing to do with
3 allocation. This is simply a matter that we're
4 entitled to know before we're given a half a
5 million dollar bill, clearly how much of this is
6 scope work. That is a, you know, basic
7 fundamental reasonable question that must be
8 answered when it comes to damages.

9 THE COURT: But isn't that -- I mean,
10 that is the -- that is the theory behind the
11 measured mile approach is that it identifies scope
12 work in the least impacted area and then compares
13 it to the impacted areas, and backs out, you know,
14 all of the self-inflicted wounds and weather and
15 so forth and attempts to come to a number. I
16 mean, it's --

17 MR. BECKER: Well, we're not there yet.

18 THE COURT: We're not going to have
19 precision in this case. I think we all know that.

20 MR. BECKER: Well, with all due
21 respect, first of all, we're not there yet --

22 THE COURT: Okay.

23 MR. BECKER: -- because this is not
24 measured mile approach.

1 It's interesting, though. You bring up
2 an interesting point. Before Mr. McCarthy got it,
3 it was a loss-of-productivity approach to drywall
4 and painting. They dropped that; don't have an
5 explanation for why, but now this is not a
6 measured mile approach here for either the
7 painting or the drywall. It is -- it is truly a
8 total cost claim.

9 And I also want to make mention of the
10 extended punch list. You heard testimony, and
11 that was really not disputed, that there were
12 between 6 and 800 items per building relating to
13 TransAmerica's work. If in fact they're right in
14 the argument that this is extensive, excessive
15 construction damage was caused by other
16 contractors, they have a right to be compensated
17 for that. We have the right to know whether
18 that's true and whether or not that in fact
19 happened. And, as you heard Mr. McCarthy admit
20 and Mr. Englehart confirm, this is a persuasion
21 for time-and-material tickets. If you believe
22 that you had to send a crew in to repair that wall
23 that got damaged by the plumber, it's pretty easy
24 to track that through a time-and-material ticket.

1 They had the job cost reports. They had the
2 software that would allow them to capture that
3 and, frankly, at this point in time, when you're
4 into the punch list phase, again, the idea is most
5 of your work is behind you. You really have the
6 time to actually do that sort of capturing of the
7 evidence of your damages. And, of course, that
8 was not done in this particular case.

9 Now, I will mention briefly for each of
10 these categories of damages, it's very interesting
11 to go back and look at the bid, compare it to the
12 job cost report, and compare it to what is being
13 claimed.

14 Despite the repeated questions to their
15 CFO, Mr. Starr, when I drew the stark contrast
16 between their bid, which is \$150,000 for painting,
17 and then, as you heard him say, he moved numbers
18 around shortly after the bid. And, you know, I
19 will -- I will not argue what that seems like to
20 me, but, nonetheless, that doesn't really matter.
21 What matters is what was their original plan, what
22 was the original bid, what was the original
23 agreement that they would do this work for as we
24 look at that breakdown.

1 And at the end of the day here, with
2 painting costs, their job cost report as they even
3 manipulated it shortly after the bid isn't that
4 far off from what they're claiming in terms of
5 damages, 421,000 and so dollars in the job cost
6 report to do this work, \$486,000 in the claim.

7 Let's take a quick peek at painting. I
8 won't repeat all the same arguments in terms of
9 the problem with the -- with the -- almost the
10 exact same approach here, but here in this
11 situation -- and, by the way, there's also
12 evidence in the record that the substantial
13 completion was far sooner than August 2nd. So
14 there's a real question about even Mr. McCarthy's
15 revised end date. And, of course, as you well
16 appreciate, these are time-sensitive numbers and
17 they should go down when you reduce the period of
18 delay.

19 But, in any event, you look at the bid
20 in this particular case, \$272,000. Moving around
21 the numbers shortly after the bid, the job cost
22 report now shows 1.2 million and the actual
23 claimed amount is a little under \$500,000.

24 You heard me ask Mr. Koniewich as early

1 as this afternoon -- this, of course, relates to
2 also the loan of some \$400,000 to Sammie Walker.
3 And I asked him is that loan going to be found in
4 the job cost report, and he said yes. So now we
5 have a claim that is very close to the amount that
6 TransAmerica ended up having to loan to this
7 subcontractor to do this drywall and painting
8 work. Again, calls into serious question the
9 reasonableness and reliability of these damages.

10 So now let me move on to the larger
11 ticket item, which is the loss of productivity for
12 rough carpentry. I've got quite a bit to say
13 about this.

14 By the way, I want to start in the big
15 picture on this particular item, and that
16 is -- you may remember that I asked Mr. McCarthy
17 about this, because they did not use their bid
18 numbers on this item of damages to figure out what
19 the delta difference was between what it should
20 have cost them and what it actually cost them.
21 They used the higher job cost numbers than the
22 bid. And I said to Mr. McCarthy, I said why did
23 you do that? Because if you're right and this
24 loss of productivity is no fault of

1 TransAmerica's, and that's his assumption, then
2 there's really nothing necessarily wrong with
3 saying okay. I think that we should have been
4 able -- there was a lot of things with the
5 measured mile, but theoretically there's nothing
6 wrong with taking an approach and saying okay. If
7 you're going to use a measured mile, then whatever
8 I come up with at the end I'm going to go back and
9 base it on the bid because, again, if your bid's
10 good, if you should have been able to do this
11 rough carpentry work for this amount and you now
12 say it took us much more and it's your fault that
13 it took us much more, then that delta difference
14 ought to be compared back to the bid. And he did
15 not. I asked him twice. He did not have an
16 answer for why they didn't do that. Again, I
17 think it shows a -- perhaps a recognition that
18 their bids weren't good to begin with. So then we
19 end up with a comparison back to some manipulation
20 of the numbers from an accounting standpoint that
21 occurred shortly after the bid.

22 Okay. So, again, staying in the big
23 picture, what's wrong with a measured mile
24 approach to loss of productivity? Well, you know

1 as we do, that it's a very sensitive approach to a
2 claim. It relies on the fact that you had good
3 supervision. In fact, it doesn't rely on it. It
4 assumes that you had good supervision. It assumes
5 that you had a good crew, and good crews tend to
6 be crews that work together. And there's no
7 evidence that any crews stayed together, gained
8 any real efficiencies just by keeping the crews
9 together. We know that it needs to be a
10 comparison of similar work. And I'm going to get
11 to the apple to apple and the big apple here in
12 just a minute, so that seems to be reasonably
13 satisfied. We know that it can be time sensitive.

14 So the question is are you comparing
15 all regular labor hours, or do you have overtime
16 and weekend work. Mr. McCarthy was reluctant to
17 admit that there's some loss of efficiency when
18 you get into overtime or weekend work, but, I
19 mean, that sort of just defies common sense. You
20 don't have to accept that. And then, of course,
21 we know it's environmentally related and that is
22 what are the conditions. And I would put weekend
23 work in that. I mean, if you're working on this
24 project when the Buckeyes are playing, you're

1 probably not the most efficient that you could be,
2 or if you're working in rain or other bad
3 environmental conditions. But we know that, in
4 the big picture of things, this category is
5 sensitive to a bunch of assumptions that have to
6 be made. And the old adage is, you know, garbage
7 in, garbage out. So how good is it in terms of
8 what we're feeding into it in terms of what we get
9 out of it.

10 We do, also, know that -- and this is
11 where you get into the big apple, and I tried to
12 draw a big apple around the measured mile, but the
13 fact of the matter is you heard Mr. Englehart say
14 when he actually started to crunch into that apple
15 and look at what the core looked like, he found
16 that Mr. McCarthy had significantly underestimated
17 the number of hours that were going into the
18 measured mile. In other words, this example of we
19 should have been able to do it for this many hours
20 is under-inflated. In fact, his testimony was
21 Mr. McCarthy was using 260 hours when, in fact, it
22 was more like 465 hours to do this work on the
23 trusses. It was Mr. McCarthy using 172 hours
24 versus more like 225 hours to do the work. So

1 that's a huge flaw when it comes to loss of
2 productivity in that Mr. McCarthy is simply wrong
3 that they were going to be able to achieve these
4 efficiency levels, because of a review of the
5 project records shows they actually spent more
6 time than he assumed or he accounted for in this
7 measured mile approach.

8 And, again, you go down here, it's sort
9 of a litmus test to whether or not this category
10 of damages makes sense. They want over a million
11 dollars, and yet in their bid they bid \$606,000.
12 In the job cost report they're actually looking at
13 nearly \$2 million to do this work. So these
14 numbers are off. These numbers are not supporting
15 themselves in any sort of reliable way.

16 Let's take a look at the general
17 conditions because, as I talk about this category,
18 we can pretty much not have to repeat the
19 discussion on the other time sensitive categories.

20 So with regard to this, extended
21 general conditions, now we would all recognize
22 that this is in fact a time sensitive category.
23 Once again, you have the same issue that it's very
24 easy to have kept track of these items. Instead

1 of just going into the cost code and charging us
2 for all this work, which may, again, just be scope
3 work done at a later time, why didn't you do
4 time-and-material tickets if you believed this was
5 truly excessive out-of-scope work that you had to
6 do.

7 This is also probably a pretty good
8 time to talk about overhead. As we showed you in
9 the general conditions and as it exists at JX-B/57
10 of TransAmerica's exhibits, overhead is defined in
11 the contract between the State and TransAmerica.
12 "Overhead" includes all the home office expenses
13 that one could imagine, or maybe you could imagine
14 more but it's pretty clear. It says all other
15 home office expenses are to be included in
16 overhead, and each one of the items of damages
17 that TransAmerica's claiming is burdened by
18 overhead.

19 So home office overhead is in each of
20 these, and yet when we turn our attention to the
21 home office overhead damage category, which they
22 have a separate damage category, it doesn't make
23 sense that they would have separate home office
24 overhead damages when the contract is clear at

1 least for those damages which they've burdened
2 with overhead. That's already taken into account.
3 There was no real explanation for why they went to
4 the ODOT horizontal contracts for approach to home
5 office overhead. That's nowhere to be seen within
6 our vertical contracts.

7 And then, and we will brief this issue
8 further, but I know you're familiar with the
9 Complete General --

10 THE COURT: Yeah. For what it's worth
11 I think I asked the question at the time, and I'm
12 not very swayed by this part of it.

13 MR. BECKER: Okay. And this is just
14 argument, so I don't need to worry about making a
15 record, so I appreciate that.

16 THE COURT: Right.

17 MR. BECKER: We can move right along.

18 Let's talk about extended trade
19 supervision costs. This is an interesting
20 category and, frankly, the facts defy extended
21 trade supervision cost. And I'm a little
22 confused, because this shows that that dips back
23 into November and December of 2011. And
24 Mr. McCarthy said that the delay period was

1 February 14th. So you only really have one, first
2 of all, supervision that falls within the delay
3 period.

4 Percentage of time is sort of just an
5 estimate. I'm not sure we even heard any
6 testimony about how that was derived. But on a
7 project where you had two superintendents that
8 were fired before you even got to this delay
9 period, for them not to recognize that they have
10 some responsibility for their supervision or
11 ineffective supervision of the project, again,
12 makes these damages unreliable.

13 The other thing that you heard I think
14 it was just yesterday from Mr. Starr, I believe we
15 confirmed this, they blew the supervision bid
16 before ground was broken.

17 So, you know, in a situation where
18 you're that far off on your estimate of cost for
19 supervision, to say later at the end of the
20 project you owe us for more supervision despite
21 the fact that we went through six supervisors, we
22 blew our bid on supervision before we even put the
23 first shovel in the ground, simply is not
24 reliable. And, you know, Mr. McCarthy didn't

1 really sort of take that into consideration when
2 he was trying to support his six-month delay
3 period.

4 Extended equipment -- and we're getting
5 close to having covered all the categories.
6 What's interesting about extended equipment, and I
7 won't repeat all of what I said, it's the same
8 arguments that apply to all these time sensitive
9 categories. Here's a new one, and you picked it
10 up on this very early on. The bid cost of 2
11 percent, they've not been assessed that. In fact,
12 there is no evidence that the bonding company will
13 ever be coming after them that for that. That's
14 truly speculative damages.

15 And it's also interesting that, at
16 least as I look through what they offered in terms
17 of their bid detail, there was nothing in the bid
18 for equipment. There's nothing in the record that
19 would allow you to say these equipment costs or
20 equipment rentals reflect anything other than
21 equipment rentals that they would have had to rent
22 to complete scope work.

23 And, with that, I believe we have
24 covered all of the damages in this case.

1 Let's talk a little bit, as we work our
2 way back into proximate cause and liability for
3 just a second. I think it's particularly telling
4 when you look at the -- I'm trying to get the
5 whole timetable up here, not the whole timetable,
6 but at least my first page of the timetable up on
7 the screen.

8 And, as I sort of started out, and I'm
9 getting close to ending here, but as you go
10 through the record and try to line up what
11 TransAmerica is claiming were impacts, and we
12 painstakingly went through a lot of the testimony
13 in the last three weeks where we talked about
14 dimensional issues, there was testimony that those
15 dimensional issues were resolved quickly and they
16 were resolved in the field. If they weren't
17 resolved in the field, they ended up going into a
18 change order, and many of these change orders were
19 in fact approved.

20 There was a period of time -- when you
21 talk about the plans, there was a period of time
22 in this case where we were spending a lot of time
23 talking about the fire rating on the walls. Well,
24 the fire rating of the walls is a perfect example.

1 of something that was actually covered through a
2 change order, change orders 25 and through 26.
3 And, in particular, there is language within those
4 change orders that you're well familiar with that
5 everybody on the agreed change orders has accepted
6 by putting their signature on this.

7 25 and 26, in terms of change orders,
8 deal with the fire-rating changes with the walls,
9 and signed by TransAmerica recognizing that this
10 compensation or time extension provided by this
11 change order constitutes full and complete
12 satisfaction, and then it goes on to say further
13 about that. But the point is that when you look
14 at -- and you mentioned chasing rabbits down
15 holes. And when you start trying to chase down
16 the litany of complaints that TransAmerica had
17 either with regard to the plans or with regard to
18 the schedule, you truly do find yourself chasing
19 down holes that gets you nowhere. And when you do
20 surface up and when you look at the proposal
21 record, you see what actually happened. More
22 often than not what happened was that issues were
23 resolved before they even had to get into a change
24 order or, if they got into a change order, they

1 got resolved and approved.

2 For example, just on that fire-rating
3 issue -- because they made such a big deal about
4 the plans being defective because of that. On
5 that fire-rating issues, if you look at what they
6 tried to reserve, you may determine that they did
7 reserve, the issue on days, they were only asking
8 for ten days. How do we go from ten days on the
9 fire-rating issue with the walls to a six-month
10 claim? There is no connection between the two.
11 There again, that's --

12 THE COURT: Four months? Four months,
13 maybe, 120 days?

14 MR. BECKER: Pardon me.

15 THE COURT: Ten times twelve, that's
16 120 days.

17 MR. BECKER: But that would be
18 inconsistent, Your Honor. When you have a chance
19 to look at the language of the schedule, they're
20 talking about adding ten days to the project
21 schedule completion dates. They don't get to say
22 it's ten times twelve. Or, if they did --

23 THE COURT: Could you put that change
24 order back up? Because I have a question that I

1 want to ask.

2 MR. BECKER: Sure.

3 THE COURT: It's better than having to
4 brief it.

5 MR. BECKER: 25 or 26?

6 THE COURT: That's fine. It doesn't
7 matter which one because I want to look at that
8 language.

9 And when I first read that language, I
10 completely bought into what you just said. But
11 then I started studying it. It doesn't -- it
12 doesn't constitute any satisfaction for time. It
13 says only, "direct and indirect costs and interest
14 related thereto which may have been incurred." It
15 doesn't -- it doesn't address time.

16 MR. BECKER: Delays.

17 THE COURT: Yeah. It says if we give
18 compensation or time extension, this satisfies any
19 direct and indirect costs. It doesn't say
20 anything about satisfying time.

21 You see my point? Now, I don't know if
22 the contract has something in it that addresses
23 that, but --

24 MR. BECKER: Well, with all due

1 respect, not entirely.

2 THE COURT: Okay.

3 MR. BECKER: I mean, I think that this
4 is a reflection. And, again, if you look at the
5 entirety of the form, you've got a place on this
6 form and --

7 THE COURT: I know, but they all have
8 zeros on them.

9 MR. BECKER: That's right. And so
10 unless TransAmerica had -- and, again, I don't
11 believe that you can sign a change order and
12 reserve your rights. I think that's just a --

13 THE COURT: I'm not even saying
14 reserving. I'm looking at the language and the
15 language says satisfies -- if you go back up to
16 the language, "complete satisfaction of all
17 direct, indirect costs, and interest...which has
18 been or may be incurred in connection with this
19 change to the work, including not limited to, any
20 delays, inefficiencies, disruption...and the
21 cumulative impact of this and other change orders
22 issued as of this date." All it talks about is
23 money, and that's my question.

24 MR. BECKER: Well, but money- for what?

1 I mean, money for delays and the fact that clearly
2 within many of these change orders there were --
3 and there were change orders used to change the
4 schedule, right?

5 THE COURT: Oh, sure.

6 MR. BECKER: So certainly the
7 parties --

8 THE COURT: Well, there was one change
9 order -- well, whatever that 15 days was and I'm
10 not quite sure what that "voided out" meant. I've
11 never understood that.

12 MR. BECKER: Well, let's go --

13 THE COURT: But I'm just trying to
14 understand that language. I'm just giving you the
15 opportunity to argue about it and help --

16 MR. BECKER: Sure. And with all due
17 respect, I think we're not going to be in
18 agreement on that --

19 THE COURT: Okay.

20 MR. BECKER: -- in terms of that
21 language and that interpretation.

22 What is interesting, by the way, before
23 I leave this, because Mr. Gregory in his close
24 talked about cumulative impact -- well, it's in

1 there now. Where did I see it? Right here at the
2 end.

3 THE COURT: Right.

4 MR. BECKER: Covers any cumulative
5 impact of this change and other change orders
6 issued as of that day.

7 I mean, the fact of the matter is the
8 State does react to claims. It does react to
9 litigation. That certainly at one point in time
10 was a theory that some contractors had. Well,
11 yeah, I signed off on this and I know it's got
12 release language, but then when you add up all the
13 change orders, well lo and behold I was impacted
14 in a different way. Well, that's now covered by
15 this change order.

16 THE COURT: Yeah. I'm not going to
17 spend a lot of time on that.

18 MR. BECKER: But you did raise an
19 issue, and let me just address it, with the
20 timetable here. But in terms of your question
21 with regard to change orders and time, we have
22 change order No. 1 on March 31st, 2011, which
23 approved the -- I guess you'd call it what, the
24 baseline schedule? We've got a change order No.

1 13, which reflects the recovery schedule No. 2.
2 Let me just take a quick look. I think that may
3 be it.

4 But the fact of the matter is there
5 were two change orders that were schedule related,
6 clearly dealt with time. The parties believed
7 that they were entering into an agreement through
8 a change order with regard to time. So --

9 THE COURT: Well, 13 didn't give any
10 time and 1 didn't give any time.

11 MR. BECKER: I'm sorry. But yes.
12 Okay. I accept that. Good point. Good point.

13 THE COURT: Okay.

14 MR. BECKER: But the fact of the matter
15 is what was agreed to was time; not additional
16 time, but what was agreed to was a revised
17 schedule, time.

18 THE COURT: Yes, I agree with that.

19 MR. BECKER: The change order was used
20 to adjust time.

21 So, I mean, I never want to say that
22 what the parties did controls the contract
23 language. The contract language needs to stand on
24 its own. But I would -- you and I may have a

1 disagreement about what that language means or the
2 significance of it with regard to time. And we
3 can brief that further for you.

4 THE COURT: Sure.

5 MR. BECKER: The other issue -- oh, the
6 other issue that I wanted to mention in terms of
7 the contract documents that were used in this
8 case, and this comes right out of the very first
9 baseline schedule endorsement. There were other
10 ways that the parties were -- uh-oh.

11 THE COURT: Oh, no. Tell me no.

12 MR. BECKER: This may take a second to
13 come back up.

14 THE COURT: Oh, you hit the button?

15 MR. BECKER: Yeah.

16 THE COURT: Okay. Panic sets in.

17 MR. BECKER: Well, I'm almost done,

18 so --

19 THE COURT: Yeah. I know.

20 MR. BECKER: -- it wouldn't have been
21 the worst thing in the world.

22 But this baseline construction schedule
23 and endorsement, which you'll find in the very
24 first page of the notebook of exhibits, one of the

1 notebooks of exhibits that you have which is
2 marked YY, what you'll see here is there's a prime
3 contractor acknowledgement on the very first page
4 of the schedule, and it says the prime contractor
5 agrees with the logic, activities, durations,
6 milestones, established completion date. Each
7 prime contractor with their endorsement certifies
8 that they shall deliver the project consistent
9 with this schedule and any associated update or
10 revision to the schedule.

11 So I know you'll keep in mind as you go
12 through on the liability side with regard to the
13 schedule, you know, all the criticisms, and
14 Mr. McCarthy had a bunch of criticism with regard
15 to the schedule, and I actually respect what he
16 has to say. But criticisms of a schedule in a
17 vacuum don't really mean anything in a courtroom.
18 I mean, I'd sit there and I'd listen. I'd go to a
19 class if he'd like to offer one. But it doesn't
20 satisfy their burden of proof. It doesn't satisfy
21 the fact that there has been in fact an agreement
22 each time that you see the TransAmerica signature
23 without any reservation of rights or anything else
24 that as of that point in time we're ~~okay~~ with the

1 schedule. So you can't then later get somebody,
2 the likes of Don McCarthy, and come in and say all
3 right, I want a laundry list from you of all the
4 problems with the schedule. You're going to need
5 to start that with the first moment TransAmerica
6 said in this project we don't agree any longer
7 with the schedule, and that's not what they were
8 doing.

9 You saw through the course of the
10 record that what TransAmerica was doing was they
11 were trying to buy time wherever they could. How
12 many people came in and testified that when it
13 came to the punch list, there was an agreement.
14 Josh Wilhelm said I don't need all that time, at
15 least for the punch list. He was trying to buy
16 time for other things. I'll go ahead and agree to
17 cut down the amount of time for the punch list.
18 So you can take this -- and you'll do this, I'm
19 quite sure, but you can do the schedule analysis
20 and take it pretty much through to nearly the end
21 of the project before TransAmerica ever really
22 itself starts to complain about the schedule.

23 I do want to make mention of one other
24 category of damages, and I know you'll review the

1 records, you'll compare it to your own
2 recollection. But there was -- in the PowerPoint
3 of TransAmerica's closing, there was discussion
4 about a contract balance of \$824,000. I didn't
5 hear a single witness talk about what the
6 appropriate contract balance was in this case, at
7 least my memory. From my memory - and I know it's
8 been a long three weeks and maybe it did come
9 out - but as I stand here before you today and
10 argue the closing of this case, I think I would
11 have picked up on it because I would have been
12 listening for that, among other things. I don't
13 recall anybody testifying as to what the contract
14 balance was. I don't believe there's any
15 evidence.

16 THE COURT: We'll have to figure that
17 out from the pay apps and the claim and whatever
18 else is in there. And if I can't figure it out, I
19 guess we've got a problem.

20 MR. BECKER: Right. And I do
21 understand and I appreciate that. And maybe it
22 shows you a number, but I think what you also need
23 as the fact finder, the decisionmaker here, is I
24 think you need testimony from somebody who says.

1 this is also the right number. This is a good
2 number. This is a number that, at least as of
3 today, because I don't know when you're looking at
4 it, but as of today, this is the appropriate
5 contract balance for those days. So I think
6 you'll think about all that.

7 THE COURT: Don't we have a certified
8 claim, though? Isn't there a certification for
9 the claim?

10 MR. BECKER: Well, certified claim, I
11 don't --

12 THE COURT: I don't see where they're
13 saying this is the right number.

14 MR. BECKER: That's another good point.
15 I don't see within the Article 8 process when they
16 certified the claim -- let me actually just look
17 at that real quick.

18 THE COURT: I mean, I'm not convinced I
19 have to go there, but that would probably be the
20 first place I'd look given what you just said.

21 MR. BECKER: Here's a -- and you may
22 remember the testimony. I'm looking at
23 Mr. McCarthy's work here on the claim, and this is
24 TA-1201/5. And, you know, he basically confirmed

1 that he got involved between the first claim,
2 first certified claim and the second supplemental
3 certified claim. And when you compare the second
4 last Article 8 claim, if you will, that
5 TransAmerica made, it looked -- well, it looked
6 exactly like what's on the top of TA-1202/5, and
7 let's see: Extended general conditions; trade
8 supervision; project management; equipment rental;
9 we have unprocessed change orders, 22,000; loss of
10 productivity; drywall; painting; home office
11 overhead. So it's not there. There isn't --

12 THE COURT: Wasn't it over on the next
13 page? I mean, I don't know about -- I thought
14 there was an 824,000 --

15 MR. BECKER: You may be right. I don't
16 have that with me right now and I'm not going
17 to --

18 THE COURT: Anyway, I think what it is
19 is contract balance and date of damages, but I'll
20 figure that out.

21 MR. BECKER: But even if it is in the
22 certified supplemental claim, is that still the
23 appropriate amount today. I still think you need
24 to hear that testimony from somebody on the stand

1 that can tell you what exactly that amount is on
2 behalf of TransAmerica making a claim in this
3 case.

4 THE COURT: If I figure that out, I
5 will refer to the documents and somebody else can
6 sort that out.

7 MR. BECKER: Your Honor, as I close out
8 this trial, again, I will end where I began, and I
9 will end where I began this closing argument:

10 This case remains a case in search of cause, in
11 particular proximate cause. And what I would add
12 to that at this juncture is that this case remains
13 a case in search of reliable and reasonable
14 damages.

15 There's no question in this case that
16 TransAmerica has come in, if we boil it down and
17 said quite simply, well, you had bad plans and,
18 you know, we went through one e-mail after
19 another. They actually said in the closing
20 argument and alluded to it throughout that this
21 was a case of cover up and the State and/or its
22 agents were using liquidated damages and other
23 contract provisions as a weapon and TransAmerica
24 ended up being a scapegoat. Well, you can't prove

1 your case in a court of law based on simply
2 argumentative type words.

3 You can't prove your case --
4 Mr. Gregory said we're in a very different world
5 because now it's the world of e-mail and public
6 records request. He may be right, but what it
7 doesn't change is what happened in the courtroom.
8 It doesn't change the Plaintiff's burden of proof.
9 I'm sure people that wrote things in e-mail that
10 they wish they hadn't at this point in time, and
11 you recognized yourself, you know, you said it's
12 construction.

13 THE COURT: It's construction.

14 MR. BECKER: There's a lot of pushing
15 and shoving that goes on in construction.

16 THE COURT: Don't press send.

17 MR. BECKER: I'll give you another
18 analysis. I think if you had a son or daughter
19 who played Division 1 sports and you were actually
20 in the locker room listening to the coach at
21 halftime, you wouldn't be real happy with what you
22 heard. As long as the coach wins a national
23 championship or, you know, is successful, then
24 nobody every really looks at it. It doesn't

1 really account for anything.

2 But certainly, in a courtroom, if there
3 was shouting -- I'm sorry. In a construction
4 case, if there was shouting and pushing that went
5 on, I'm not defending that. I'm not justifying
6 it. In my mind that shouldn't happen. But even
7 if it did, you still have the question of how did
8 that then impact TransAmerica. How do you then
9 link that up with your damages from a proximate
10 cause standpoint?

11 Their case basically was I don't have
12 to do that. I've got, you know, bad plans and
13 I've got bad scheduling. Well, that still,
14 however, begs the question of okay. So for each
15 time you said there's a problem in the plans,
16 dimensions, what's your impact? For each time
17 that you said there wasn't a predecessor or
18 successor activity to the schedule and it defied
19 logic, fine. What's your impact? What are your
20 damages?

21 They still have that burden of proof.
22 It is still a matter of law. A defendant still
23 has the right to have a plaintiff actually prove
24 their case, duty, breach, proximate cause, and

1 damages. And I would suggest to you that has not
2 been done in this case.

3 Thank you for your time over the last
4 three weeks.

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1 State of Ohio : C E R T I F I C A T E
2 County of Franklin: SS

3 I, Reva Chafin Mundy, a Notary Public in and
4 for the State of Ohio, do hereby certify that I
5 reported the aforementioned proceedings; that the
6 foregoing is a true record of an excerpt of the
7 proceedings.

8 I do further certify I am not a relative,
9 employee or attorney of any of the parties hereto,
10 and further I am not a relative or employee of any
11 attorney or counsel employed by the parties hereto,
12 or financially interested in the action.

13 IN WITNESS WHEREOF, I have hereunto set my
14 hand and affixed my seal of office at Columbus,
15 Ohio, on June 9, 2015.

16
17
18
19
20 Reva Chafin Mundy

21 Reva Chafin Mundy, Notary Public - State of Ohio
22 My commission expires June 23, 2017.
23
24