Case Number: PC-2024-04526
Filed in Providence/Bristol County Superior Court
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Reviewer: Carol M.

BUSINESS CALENDAR HEARING
January 21, 2025 at 9:30am

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

STATE OF RHODE ISLAND

Plaintiff,

v.

AECOM TECHNICAL SERVICES, INC., *et al.*

Defendant.

C.A. No. PC-2024-04526

DEFENDANT AECOM TECHNICAL SERVICES, INC.'S REPLY TO PLAINTIFF'S CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' RULE 12 MOTIONS AND IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rhode Island Superior Court Rule 12, Defendant AECOM Technical Services, Inc. ("AECOM") respectfully submits its Reply to Plaintiff State of Rhode Island's ("Plaintiff" or the "State") Consolidated Response in Opposition to Defendants' Rule 12 Motions (the "Opposition") and in support of its Motion to Dismiss the Complaint ("Complaint"), or in the Alternative for a More Definite Statement, hereby states as follows:

I. INTRODUCTION:

Having received and reviewed the Opposition, and given the impending hearing, AECOM limits its response to a handful of key points and observations. These points highlight the clear misunderstanding or attempt of the State to obfuscate, ignore or contort various fundamental statements of law dealing with, *inter alia*, the Economic Loss Doctrine ("ELD"); the State's waiver of sovereign immunity and its relationship to the contracts in question as a commercial party; and the State's failure to state a claim related to contract damages, fiduciary duty, and declaratory

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judgment. In its Opposition, the State also introduces a plethora of new facts and allegations that are wholly outside the four corners of its Complaint, further supporting the pending Motion.

II. ARGUMENT

a. Plaintiff cannot plead new facts in its Opposition that were not included in the Complaint.

Rhode Island follows the well-established rule that a court cannot consider any facts outside of the pleadings (in this case the Complaint) for purposes of a motion to dismiss. *See Warren Ed. Ass'n v. Lapan*, 235 A.2d 866, 870 (R.I. 1967) (a judge must "confine his examination to the well-pleaded facts in applying the substantive law to the allegations pleaded to determine if the complaint properly describes the set of circumstances upon which a court could justifiably grant relief."); *see Chase v. Nationwide Mut. Fire Ins. Co.*, 160 A.3d 970, 973 (R.I. 2017) (noting that a court is confined to the "four corners of the complaint").

Through its Opposition, the State now attempts to support and enhance its bare conclusions and blind allegations in its Complaint by alleging new facts. For example, and certainly without limitation, the State now argues that it sustained some unspecified "property damage" apart from damage to the bridge, including damage as a result of increased traffic and damage to surrounding land and structures caused by the demolition to the Bridge (Opposition at 36-37); and that it somehow implicitly pled negligent misrepresentation as part of its negligence claim (*Id.* at 38-40). To the extent that the State includes new facts in its Opposition that were not previously included in the Complaint, these facts should not be considered by this Court.

b. The Economic Loss Doctrine Bars the State's Negligence Claims Because the State is acting as a commercial party and alleges no facts in support of its negligence claims outside of the Contract.

The State argues that the Economic Loss Doctrine does not bar the State's negligence claim, Count II, because "it does not apply in the circumstances here in which the State, a sovereign

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entity, is seeking damages for harm to public infrastructure that amounted to a public hazard," and further because the "State's negligence claims implicate duties independent of their contractual obligations." Opp. at 33. Plaintiff cites two inapposite and out-of-jurisdiction cases in support of this proposition, but ignores Rhode Island precedent to avoid the inevitable conclusion: the State's argument on avoiding the ELD are not supported by Rhode Island law, or for that matter, the law of any jurisdiction in the United States.

i. The State acts in its commercial, business capacity when contracting with AECOM and waived all immunity as to liability.

Firstly, there is no exception to the ELC for a sovereign acting in *parens patriae*. *See State v. Lead Indus. Assoc., Inc.*, No. 99-5226, 2001 WL 345830, at *3 (R.I. Super. 2001). *Parens patriae* is an exception to normal rules relating to a party's standing when the State pursues its sovereign interests in the "well-being of its populace" notably distinct from, for example, "conducting a business venture." *Id.* (*citing Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-602 (1982)); *see also Franklin Grove Corp. v. Drexel*, 936 A.2d 1272, 1276 (R.I. 2007) (holding that "the [ELD] applies to entities acting in a business capacity" when defendants argued that the parties were not commercial entities). Here, the State is acting in its capacity as a contracting party, based on forms of contract that it elected and language that it included therein. Likewise, the State is certainly a sophisticated contracting party in entering into said contracts.

Further, the State waived its immunity by entering a contract for the "design, construction, repair, or alteration of any state…bridge." *See* RI Gen. L. § 37-13.1-1; *Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill*, 652 A.2d 440, 451-452 (R.I. 1994) ("we find it obvious that the Legislature intended to have a judicial determination concerning those disputed claims which arise under a public-works contract."). The State was acting as a commercial or business entity in the case at bar, and a private party in conducting repairs to the bridge. As such, and per statute, the

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State waived immunity as to liability to do so. Accordingly, the ELD applies to the State acting in its commercial capacity in entering a construction contract to repair the bridge.

Finally, to the extent that the State intends to argue that the ELD does not apply because of some unspecified, unpled possibility of public harm, Rhode Island does not recognize the exception to the ELD for "losses coupled with a *serious* risk of personal injury resulting from a dangerous condition." Opp. at 34. While a few other states may so include such an exception, it is not controlling or mandatory authority in this jurisdiction. And even in those states, the application of this limited exception must be based on facts that show the "existence of a clear and extreme danger." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 536 (1995). The year's long degradation of the Bridge as alleged by Plaintiff does not demonstrate any immediate danger, much less a "clear and extreme danger," particularly where, as here, the State admits in its Complaint that it knew of the degradation over many years, including by the very inspection reports that AECOM and other defendants provided it over many years, and given that the State had proceeded with various repair and modernization efforts (which it then cancelled). Accordingly, the ELD applies to the present circumstances and the State's counts on negligence must be dismissed as a matter of law.

ii. The State misconstrues "property damage" to include economic losses.

The State now claims that it has adequately pled damages by making a wholly generic reference to "damages to property". In doing so, the State misconstrues "property damage" and argues generally that "damages to property" is sufficient to survive the ELD. It is not, and case law readily establishes this. Although the State tries to construe its damages otherwise, the State alleges only economic losses, not losses or damage to property or person. *See Boston Inv. Prop.*

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No. 1 State v. E.W. Burman, Inc., 658 A.2d 515, 517 (R.I. 1995); *Hart Engineering Co. v. FMC Corp.*, 593 F.Supp. 1471, 1482-84 (D.R.I. 1984).

The difference between property damage and economic loss depends on the nature of the claimed defect and the manner in which the damage occurred. *Hart Engineering Co.*, 593 F.Supp. at 1484. Economic losses are damages from "deterioration, internal breakdown, or nonaccidental cause", whereas property damage results from a "sudden dangerous occurrence." *Id.* In other words, "economic loss results from the failure of the product to perform to the level expected by the buyer and the seller." *Id.* 1483. *See also Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 286-89 (3rd Cir. 1980) (cited by *E.W. Burman* and *Hart Engineering Co.*) (describing economic loss as "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property"); *Hecktman v. Pacific Indemn. Co.*, 59 N.E.3d 868, 872-876 (Ill. App. 2016) (describing economic loss as damage "caused by disappointed commercial expectations, gradual deterioration, internal breakage, or other nonaccidental causes"). All references to "damage" in the Complaint (to the extent that such damages are actually alleged) arise out of the claimed repair and replacement of defective parts of the Bridge; they do not relate to damages caused from a sudden dangerous occurrence or other immediate danger of harm. Plaintiff's damages are contemplated by the contract, which the State drafted and freely negotiated each and every time, and are thus not recoverable in tort.

Furthermore, the State argues that its allegations of property damage are not limited to damage to only the Bridge itself, now alleging in its Opposition (not the Complaint) that the repair of the Bridge *might* cause (perhaps in the future or now, we are not sure) damage to alternative routes of travel with increased traffic, or property damage to surrounding land and structures. Opp.

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at 36-37. These allegations are not sufficient to prevent the application of the ELD. First, the State did not raise such arguments in its Complaint, and thus the Court should not consider them when deciding defendants' motions to dismiss. *See Chase v. Nationwide Mut. Fire Ins. Co.*, 160 A.3d 970, 973 (R.I. 2017). Second, such damages are not recoverable in tort: "Damage incidental to the defective construction of the building…is damage 'consequent to the qualitative defects' and therefore not recoverable in tort." *Hecktman*, 59 N.E.3d at 875. Third, even under Rhode Island's "notice pleading" standard, *see Gardner v. Baird*, 871 A.2d 949, 953 (R.I. 2005), the State's damages allegations are not sufficiently pled. A complaint must provide the opposing party with fair and adequate notice of the type of claim being asserted. *Rhode Island Economic Development Corp. v. Wells Fargo Sec., LLC*, No. PB-12-5616, 2013 WL 4711306, at *8 (R.I. Super. Aug. 28, 2013). The drafter of a complaint has "responsibilities with respect to providing some degree of clarity as to what is alleged; due process concerns are implicated…" *Barnes v. R.I. Public Trans. Auth.*, 242 A.3d 32, 37 (R.I. 2020). Even with notice pleading, the defendant must still be able to fully respond to the plaintiff's claim. Here, AECOM had no opportunity to respond to such damages as there is no way to tell from the Complaint what those damages are, how much they are, what the constitute or other fundamental elements of damage. Damage to property that "could," or might, have speculatively occurred now or in the future is not sufficient under this standard. There is no way for AECOM to respond to this allegation or conclusory *ad damnum* claim as it is woefully inadequately pled.

iii. To the extent that the State argues that it alleged negligent misrepresentation as a tort independent of the contract, AECOM was not put on notice of the negligent misrepresentation claim.

Plaintiff argues in its Opposition that the ELD does not bar recovery because AECOM's alleged misconduct implicates a tort arising independently from the Contract, specifically

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negligent misrepresentation. Opp. at 38-40. In support of this wholly new position, Plaintiff points to certain statements in the Complaint alleging that AECOM allegedly represented itself as part of its pre-contract proposal as a "top transportation engineering design firm" and that its subconsultants possessed the "experience, knowledge, and character to qualify them" for particular duties, as well as its general negligence count. *Id.* at 39.

As an initial matter, and as it admits, the State's Complaint does not raise or identify a cause of action of "negligent misrepresentation." Opp. at 39. This patent admission should end this argument. The State admits it did not raise this cause of action and that terminology is not articulated *anywhere* in the Complaint. A plain reading of the Complaint forces one to conclude that this is not a proper count before the Court and, as such, the State cannot avail itself of this claimed exception to the ELD.

Likewise, even assuming, *arguendo,* that the State's argument that it had this count or basis of claim in its Complaint were true, it would be inadequately plead. For a defendant to be properly put on notice of a claim, the claims must arise from the same operative set of facts. *See Stebbins v. Wells*, 818 A.2d 711, 714-15 (R.I. 2003). Negligence requires a showing of a "duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." *Oliver v. Narragansett Bay Ins. Co.*, 205 A.3d 445, 450 (R.I. 2019). In contrast, negligent misrepresentation requires "'(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he [or she] ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation." *Rhode Island Econ. Develop. Corp. v.*

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Wells Fargo Sec., LLC, No. PB-12-5616, 2013 WL 4711306, at *36 (R.I. Super. Aug. 28, 2013) (quoting *Cruz v. DaimlerChrysler Motors*, 66 A.3d 446, 453 (R.I. 2013)). Negligent misrepresentation involves inducement to *enter into* a contract; misrepresentations throughout the performance of a contract are not a separate tort (and again sound in contract, not tort). *Id.* at *37.

While Plaintiff argues that AECOM was on notice of the negligent misrepresentation claim through its negligence count and its single allegation of AECOM's representations (Opp. at 38-40), the negligence and negligent misrepresentation claims do not arise from the same set of operative facts. Plaintiff has not pled that it was induced to enter into the Contract with AECOM to perform repair or design services on the bridge, or that it was induced into entering into the inspection contracts with AECOM (or other defendants). Further, the State has not pled any facts related to (1) AECOM's knowledge of the truth or falsity of the alleged statement; (2) intent for the State to rely on such a statement; (3) justifiable reliance on the representation; or (4) injury resulting from such justifiable reliance. The State has not alleged that it would not have entered the Contract but-for this reliance or that AECOM's alleged negligence occurred *prior to the contract*. Instead, each of the State's allegations relate to alleged negligent conduct occurring during contract performance. Accordingly, to the extent that the State now attempts to argue that it pled a claim for negligent misrepresentation in order to avoid the ELD bar, AECOM was not put on notice of such a claim and as such dismissal is appropriate.

c. Plaintiff's damages allegations related to its breach of contract action are not sufficient under the notice pleading standard.

The State tries to argue that Rhode Island's pleading standard is somehow set at a lower bar than the Federal Courts. Opp. at 14 *et seq.* This is just not the case. Even under Rhode Island's "notice pleading" standard, *see supra*, Plaintiff fails to state a claim in Counts I, IV and X because it does not adequately allege damages. The State concludes that it has suffered "damages" so

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broadly and vaguely that it cannot meet its burden of proof and AECOM cannot properly rebut such allegations. What damages did the State suffer – what is the nature of the damages? What is the source of the damages? How do such damages connect to AECOM's alleged breaches of contract – *i.e.,* how did the damages flow from AECOM's alleged breaches or misconduct? On what basis is AECOM, as a third party, liable for contractual indemnity? As critically, given the State's admission that it has not received any demands, claims or suits from any other party (third parties) seeking recovery from the State based on the situation with the Bridge, it cannot prove damages.

Although the State tries to circumvent its pleading requirements by saying that only some mention of the word "damage" or a like articulation is required under *Rhode Island Economic Development Corp. v. Wells Fargo Sec., LLC*, No. PB-12-5616, 2013 WL 4711306 (R.I. Super. Aug. 28, 2013), that case is readily distinguishable. In that case, that court acknowledged in its decision that the plaintiff there alleged four specific injuries related to the conduct of the defendants, including certain amounts lost in loans, reimbursement liability, the ability to issue bonds or other guarantees, and injuries to the plaintiff's reputation and credit. 2013 WL 4711306, at *8-9. The plaintiffs further connected the damages to the conduct of the defendant. *Id.* at *12-15. Moreover, the allegations of damages were sufficient to allow defendants to mount a response. For example, defendants could rebut the claim that plaintiffs were entitled to damages related to plaintiff's ability to issue bonds. *Id.* at *14. AECOM does not have such ability here given the simplistic and ineffective manner in which the State has drafted its Complaint. For example, AECOM cannot analyze the relevant indemnity provision in the relevant contract to determine whether it is liable for an indemnity claim (nor can the Court). Likewise, AECOM cannot determine the type or value of such damages, particularly where, as here, there is nothing

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whatsoever to review or consider. Accordingly, Plaintiff has failed to allege these damages with specificity under the notice pleading standard.

d. The State fails to allege a fiduciary relationship – as none exists.

The existence of a fiduciary duty depends on the analysis of certain factors, including: "the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in uncomplicated transactions." *EDC Investment LLC v. UTGR, Inc.*, 275 A.3d 537, 544 (R.I. 2022). The State points to a conclusory allegation in the Complaint that such a relationship existed here with AECOM, in an attempt to argue that it has sufficiently pled a fiduciary relationship. However, a party entering into a commercial contract with a commercial party alone is not sufficient to create a fiduciary duty, even a contractual relationship with imbalanced bargaining power. *Id.* (finding no fiduciary duty based on allegations of the "typical" landlord-tenant association). There is nothing "special" about the contractual relationship between AECOM and the State that rises to the level of a fiduciary. It is simply a commercial arrangement between two sophisticated parties. To the extent that the State argues that AECOM's expertise in the design field creates such a duty or relationship, that is also in sufficient to impose a fiduciary duty where the parties are equally sophisticated commercial entities – noting that it is public knowledge that the State has its own designers (engineers, architects, construction professionals) in the RIDOT who are as well versed in these sorts of issues as is AECOM or the other defendants. *See id.* Accordingly, this Court should dismiss Count V of the Complaint for failure to state a claim.

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e. Declaratory Judgment is not available to the State.

Finally, as relates to the three counts on declaratory relief/judgment, the State's arguments are equally lacking. The law in Rhode Island is clear that "a claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *State v. Gaylor*, 971 A.2d 611, 613-14 (R.I. 2009). AECOM moved to dismiss the State's three requests for declaratory relief (Counts XVIII, XIX & XX) because, in each Count, the State seeks to hold AECOM liable for some unspecified, unpled, hypothetical future indemnity event that may or may not happen. Accordingly, the State's requests for declaratory relief must be dismissed because there is no justiciable controversy.

In its Opposition, the State does not dispute that its three requests for declaratory relief seek to hold AECOM (and the other defendants) responsible for *potential* claims that *potential* third parties might *potentially* bring against the State at some, unspecified future time. Instead, the State argues in its Opposition that "[t]he Court may award declaratory relief under the Uniform Declaratory Judgments Act to clarify the parties' rights and obligations even when future events may further define the scope of those rights and obligations." See Opp. at 58. The State cites *FleetBoston Fin. Corp. v. Advanta Corp.*, No. CIV.A. PB 03-0220, 2003 WL 22048742, at *3 (R.I. Super. Aug. 13, 2003) in support of this flawed proposition.

First of all, *FleetBoston Fin. Corp. v. Advanta Corp.* is readily distinguishable from the instant case. In *FleetBoston Fin. Corp.*, there was actual, pending litigation against the parties, which, as the Superior Court stated, created a "factual predicate" for the indemnification case. Here, by the State's own admission (Opp. at 57) there is no pending third-party litigation. Moreover, the State's hypothetical injured third parties are not identified or known – nor are they parties to this action, whereas in *FleetBoston*, the third party was clearly identified as the IRS. For

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both these reasons, the injury in *FleetBoston* was actual and imminent, whereas, in the case-at-bar, it is purely speculative and hypothetical.

Secondly, *FleetBoston Fin. Corp. v. Advanta Corp.* fully supports AECOM's position that this Court should dismiss the State's requests for declaratory judgment as there is no justiciable controversy. Indeed, the trial court in *FleetBoston Fin. Corp. v. Advanta Corp.* acknowledged that "'any petition which is based on facts and circumstances which may or may not arise at a future date is of necessity unripe and abstract.'" *FleetBoston Fin. Corp. v. Advanta Corp.*, No. CIV.A. PB 03-0220, 2003 WL 22048742, at *3 (R.I. Super. Aug. 13, 2003) (quoting *Berberian v. Travisano*, 332 A.2d 121, 124 (R.I.1975)). Therefore, because the State's requests for declaratory relief are premised on facts and circumstances "which may or may not arise at a future date," they are not ripe for adjudication and must be dismissed.

Finally, under the Uniform Declaratory Judgment Act, there is a mandate that all relevant parties be included in the litigation at issue. In particular, the Act states "…all persons shall be made parties who have or claim any interest which would be affected by the declaration…." R.I. Gen. §9-30-11. Here, those "third-parties" against which indemnification might be needed, must first be made a party to these causes of action. That has not happened. Likewise, the real question that must be asked is how can the Court determine under the guise of a declaratory judgment what obligations and rights AECOM and the State have under the relevant bases of judgment where (a) we do not know what the claims are and what they sound in; (b) we do not know what the conduct complained of is or who is responsible therefore; and (c) what are the damages claimed? How can the Court make a determination in declaring judgment and articulating the rights that the State is seeking without having any of these fundamental facts? It cannot. As such, these counts must be dismissed as improper, inadequately pled and (at worse) premature.

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III. Conclusion

For the reasons set forth above and, in its Motion, AECOM respectfully requests that the Court dismiss the State's Complaint in whole or in part. Alternatively, should this Court fail to grant AECOM's Motion to Dismiss, AECOM respectfully requests this Court order the State to submit a more definite statement.

AECOM TECHNICAL SERVICES, INC.

By Its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2025, I electronically filed and served this document through the electronic filing system on counsel of record.

The document is available for viewing and/or downloading from the Rhode Island Judiciary's electronic filing system.

/s/ Amanda Prosek
Amanda Prosek