

**ORIGINAL**

IN THE COURT OF CLAIMS OF OHIO

FILED  
COURT OF CLAIMS  
OF OHIO

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TRANSAMERICA BUILDING  
COMPANY, INC.

*Plaintiff,*

v.

OHIO SCHOOL FACILITIES  
COMMISSION,

*Defendant.*

CASE NO. 2013-00349

JUDGE PATRICK M. MCGRATH

REFEREE SAMUEL WAMPLER

**STATE OF OHIO'S RESPONSE TO  
TRANSAMERICA'S OBJECTIONS TO THE  
REFEREE'S REPORT AND RECOMMENDATION**

**I. INTRODUCTION.**

Transamerica, through its objections, seeks to restore another \$1 million dollars to its claim for:

1. A loss of productivity claim which the Referee found that Transamerica had failed to prove in the first instance;
2. Recovery of nearly a half million dollars which it loaned to finance one of its sub-contractors which was limping along through the project; and
3. Costs for additional supervision even though Transamerica fired two of its supervisors and employed a total of six, some with no supervisory experience with Transamerica.

As can be seen from the State's objections to the Referee's report and recommendation, Transamerica is not entitled to what the Referee recommended let alone an additional one million dollars which he didn't recommend.

## II. TRANSAMERICA'S LOST PRODUCTIVITY CLAIM.

Transamerica (T/A) did not keep a contemporaneous record of its claimed lack of productivity and additional costs incurred during the course of this project. Rather, it retained an expert for an after-the-fact estimated approach to damages. Specifically, it used a measured mile approach.

In its Post-Trial Brief and Objections, the State outlined how Transamerica's use of a measured mile approach to estimate its damages was unreliable. In fact, the Referee agreed. The Referee found that Transamerica had failed to prove its loss of productivity claim through its measured mile approach:

TA has not proven its damages for loss of productivity to a reasonable degree of certainty utilizing the measured mile analysis prepared by McCarthy.

And then the Referee committed error. Instead of finding that T/A had failed to prove its case, the Referee proceeded to use an entirely different methodology to calculate Transamerica's loss of productivity claim. He used a modified total cost approach. (See recommendation page 84). He then adjusted Transamerica's bid, accounted for impacts and change orders that hadn't been accounted for by Transamerica's and came up with a loss of productivity recovery for Transamerica of over a half million dollars.

The Referee did what no judge would ever do or is permitted to do. When a party, through expert testimony, has failed to prove their claim, the Defendant is entitled to a defense judgment. The Court doesn't employ a different methodology or change the evidence to produce an outcome which the Plaintiff hadn't proven.

By analogy, if a Court determined that an economist used a flawed method to estimate damages for a Plaintiff, the Court wouldn't employ a different methodology and redo the

economist's calculations. Rather, the Court would find that the Plaintiff had failed to prove its case. And that is what this Court must find in this case.

Plaintiffs are not entitled to add to the Referee's recommendation for lost productivity any more than they are entitled to his original recommendation that they recover such damages which they never proved.

**III. TRANSAMERICA IS NOT ENTITLED TO RECOVER MONEY IT LOANED TO ONE OF ITS SUB-CONTRACTORS.**

Transamerica's painting and drywall sub-contractor, which accounts for nearly \$1 million dollars of T/A's claim in this case, was performing so badly that Transamerica not only had to supplement its work but ended up loaning it \$400,000. As Transamerica admitted, this loan found its way into Transamerica's financial records for this project (the job cost report). This was a record that Transamerica's expert (McCarthy) relied upon in calculating Transamerica's damages. It is an amount that actually "poisons" Transamerica's claimed damages. And certainly an owner, such as the State of Ohio, is never responsible for a contractor having to finance its sub in order to keep the project moving forward.

**IV. TRANSAMERICA IS NOT ENTITLED TO ADDITIONAL SUPERVISION COSTS.**

Transamerica went through six different supervisors for this project, having fired two. With such poor performance on its part, it shouldn't have recovered anything additional for supervision costs. But at a minimum, the Referee was correct in not awarding Transamerica additional supervision costs for when they were performing scope work (contract work) during the normal (not extended) portion of the project.

**V. CONCLUSION.**

At first blush, the Court may be inclined to be dismissive of the objections filed in this case. Transamerica has filed objections claiming that they should get everything they claimed; the State has filed objections that they should receive nothing.

However, one thing is clear. When the Referee found that Plaintiff had failed to prove the largest part of its claim (loss of productivity) through the estimated methodology that it employed, it was error for the Referee to employ a different methodology, adjust the factors at issue with that methodology and come to a completely different calculation of damages than the Plaintiff did.

For these reasons, Plaintiff's objections should be overruled and the State's objections, including legal errors in the Referee's report and recommendation should be sustained.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the *State of Ohio's Response to Transamerica's Objections to the Referee's Report and Recommendation* was served via electronic and regular U.S. Mail, postage pre-paid, this 11<sup>th</sup> day of December, 2015 upon the following:

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