# EXHIBIT 5

STATE OF RHODE ISLAND

PROVIDENCE, SC. SUPERIOR COURT

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| AISLE FIVE REALTY, LLC,<br>Plaintiff, | : | |
| v. | : | C.A. No. PC-2018-7865 |
| RANSOM CONSULTING, INC. f/k/a RANSOM ENVIRONMENTAL CONSULTANTS, INC.; RHODE ISLAND CVS PHARMACY, L.L.C. f/k/a TIVERTON CVS, INC.; GERSHMAN BROWN CROWLEY, INC.,<br>Defendants, | : | |
| RANSOM CONSULTING, INC. f/k/a RANSOM ENVIRONMENTAL CONSULTANTS, INC.,<br>Third-Party Plaintiff, | : | |
| v. | : | |
| D.F. PRAY, INC.; NEW ENGLAND RETAIL CONSTRUCTION CORPORATION,<br>Third-Party Defendants. | : | |

DECISION

STERN, J. Before the Court are two motions. First, Third-Party Defendants—D.F. Pray, Inc. and New England Retail Construction Corporation—moved for Summary Judgment on certain of Ransom Consulting, Inc.'s Amended Third-Party Complaint claims and Gershman Brown & Crowley, Inc.'s Crossclaims. Ransom Consulting, Inc. and Gershman Brown & Crowley, Inc. object to this motion.

Second, Gershman Brown & Crowley, Inc. moved for leave to file a Third-Party Complaint, pursuant to Rule 14(a) of the Superior Court Rules of Civil Procedure, to assert claims

against New England Retail Construction Corporation. New England Retail Construction Corporation objects to this motion. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

## I

## Background

The underlying dispute stems from a twenty-five-year lease of property, which required the Defendant Rhode Island CVS Pharmacy, L.L.C. f/k/a Tiverton CVS, Inc. (CVS), as the lessee, to remediate hazardous environmental conditions on the land. During their efforts to comply, there was an unintentional fracture of a septic tank, resulting in the discharge of hazardous waste onto the property. Because various contractors and subcontractors were involved in the remediation of the land and the construction on the property—including the respective agreements that governed these business relationships and obligations—there is a montage of claims, counterclaims, crossclaims, and third-party claims pointing fingers at who allegedly blundered and, ultimately, who should be responsible.

## II

## Facts and Travel

In 2008, Plaintiff Aisle Five Realty, LLC (Aisle Five) and CVS entered into a Lease Agreement (Lease) for property in Tiverton, where CVS was to build a CVS Store. (Compl. ¶ 1 (Nov. 1, 2018); CVS Answer ¶ 1 (June 14, 2019).) The Lease provided that CVS was to remediate hazardous substances from the premises, utilizing Ransom Consulting, Inc. (Ransom) or another firm acceptable to Aisle Five. (Compl. Ex. CVS Lease, §2.1(b).)

For purposes of construction upon and remediation of the land (the Project), CVS entered into contracts with both Ransom and Gershman Brown & Crowley, Inc. (GBC). (CVS Answer ¶¶ 1-2.) A CVS Services Agreement lists Ransom as a Consultant and GBC as a Developer or

Architectural Firm, and an attached memo states that Ransom was "to provide oversight during the completion of remedial activities" at the property. (Ransom Mem. Opp'n (Ransom Opp'n) Exs. B, C (Apr. 9, 2021).) GBC then hired New England Retail Construction Corporation (NERCC) as the general contractor.[1] (Third-Party Defs.' Mot. Summ. J. (Pray Group Mem.) Ex. 1, Dep. Tr. 19:5-7; 22:7 (Mar. 17, 2021); Ransom Opp'n Ex. G., Dep. Tr. 33:17-20.) Subsequently, NERCC entered into a contract with D.F. Pray, Inc. (D.F. Pray) for D.F. Pray "to supervise and manage certain construction work" on the Project.[2] (Pray Group Mem. Ex. 2 ¶ 9.)

On December 4, 2009, the Town of Tiverton issued a Certificate of Use and Occupancy for the CVS store. (VHB Obj. Ransom Mot. Leave Amend Ex. 1 (Nov. 23, 2020).) The Certificate of Use and Occupancy listed NERCC as the "Contractor[.]" Id. In January 2010, while Ransom was replacing a monitoring well, it punctured an underground septic tank, which Aisle Five alleged to have caused a new release of hazardous waste into the groundwater. (Ransom Am. Compl. ¶¶ 17-19 (Mar. 3, 2020); Compl. ¶¶ 13, 16.) According to Aisle Five, that septic tank, which was already a source of contamination, should have been removed or closed but was instead abandoned in place. (Compl. ¶¶ 4-5, 7.)

The Lease provides that "with regard to the presence or Release of any Hazardous Substances caused by [CVS] or any of the [CVS] Related Parties, [CVS] shall remove or remediate same to the extent required by all governmental laws . . . and at [CVS's] sole cost." (CVS Lease §

[1] According to GBC, "NERCC was retained by GBC to build the new store." (Mot. Def. GBC Leave File Third Party Compl. (GBC Mot. Leave) 2 (Apr. 23, 2021).) However, according to NERCC, '[o]n September 19, 2008, G.B. New England 2, LLC ("GBNE"), a GBC affiliate, entered into a Master Contract Agreement with NERCC . . . (the 'Master Agreement')[,] [which contemplated] that GBNE and NERCC would enter into further agreements . . . with respect to the construction of particular retail stores to be operated by [CVS] . . . for which NERCC would serve as construction manager." (Obj. NERCC GBC's Mot. Leave (NERCC Obj.) 2 (May 17, 2021).)
[2] As a summary, Aisle Five and CVS entered into a Lease; CVS hired Ransom and GBC; GBC hired NERCC; NERCC hired D.F. Pray.

13(p)(ii).) "[CVS] Related Parties" includes CVS's "officers, agents, servants, employees, contractors, sublessees, invitees, or affiliates[.]" Id. § 15(a).

Aisle Five brought claims against CVS, Ransom, and GBC of intentional tort, negligence, fraudulent misrepresentation, negligent misrepresentation, and, against CVS and GBC, negligent supervision and vicarious liability. (Compl. ¶¶ 61-81.) Ransom brought a Third-Party Complaint against NERCC and D.F. Pray (collectively the Pray Group), alleging that either NERCC or D.F. Pray, or both, were responsible for removing the punctured septic tank, that neither of them removed the tank, and that, if Ransom is liable to Aisle Five for the release of hazardous wastes, NERCC and/or D.F. Pray are liable to Ransom for contributions pursuant to §§ 10-6-1 et seq. (Ransom Am. Compl. ¶¶ 13-26.) GBC brought a separate Crossclaim against D.F. Pray, for contribution and indemnification, alleging that—if the tank was abandoned, punctured, caused damages, and the foregoing results in GBC being liable to Aisle Five—its liability is strictly vicarious and due solely to the negligence or other acts of D.F. Pray. (GBC Cross-cl. ¶¶ 8-10, 26, 28 (Feb. 27, 2019).)

CVS filed a Motion to Dismiss Aisle Five's claims, and the Court dismissed the claims against CVS of intentional tort, negligence, negligent misrepresentation, negligent supervision, and vicarious liability because the economic loss doctrine barred the claims where the Lease controlled. (Decision (May Decision) (May 9, 2019).)

In the instant Motion for Summary Judgment, the Pray Group asserts that it is entitled to judgment as a matter of law on (1) Ransom's Counts I and II for tortious contribution against both D.F. Pray and NERCC; and (2) GBC's Counts V and VI for tortious contribution and indemnification against D.F. Pray. (Pray Group Mem. at 1-2.) The Pray Group argues that because Aisle Five's tort claims against Ransom and GBC are barred by the economic loss doctrine, so too

are Ransom's and GBC's derivative tort claims against the Pray Group. Id. Ransom and GBC oppose the motion asserting that outstanding factual issues preclude summary judgment, yet if the Court is inclined to apply the economic loss doctrine, it must also determine that the tort claims asserted by Aisle Five against them fail as a matter of law. (Ransom Opp'n at 6; GBC Opp'n Mem. (GBC Opp'n) 6 (Apr. 14, 2021).) On April 28, 2021, the Court held a hearing on this motion.

In the instant Motion for Leave to File Third Party Complaint, GBC requests leave of this Court, pursuant to Rule 14(a), to file a Third Party Complaint against NERCC and assert claims for contribution and indemnification under the Uniform Contribution Among Tortfeasors Act and for contractual indemnification. (GBC Mot. Leave at 3.) NERCC opposes the motion arguing that the proposed Third Party Complaint is futile because (1) the economic loss doctrine bars the tort based contribution and indemnification claims and (2) the statute of repose, codified in § 9-1-29, and the doctrine of laches bar all of GBC's proposed claims against NERCC. (NERCC Obj. at 1-2.) On May 20, 2021, the Court held a hearing on this motion. This Decision, addressing both motions, follows.

## III

## Motion for Summary Judgment

### A

### Standard of Review

"Summary judgment is an extreme remedy and should be granted only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" Plunkett v. State, 869 A.2d 1185, 1187 (R.I. 2005) (quoting Wright v. Zielinski, 824 A.2d 494, 497 (R.I. 2003)). The Court views the

admissible evidence "in the light most favorable to the nonmoving party[.]" National Refrigeration, Inc. v. Standen Contracting Company, Inc., 942 A.2d 968, 971 (R.I. 2008). A party opposing "'a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Id. (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996)). "[W]hen ruling on a motion for summary judgment, the court is not authorized to try issues. The purpose of summary judgment procedure is issue finding and not issue determination." Westinghouse Broadcasting Company, Inc. v. Dial Media, Inc., 410 A.2d 986, 992 (R.I. 1980).

B

Analysis

The Pray Group argues that because Aisle Five's claims against the primary defendants (CVS, Ransom, and GBC) are barred by the economic loss doctrine, the derivative claims for contribution and indemnification against the Pray Group also fail as a matter of law. (Pray Group Mem. at 6-7.) Ransom contends that there are outstanding factual issues as to whether Aisle Five's damages are purely economic, making summary judgment premature. (Ransom Opp'n at 5-6.) GBC echoes Ransom's concern and also asserts that discovery is required to understand the scope of the Pray Group's involvement with the remediation of the property. (GBC Opp'n at 4.)

Certainly, where summary judgment is premature, Rule 56(f) of the Superior Court Rules of Civil Procedure allows this Court to continue a matter for want of discovery. The decision to grant a continuance under Rule 56(f) is left to the trial court's discretion. See Holley v. Argonaut Holdings, Inc., 968 A.2d 271, 275 (R.I. 2009). To invoke Rule 56(f), the party opposing the motion must provide an affidavit demonstrating that "the party cannot for reasons stated present by

affidavit facts essential to justify the party's opposition[.]" Super. R. Civ. P. 56(f); see also Holley, 968 A.2d at 276; Chevy Chase, F.S.B. v. Faria, 733 A.2d 725, 727 (R.I. 1999).

GBC did not file an affidavit with its opposition. Ransom provided an affidavit of its attorney explaining that it is awaiting responses to discovery requests relative to "damages information[,]" which is "necessary for Ransom to submit a response" to the summary judgment motion. (Lapish Aff. ¶¶ 14-15 (Apr. 9, 2021).) However, by affidavit or otherwise, neither Ransom nor GBC gave the Court a legally sufficient explanation as to what facts relating to Aisle Five's damages or the Pray Group's involvement with remediation are material or essential to justify their oppositions. The affidavit and arguments were devoid "of any facts suggesting that a continuance might result in [Ransom or GBC] producing 'facts essential to justify [the] opposition[s.]'" Chevy Chase, F.S.B., 733 A.2d at 727 (quoting Super. R. Civ. P. 56(f)).

Ransom's affidavit states that the parties have only exchanged written discovery and conducted one deposition and that D.F. Pray, NERCC, and Aisle Five have not yet been deposed. (Lapish Aff. ¶¶ 12-13.) The fact that Ransom and GBC are waiting for discovery responses relative to these subjects does not give the Court any insight as to what material facts could be uncovered to create a genuine issue before this Court or how damages information or facts related to the Pray Group's involvement could create an issue of fact. Furthermore, it is worth noting that the Pray Group filed their motion for summary judgment more than two years after the filing of the original Complaint, Ransom's Third-Party Complaint, and GBC's Crossclaims and approximately a decade after the remediation efforts at issue.

According to the claims in the pleadings, admissions on file, and documents before the Court, facts relating to Aisle Five's damages and the Pray Group's involvement with remediation would be of no effect to the Court's application of the economic loss doctrine and the derivative

claims as issue in this motion. Rather than cause undue delay, the Court denies Ransom's and GBC's requests for a continuance to conduct further discovery.

1

Whether the Economic Loss Doctrine Bars the Contribution Claims

Our Supreme Court has stressed that the Contribution Among Joint Tortfeasors Act, §§ 10-6-1 et seq., provides the right to contribution amongst joint tortfeasors. Cacchillo v. H. Leach Machinery Co., 111 R.I. 593, 595, 305 A.2d 541, 542 (1973). Thus, "there can be no contribution unless the injured person has a right of action in tort against both the party seeking contribution and the party from whom contribution is sought. The right of contribution is a derivative right and not a new cause of action." Id. (Emphasis added). Therefore, if Aisle Five does not have a right of action in tort against Ransom and/or GBC, on the one hand, and D.F. Pray and/or NERCC, on the other hand, then Ransom and GBC do not have viable contribution claims under chapter 6 of title 10 against either D.F. Pray or NERCC.

The Pray Group cites to Franklin Grove Corp. v. Drexel, 936 A.2d 1272 (R.I. 2007) (Franklin Grove) to support the proposition that since Ransom and GBC cannot be liable in tort to Aisle Five, the Pray Group cannot be derivatively liable. In Franklin Grove, the Court stated that the economic loss doctrine bars recovery of damages under a negligence claim where an injured party suffered purely economic losses absent personal injury or property damage. Franklin Grove, 936 A.2d at 1275; see also Hexagon Holdings, Inc. v. Carlisle Syntec Inc., 199 A.3d 1034, 1042 (R.I. 2019) ("Where there are damages in the construction context between commercial entities, the economic loss doctrine will bar any tort claims for 'purely economic damages.'").

Simply, "'[w]hen parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override . . . tort principles . . . and,

thus, purely economic damages are not recoverable.'" Franklin Grove, 936 A.2d at 1275 (quoting Boston Investment Property # 1 State v. E.W. Burman, Inc., 658 A.2d 515, 517 (R.I. 1995)). The Court reasoned that, whereas, "'tort principles . . . are better suited for resolving claims involving unanticipated injury[,] . . . [c]ontract principles . . . are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.'" Id. at 1276 (quoting E.W. Burman, Inc., 658 A.2d at 517-18).

This Court has recognized "that injuries to property that is the subject of a construction contract constitutes a 'disappointed expectation' for which a remedy is only available, if at all, in contract." (May Decision at 9 (citing Hexagon Holdings, Inc., 199 A.3d at 1042).) Further, this Court determined that Aisle Five's claimed damages—including consultant fees, missed opportunity to refinance at favorable rates, increased fees and costs associated with refinancing, and the cost of subpar insurance that depressed the value of the property—all stemmed from CVS's failure to comply with the obligations under the Lease to properly remediate the property and, although not purely economic, were dependent upon, and intertwined with, property subject to the Lease and considered economic losses. Id. at 9-10 (citing Bocre Leasing Corp. v. General Motors Corp., 645 N.E.2d 1195, 1197-98 (N.Y. 1995) ("Tort recovery in strict products liability and negligence against a manufacturer should not be available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract.")).

Damages need not be purely economic in its literal sense, absent any damage to property, to be considered economic for purposes of applying the economic loss doctrine. For example, in Franklin Grove, the plaintiff (the buyer) purchased property for residential development; under the purchase and sales contract, the sellers were required to obtain a wetlands permit and hired an engineering company for this purpose (engineer). Id. at 1273. The buyer hired a company to

survey the property in preparation for construction (surveyor) and a second company to excavate for the foundation (excavator). Id. at 1273-74. After the house was fully constructed, the Department of Environmental Management issued a notice of violation to the buyer with a directive to restore the wetlands. Id. at 1274. Although there was damage to the wetlands, the actions or inactions that led to the damage were subject to commercial contracts; that is, the damages were a consequence of the contractual relationships and performance obligations thereunder, should have been addressed by the contract(s), and, thus, were considered economic for purposes of applying the economic loss doctrine. Id.

Likewise, in Hexagon Holdings, the plaintiff—a commercial entity—entered into a construction contract with a general contractor; the general contractor hired a subcontractor to install a roof, which started to leak after its installation. Hexagon Holdings, Inc., 199 A.3d at 1037. Although a roof is certainly property, the repair of the roof—albeit a failed repair—was subject to a contract, and opposed to being unanticipated injury, the parties entered an arms-length deal for the repair and had an opportunity to allocate risk accordingly. See id. at 1042-43. Contracts, specifically where commercial entities are involved, are the "proper device[s] to allocate economic risk." Id. at 1043. Notwithstanding the damage to the roof, the damages were economic for purposes of applying the economic loss doctrine. Id.

Ransom argues that there are outstanding discovery requests seeking evidence relative to Aisle Five's damages, which could uncover the existence of property damages, making summary judgment premature. However, any further discovery relative to damages will not assist in tuning this already harmonious chord, as the relevant facts are undisputed. According to Aisle Five's claims, all of CVS's, Ransom's, and GBC's allegedly wrongful acts are related to the construction upon and remediation of the property, which was the subject of the Lease, and there are no

allegations of other activities or conduct to have occurred outside of the construction and remediation. In addition, all of the damages alleged by Aisle Five are losses arising from the—albeit failed—remediation efforts contracted for in the Lease. The various counter and crossclaims also fall within the scope of the construction and remediation efforts and, therefore, also fall within the Lease. Thus, the scope of facts that could have any relevance are limited to the claims before the Court.

Certainly, like damage to wetlands or a leaking roof, hazardous waste in soil is damage to property in its most literal sense. See Franklin Grove, 936 A.2d at 1274; see also Hexagon Holdings, Inc., 199 A.3d at 1037. However, rather than being unanticipated and in want of a remedy, the damages from the remediation efforts were foreseeable, contemplated, and allocated for in the Lease. All parties involved are commercial entities that either did or could have contractually allocated the risk associated with the construction and remediation activities on the property. All of Aisle Five's damages arose out of the Co- or Third-Party Defendants' conduct in pursuit of construction and/or remediation of the property. As a matter of law, the damages that Aisle Five claims it suffered are considered economic under the economic loss doctrine, and there are no factual disputes involved that would alter this conclusion.[3]

In addition, the doctrine applies regardless of Aisle Five's lack of direct contractual privity with Ransom or GBC. In Hexagon Holdings, the economic loss doctrine precluded a building owner from suing a subcontractor in negligence when the economic loss doctrine barred a direct action against the general contractor. See Hexagon Holdings, Inc., 199 A.3d at 1043. In the instant

[3] For example, the Court in Rousseau v. K.N. Construction, Inc., 727 A.2d 190 (R.I. 1999) determined that the economic loss doctrine does not apply to consumer transactions. Rousseau, 727 A.2d at 193. In the instant matter, there is no dispute that all of the entities involved are commercial entities and the relationships arise from commercial transactions.

matter, this Court has already determined that the economic loss doctrine bars several of Aisle Five's tort claims against CVS. There is no dispute that Ransom and GBC were hired by and under contract with CVS for the purpose of fulfilling CVS's remediation obligations and construction under the Lease. (Ransom Opp'n Ex. B, "CVS Corporate Services Agreement" (naming GBC as the developer/architectural firm and Ransom as the consultant for the "Remedial Action Oversight"); CVS Lease § 2.1(b) (CVS "shall use Ransom . . . and/or another environmental engineering firm or firms reasonably acceptable to [Aisle Five] to remediate the Hazardous Substances at the Shopping Center in accordance with the Remedial Action Work Plan[.]").) Neither Ransom nor GBC dispute or provide any evidence to contradict the fact that they are contractors of CVS.[4] Thus, as in Hexagon Holdings, Aisle Five cannot sue CVS's contractors for negligence if it cannot sue CVS directly for negligence. See Hexagon Holdings, Inc., 199 A.3d at 1043.

In addition, the Lease provided for the event that CVS's contractors failed in their remediation efforts by causing the release of hazardous waste and further allocated the risk of loss to CVS for its contractors' failed efforts. (Lease §§ 13(p)(ii), 15(a) ("[W]ith regard to the presence or Release of any Hazardous Substances caused by Tenant or any of the Tenant Related Parties, Tenant shall remove or remediate same to the extent required by all governmental laws . . . and at Tenant's sole cost."; "Tenant Related Parties" includes Tenant's officers, agent, servants, employees, contractors, sublessees, invitees, or affiliates[.]").) Therefore, not only does the principle in Hexagon Holdings hold true—that if one cannot bring a tort claim against the

[4] The Lease does not define contractor. Under the plain and ordinary meaning of that term—"a party to a contract" or "one who contracts to do work for . . . another"—the documentary evidence, which is undisputed, demonstrates that Ransom and GBC were contractors of CVS in relation to the remediation of the property. Contractor, Black's Law Dictionary 413 (11th ed. 2019); Ransom Opp'n Ex. B.

contractual promisor because the contract controls, then one cannot bring that same claim against the contractor hired to perform the obligations of the promisor under that contract—but also Aisle Five's and CVS's intentions were clear; the Lease was to serve as the device to allocate the risk of remediation efforts no matter whom CVS hired to perform in those efforts under the Lease. See Hexagon Holdings, Inc., 199 A.3d at 1040, 1043.

Thus, there are no genuine issues of material fact that Aisle Five's damages are purely economic and that Ransom and GBC are contractors of CVS under the Lease,[5] and thus, the economic loss doctrine bars the contribution claims against the Pray Group because Aisle Five cannot assert the relevant tort claims against either Ransom or GBC. Only certain of Aisle Five claims against Ransom and GBC, and in turn Ransom and GBC's claims against D.F. Pray and/or NERCC, are relevant to this motion. Aisle Five asserts various claims against both Ransom and GBC. However, Ransom and GBC's derivative claims are limited by their own allegations in their respective pleadings.

First, Ransom claims that either D.F. Pray or NERCC were responsible for removing the septic tank—which Ransom later punctured—and failed to do so, and because of this, either D.F. Pray or NERCC, or both, are responsible to Ransom for contribution in the event that Ransom is found liable to Aisle Five for puncturing the tank. The only tort claim for which the Pray Group's alleged failure to act is possibly relevant—according to Ransom's allegations—is for negligence—

[5] Ransom argues that the Pray Group relied upon inadequate admissible evidence, specifically allegations, and not facts, to support its summary judgment motion and cites to certain allegations made by Aisle Five and cited by the Pray Group in its memorandum of law in support of its motion for summary judgment. (Ransom Opp'n at 6.) However, the relevant facts to this dispute were either admitted by CVS, such as there being a lease between Aisle Five and CVS and that it was known by those parties that the premises needed remediation, or supported by undisputed documents, such as Ransom's Exhibit B showing that both Ransom and GBC are contractors of CVS related to the remediation.

that is, in failing to act according to a certain standard or neglecting to act when there was an obligation to do so.[6] Because the Court can conclusively determine that Ransom cannot be liable in negligence to Aisle Five due to the economic loss doctrine, the Pray Group cannot be liable for contribution to Ransom for that claim.[7]

Second, GBC claims that if it is liable to Aisle Five for abandoning and/or puncturing the septic tank, then "its liability is strictly vicarious and is due solely to the negligence or other acts of D.F. Pray[,]" and it is entitled to contribution from D.F. Pray.[8] (GBC Cross-cl. ¶¶ 9-10, 26.) As

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[6] There are no allegations that relate to the element of intent, such as whether the Pray Group knew or should have known or acted with the intentional disregard for its responsibility. However, Ransom's allegations as they relate to the Pray Group are only fitting for contribution for Ransom's negligence as a responsibility to act and a failure to do so. For example, there are no allegations that the Pray Group acted intentionally or made any representations, such that Aisle Five's "intentional tort" or misrepresentation counts are relevant. To the extent that Ransom has even stated a claim for contribution against the Pray Group, the Court is limiting that claim to negligence.

[7] The Court finds Ransom's other arguments unconvincing and/or irrelevant to the issues at hand. First, Ransom argues that the Pray Group cannot rely upon a self-serving affidavit to establish that there is no genuine issue of material fact. However, the Pray Group's Affidavit of Michael Burke, an executive employed by D.F. Pray, merely seeks to establish that D.F. Pray never entered into a contract with GBC, and rather, D.F. Pray entered into a contract with NERCC relative to the project at issue. (Pray Group Mem. Ex. 2 ¶¶ 7-9.) The Court cannot see how the question of whether GBC entered into a contract with D.F. Pray or NERCC is of any relevance to Ransom's claims, and Ransom does not explain such relevance. In addition, Ransom's own exhibit—Exhibit G—is the deposition testimony of GBC's corporate designee establishing that GBC entered into a contract with NERCC, not D.F. Pray. In providing this testimony, Ransom established the only fact that D.F. Pray sought to establish through its affidavit. Nevertheless, this fact has no conclusive effect. Second, Ransom disputes the claim that D.F. Pray and NERCC were discrete entities, suggesting an alter ego theory, but fails to explain the relevance of D.F. Pray and NERCC being one in the same. In fact, it makes no difference to Ransom's contribution claim as it relates to this motion because in order for Ransom to have a contribution claim against D.F. Pray and/or NERCC, Aisle Five must have a claim against Ransom for which Ransom would be entitled to contribution from a joint tortfeasor.
Finally, Ransom asserts that "if the Court grants the instant motion despite Rule 56(f), then – as a matter of law – the Court must also enter judgment for Ransom and dismiss Plaintiff's negligence claims." (Ransom Opp'n at 6.) If Ransom believes it is entitled to judgment as a matter of law on any claims, it must file the appropriate motion.

[8] There are no other allegations that make mention of D.F. Pray, such as a negligent act by D.F. Pray, such that D.F. Pray is a joint tortfeasor. There are also no other allegations relating to D.F.

the Court can conclusively determine that GBC cannot be liable in negligence to Aisle Five due to the economic loss doctrine, D.F. Pray cannot be liable for contribution to GBC for that claim.

As a result of the economic loss doctrine barring Aisle Five's negligence claims against Ransom and GBC, as a matter of law, Ransom cannot claim contribution from the Pray Group, and GBC cannot claim contribution from D.F. Pray. The Pray Group's motion with respect to Ransom's Counts I and II and GBC's Count V is granted as there are no genuine issues of material fact that D.F. Pray and/or NERCC are not liable for contribution where the economic loss doctrine bars the negligence claims against Ransom and GBC.

2

Whether the Economic Loss Doctrine Bars
**GBC's** Indemnification Claim

The Pray Group argues that the economic loss doctrine also bars GBC's indemnification claim. (Pray Group Mem. at 9.) GBC's Crossclaim requests indemnification from D.F. Pray in the event that GBC is liable to Aisle Five.[9] (GBC Cross-cl. ¶ 28.) GBC alleges that "its liability is strictly vicarious and is due solely to the negligence or other acts of D.F. Pray[.]" Id.

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Pray that are relevant to any other claim made by Aisle Five against GBC. Notably, there are no allegations, whatsoever, that mention NERCC. Nevertheless, because GBC mentions D.F. Pray's "negligence or other acts" as the subject of GBC's claim for contribution, the Court limits GBC's request for contribution to Aisle Five's negligence claim against GBC. As aforementioned, because a claim for contribution is a right against a joint tortfeasor, there must be some specific claim—not all tort claims asserted in general—that the injured party has against the one tortfeasor that allows that tortfeasor to seek contribution from another for the same tort. See Cacchillo, 111 R.I. at 595, 305 A.2d at 542. To the extent that GBC has even stated a claim for contribution against D.F. Pray, the Court is limiting that claim to negligence.

[9] Although claims for indemnification can sound in tort or in contract, GBC has not brought a contractual indemnification claim, or any contractual claims, before the Court for its consideration. GBC did not allege the existence of any contract in its Crossclaim, did not state any allegation or claim against NERCC, did not allege facts to support an alter ego theory, and did not raise an alter ego theory amongst D.F. Pray and NERCC until its opposition to this motion. The Court is going to decline to create a contract claim, whether for indemnification or otherwise, where none has been brought before the Court. The proper means of bringing a claim is through a pleading;

First, as established in the foregoing, where a party cannot bring a claim of negligence against the primary contracting party—here CVS—it also cannot bring that action against the primary contracting party's contractor(s) who was (were) hired to perform the obligations under the contract—here Ransom and GBC. See Hexagon Holdings, Inc., 199 A.3d at 1043.

Furthermore, in Franklin Grove, the Court held that if the economic loss doctrine bars the primary negligence claim against the party seeking indemnification, there cannot be an independent derivative indemnification claim. See Franklin Grove, 936 A.2d at 1277-78. As set forth above—and the same holds true here—Aisle Five's claimed damages are confined to those resulting from the remediation of the property subject to the Lease; there is no dispute that Aisle Five and CVS entered into the Lease knowing of the need for remediation of hazardous conditions, that CVS undertook the obligations to remediate the same, and that CVS hired both Ransom and GBC in connection with these efforts.

The negligence claim against CVS was dismissed due to the economic loss doctrine, as this Court found that Aisle Five's alleged damages were economic in nature under that doctrine. Because the economic loss doctrine bars Aisle Five's negligence claim against CVS, both of whom are commercial entities, it also bars the negligence claim against GBC. Barring Aisle Five's claim of negligence against GBC, GBC does not have a viable derivative claim for indemnification based on that claim of negligence against anyone, neither D.F. Pray nor NERCC.

GBC has not created a genuine issue of material fact relative to the instant motion, and its arguments in opposition do not support there being any outstanding issues that would have any

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without a pleading, a party has not been placed on notice of the claim against it. As a result, the Court is treating the indemnification claim as a derivative tort claim.

effect if the Court were to continue this motion.[10] Therefore, the Pray Group's motion with respect to GBC's Count VI is granted.

Having found that there are no issues of material fact and that the Pray Group is entitled to judgment as a matter of law, the Pray Group's Motion for Summary Judgment is granted.

## IV

## Motion for Leave to File Third Party Complaint

"Under Rule 14, the decision as to whether or not to allow a defendant to file a third-party complaint is left to the sound discretion of the trial court." Wampanoag Group, LLC v. Iacoi, 68 A.3d 519, 522 (R.I. 2013) (citing Pettella v. Corp Brothers, Inc., 107 R.I. 599, 613, 268 A.2d 699, 706 (1970)). Rule 14 of the Superior Court Rules of Civil Procedure "governs impleader[,]" Wampanoag Group, LLC, 68 A.3d at 522, which allows "a defending party, as a third party plaintiff," to serve "a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff[,]" Super. R. Civ. P. 14(a). (Emphasis added).

On February 27, 2019, GBC filed a Crossclaim asserting claims of contribution from D.F. Pray, and on March 3, 2020, NERCC was made a party to the action by way of Ransom's Motion for Leave to Amend. Thus, when GBC filed the instant Motion for Leave to File Third Party Complaint against NERCC, NERCC was already a party to the action. Because Rule 14 is designed to implead a person not a party to the action, GBC's instant motion is procedurally

[10] GBC argues that (1) summary judgment is premature, which was addressed supra; and (2) an issue of material fact remains as to whether D.F. Pray and NERCC are separate entities yet does not explain the significance of this argument. (GBC Opp'n at 4-5.) At least in the context of this derivative tort claim, whether GBC was in contract with D.F. Pray or NERCC is irrelevant because a derivative claim is not independent but dependent upon the direct claim. Without the direct claim against GBC, GBC has no derivative claim left standing.

deficient. The proper procedure in this circumstance would have been for GBC to file a motion to amend its Crossclaim.

Each Rule of Civil Procedure carries its own posture, requirements, and hurdles. Accordingly, to add these claims against NERCC, GBC must file the proper motion and clear the Rule 15 specific hurdles, such as relation back and futility.[11] However, the particular motion before the Court cannot be used to add these claims against NERCC who is already a party to this action. As a result, GBC's Motion for Leave to File Third Party Complaint is denied.

## V

## Conclusion

Based on the foregoing, the Pray Group's Motion for Summary Judgment is granted and GBC's Motion for Leave to File Third Party Complaint is denied. Counsel for D.F. Pray and NERCC shall submit the appropriate orders for entry.

[11] As was thoroughly set forth, supra Section III relative to the Motion for Summary Judgment, the economic tort doctrine bars the tort-based claims of contribution and indemnification. For the same reasons set forth in that analysis, the doctrine would similarly apply to GBC's proposed claims of contribution and indemnification from NERCC under § 10-6-1 et seq. Because NERCC argued this point in its objection and because this Court must also weigh judicial efficiency, the Court notes here that if GBC were to propose these claims arising in tort pursuant to a motion to amend, this subject of the motion would be futile.
In addition, the statute of repose set forth in § 9-1-29 in conjunction with the need to relate back would create another substantial hurdle for GBC's proposed claims of contribution and indemnification based in tort. Although the statute's application to contractual indemnification claims for tortious acts is not so clear, that proposed claim has its own hurdles. Because this action has been pending for over two and one half years and NERCC has been a party to this action for over a year, if GBC is to file the appropriate motion, it should also be prepared to clear the coinciding hurdles.