Hearing Date TBD by Judge Stern

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT
PC-2024-04526

STATE OF RHODE ISLAND,	)
	)
Plaintiff,	)
	)
v.	)
	)
AECOM TECHNICAL SERVICES, INC.,	)
AETNA BRIDGE COMPANY,	)
ARIES SUPPORT SERVICES, INC.	)
BARLETTA HEAVY DIVISION, INC.	)
BARLETTA/AETNA I-195 WASHINGTON	)
BRIDGE NORTH PHASE 2 JV,	)
COLLINS ENGINEERS, INC.,	)
COMMONWEALTH ENGINEERS &	)
CONSULTANTS, INC.,	)
JACOBS ENGINEERING GROUP, INC.	)
MICHAEL BAKER INTERNATIONAL, INC.	)
PRIME AE GROUP, INC.	)
STEERE ENGINEERING, INC.,	)
TRANSYSTEMS CORPORATION, and	)
VANASSE HANGEN BRUSTLIN, INC.,	)
	)
Defendants.	)

MEMORANDUM OF LAW OF DEFENDNANT STEERE ENGINEERING, INC. IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Defendant Steere Engineering, Inc. ("Steere") hereby submits this Memorandum of Law in Support of its Motion to Dismiss the Amended Complaint of Plaintiff State of Rhode Island (the "State").

I. Introduction

The State has amended its complaint against Steere in an effort to avoid the bar of the economic loss doctrine this Court recognized in its Decision dated February 27th, 2025 (the "Decision"). The State's efforts fail.

To avoid the economic loss doctrine and satisfy the requirement missing from the Original Complaint, the State was obligated to allege personal injury or physical damage to "other property" caused by Steere's alleged negligence. The Amended Complaint does not contain such allegations. Instead, the Amended Complaint alleges the State has, and is, sustaining nothing more than the foreseeable consequences of the loss of use of the Westbound Washington Bridge due to alleged negligence of Steere and other Defendants. The State does plead that the loss of use manifests itself as additional wear and tear on Eastbound Washington Bridge, but that does not change the economic nature of the alleged damage sustained.

Accordingly, the State's negligence claim is barred as a matter of law by the economic lass doctrine and the Amended Complaint against Steere should be dismissed.[1]

II. The Claims Against Steere In the Original Complaint

The State filed its Original Complaint on August 16, 2024 (the "Original Complaint"), seeking recovery from Steere for alleged negligence in providing services related to certain efforts undertaken to rehabilitate the Westbound Washington Bridge in Providence, Rhode Island. The State's original complaint asserted only three counts against Steere. At Count II (Negligence), the State provided no description of the scope of Steere's services or its failures in the context of the services Steere was to perform.[2] Instead, the State simply alleged that all Defendants, including Steere, were negligent:

> [I]n failing to (a) conduct a reasonably adequate detailed research and review of previous inspection reports, drawings, and plans—including, but not

[1] Steere's motion is not based on whether the State can prove what its loss of use damages are as a result of the closure of the Westbound Washinton Bridge, although Steere submits determining and monetizing wear and tear on the adjacent bridge span that now carries the traffic previously using the Westbound Washington Bridge would be speculative at best. Steere's motion is based on the legal principle that wear and tear on another asset used to perform the function of an asset disabled by a party's alleged negligence is nothing more than a consequence of "loss of use" and barred as a matter of law by the economic loss doctrine, even if it is measurable.

[2] As Steere demonstrated in its motion to dismiss the Original Complaint and supported with uncontested documentation, Steere's structural design services were limited to a portion of the Washinton Bridge nowhere mentioned in the State's pleadings and unrelated to the structural issues that caused the State to close and replace it.

> limited to, the Original Design Plans, and the plans for the 1996-1998 rehabilitation project; (b) recognize the importance and significance of the tie-down rods as critical to the stability of the Washington Bridge; (c) perform an investigation into or evaluation of the cracking discovered along the post-tensioned cables in the post-tensioned cantilever beams; and (d) recommend repairs to address the cracking discovered along the post-tensioned cables in the post-tensioned cantilever beams.

Original Complaint, at ¶ 102.

The only other basis on which the State sought recovery against Steere were Count XIX (non-contractual indemnity with all other Defendants) and Count XX (contribution with all other Defendants). Both Counts XIX and XX sought a declaratory judgment that theoretically all Defendants would be liable to indemnify the State and share in contribution for future damages as alleged joint tortfeasors, in the event the State sustained future liability for unknown damages to unknown third parties. Original Complaint at p. 39-41.

III. The Decision

On February 27th, 2025, this Court issued its Decision on the Defendants' Rule 12 Motions (the "Decision"). This Court, in the Decision, ruled that Rhode Island law recognized the economic loss doctrine and the State's negligence claim was governed by it. Decision at 15. This Court declined to adopt a "sovereign entity" or "public safety" exception, as advanced by the State. Id. at 12-13. This Court also refused to apply a consumer transaction exception, ruling, "the State acted as a sophisticated business entity in contracting with the Defendants related to the maintenance of and repair of the [Westbound Washington] Bridge." Id. at 13.

Additionally, this Court declined to accept the State's argument that the Court "lacks a sufficient basis to apply the economic loss doctrine because the contract may have specifically allowed the State to sue for negligence." Id. at 15. The Court noted that

nothing in the Original Complaint alleged the parties specifically contracted for the right of the State to bring a negligence claim. Id. at 15-16.

After rejecting all the State's arguments that the economic loss doctrine did not apply to the State's negligence claim, this Court ruled that the State could not avoid the bar of the economic loss doctrine because the State failed to allege damages other than damage to the bridge itself. Id. at 14-15. This Court ruled that the Original Complaint did not provide the Defendants with adequate notice of what "other property" damage was caused and by which Defendant's alleged negligence, leaving "the Defendants to guess what 'property damage' may in fact be and whether the stated 'property damage' bars the negligence claims based on the economic loss doctrine." Id., at 15. The Court noted that if the "property damage is the bridge itself, then the negligence claims would be barred by the economic loss doctrine." Id.

Having rejected all the State's arguments that the negligence claim could proceed despite the bar of the economic loss doctrine, this Court gave the State thirty (30) days to amend its complaint to allege damages that would take its negligence claim out of the economic loss doctrine. Id. at 40.

IV. The Amended Complaint

In its Amended Complaint, the State has added nothing substantive against Steere. The State alleges in Count II Steere was negligent, using the same allegations recited in Count II of the Original Complaint. Amended Complaint at 27. The Amended Complaint, like the Original Complaint, fails to provide "adequate notice of what 'other property' damage was caused and by which defendant's alleged negligence." The State also recites the same allegations seeking a declaratory judgment for potential and speculative future

common law indemnity and contribution claims. Counts XIX and XX, Amended Complaint at 47-48.

On page 21 of the Amended Complaint, the State attempts to cure the deficiency that the Original Complaint only alleged property damage to the bridge itself by alleging the State has sustained "other damages" in the nature of wear and tear to the Eastbound Washington Bridge caused by the loss of use of the Westbound Washington Bridge. The Amended Complaint alleges that "westbound traffic was rerouted onto the Eastbound Wahington Bridge, substantially increasing its traffic volume" (Amended Complaint, at ¶ 101); the increase in traffic volume has resulted in physical wear and tear damage to the bridge (Id. at ¶ 102); the increased volume of traffic has caused wear and tear to the Eastbound Washington Bridge that otherwise would not have occurred (Id. at ¶ 103); and that physical maintenance is required on a more frequent basis (Id., at ¶ 104).

The Amended Complaint includes no allegations that any defendant, much less Steere (who had no contract with the State), contracted to allow a negligence action.

V. LEGAL STANDARD

The function of a motion to dismiss is to test the sufficiency of the complaint. Rhode Island Employment Security Alliance, Local 401, S.E.I.U., AFL-CIO v. State Department of Employment and Training, 788 A.2d 465, 467 (R.I. 2002). In ruling on a motion to dismiss, the trial court is confined to the complaint and must assume all allegations are true. Narragansett Electric Co. v. Minardi, 21 A.3d 274, 278 (R.I. 2011). "A motion to dismiss may be granted only when it is established beyond a reasonable doubt that a party would not be entitled to relief from the defendant under any set of conceivable facts that could be proven in support of its claim." Chase v. Nationwide Mutual Fire Insurance Co., 160 A.3d 970, 973 (R.I. 2017). Any dispute over

the accuracy of the allegations is irrelevant if the law does not permit recovery based on the facts alleged. See City of Warwick v. Aptt, 497 A.2d 721, 723 (R.I. 1985) (holding there was no conceivable set of facts that could support a plaintiff's claim based upon impermissibly vague statute).

VI. ARGUMENT

The validity of the State's negligence claim hinges on whether the Amended Complaint alleges damages to "other property" caused by the alleged negligence of Steere in providing engineering services with regards to the Westbound Washington Bridge. It does not.

A. The Alleged "Wear and Tear" on Substitute Assets Is Nothing More than Damage for Loss of Use Barred by the Economic Loss Doctrine

This Court in its Decision recognized the firm ground on which the economic loss doctrine stands in Rhode Island. This Court cited with approval Isla Nena Air Servs., Inc. v. Cessna Aircraft Co., 449 F.3d 85, (1st Cir. 2006), which holds, "under the economic loss rule, a party may not recover in tort when a defective product harms only the product itself." Id. at 87 (citing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 868–869 (1986) ("When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.")). See also Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 107 (1989) (damage to product itself and the cost of repairs and lost profits are not recoverable in tort); Canal Elec. Co. v. Westinghouse Elec. Corp., 756 F. Supp. 620, 630 (D. Mass. 1990) (injury to the product itself or recovery for disappointment in the product's performance invoked not tort law, but contract-based warranty law). This Court also cited with approval Haart Eng'g Co. v. FMC Corp., 593 F. Supp. 1471 (D.R.I. 1984) for the proposition that "economic loss encompasses the costs associated with repair and-or replacement of a defective product, or loss of profits consequent thereto . . ." Id.at 1481 n.1.

The State's attempt through clever pleading to allege "other property damage" in the nature of wear and tear on other assets being used while the Westbound Washington Bridge is being rebuilt must be rejected as legally insufficient to create a right of recovery in negligence. Logic provides that recovery for "wear and tear on substitute assets" is nothing but recovery for "loss of use," and thus barred by the economic loss doctrine. See, e.g., A.J. Decoster Co. v. Westinghouse Elec. Corp., 634 A.2d 1330, 1332 (Md. 1994) ("Economic losses include such things as the ***loss of value or use*** of the product itself, the cost to repair or replace the product, or the lost profits resulting from the loss of use of the product.")(emphasis added); Marcil v. John Deere Indus. Equip. Co., 9 Mass. App. Ct. 625, 630 (1980) ("The ***loss of use*** of the loader is clearly pecuniary, or economic loss which . . . would not make the defendants liable to the plaintiff in tort for negligence.") (emphasis added); Trans States Airlines v. Pratt & Whitney Canada, Inc., 86 F.3d 725, 729 (7th Cir. 1996) ("economic loss refers to the costs of repairing or replacing a defective product and consequent ***loss of use*** of the product") (emphasis added); Glob. Hunter, LLC v. Des Moines Flying Serv., Inc., No. 1:18-CV-062-C, 2019 WL 7757888, at *3 (N.D. Tex. June 18, 2019) ("damages resulting from the ***loss of use*** of [an] aircraft, amount[ed] to purely economic losses") (emphasis added); Pac. Indem. Co. v. Whaley, 572 F. Supp. 2d 626, 628 (D. Md. 2008) ("economic losses include such things as the loss of value or ***use of the product itself***") (emphasis added); Kestrel Holdings I, L.L.C. v. Learjet Inc., 316 F. Supp. 2d 1071, 1075 (D. Kan. 2004) (damages for ***loss of use of*** an aircraft barred by economic loss doctrine) (emphasis added); Fireman's Fund Ins. Co. v. Childs, 52 F. Supp. 2d 139, 142 (D. Me. 1999) (defining "economic losses" to include "loss of use").

Here, the only way the State can calculate its lost "profit"[3] or loss of use of the Westbound Washington Bridge is by measuring the increased cost to the State to accommodate by alternative means the traffic the bridge would carry if it functioned as intended.[4] Indeed, the Amended Complaint proves the 'economic" nature of the loss as it alleges that wear and tear caused by the loss of use of the Westbound Washington Bridge results in more frequent (i.e., more costly) "physical maintenance" of the Eastbound Washington Bridge. Amended Complaint, ¶ 104. As a matter of law, the consequences of diverting traffic to the Eastbound Washington Bridge are solely economic in nature and not recoverable on a theory of negligence.

The State is asking this Court to recognize a "wear and tear to alternative assets" exception to the economic loss doctrine that would swallow the rule and contradict all of the settled precedent applying the economic loss doctrine. If the State's argument that pleading nothing more than wear and tear on substitute assets to accommodate loss of use makes inapplicable the economic loss doctrine, any plaintiff through clever pleading could avoid the bar of the economic loss doctrine. A claim based on a defective product can in most, if not all, circumstances include allegations that a consequence of the defect was the need to use a substitute while the defect was being addressed. Use of any substitute would give rise to additional "wear and tear" on that substitute. So, for example, an owner of an automobile who had to return it to the dealer for repairs could avoid the economic loss doctrine and sue in negligence simply by alleging the owner sustained additional wear and tear on a second car driven while the first one was being repaired. Similarly, a defective generator turbine for which recovery was unavailable in negligence due to the economic loss

[3] Of course the State does not show a "profit" or loss thereto as a commercial business would when its loss of use of one asset requires it use another, but the concept of economic harm and costs and components thereof caused by the inability to use an asset as intended would be calculated similarly.

[4] The Amended Complaint contains no allegation that the State's costs tied to the alleged increased wear and tear on the Eastbound Washington Bridge exceed the costs of wear and tear that same traffic would create if it were to use the Westbound Washington Bridge. See also note 1, supra.

doctrine would now give rise to a negligence claim due to the "wear and tear" on the replacement turbine used. Contrast, Canal Elec. Co. v. Westinghouse Elec. Corp., 756 F. Supp. 620, 630 (D. Mass. 1990) (economic loss doctrine a bar to recovery when turbine blade showed a defect and another blade had to be used in place of the defective one). See, also, Kestrel Holdings I, L.L.C., 316 F. Supp. 2d at 1076 (D. Kan. 2004) ("service costs for an unusable aircraft; costs of using alternative aircraft… and lost use of the aircraft as damages…relate to the aircraft itself—not damage to other property."); Glob. Hunter, LLC, 2019 WL 7757888, at *1 (N.D. Tex. June 18, 2019) (damages for rental cost of replacement engine barred by economic loss when faulty aircraft gearbox caused engine failure and loss of use of aircraft). "Wear and tear" on a substitute asset used to do the work of a disabled one is nothing more than the cost of "loss of use" barred by the economic loss doctrine. It is hard to imagine a single product defect case where clever pleading could not avoid the economic loss doctrine if the doctrine did not apply when a product defect required the owner to use a substitute while the defective product was being repaired.

The alleged wear and tear on the Eastbound Washington Bridge resulting from alleged increased traffic is nothing more than the economic consequence of the loss of use of the Westbound Washington Bridge while it is being rebuilt. Loss of use damages do not permit a party to avoid the bar of negligence claims under the economic loss doctrine. Count II as to Steere seeking recovery in negligence should be dismissed.

B. Wear and Tear on Alternative Traffic Routes is Not Recoverable Against Steere For the Additional Reason It was Within the State's Scope of Bargaining at the Time of Contracting with AECOM

Another important approach courts use in applying the bar of the economic loss doctrine is the disappointed expectations test. If the damages suffered were reasonably foreseeable at the time of contracting, the economic loss doctrine applies and contract, instead of tort, rules govern

because the owner could have negotiated for appropriate protection and remedies. Grams v. Milk Prods., Inc., 283 Wis. 2d 511, 516 (2005). The consequence of the State failing to negotiate for protection from foreseeable "wear and tear" damage to substitute assets precludes efforts to recover those damages in tort. Id. "[I]f [the] claimed damages are the result of disappointed expectations of a bargained-for product's performance, the economic loss doctrine applies to bar the plaintiff's tort claims." Id. In Grams, the Court noted that damages to the plaintiff's livestock as a result of a defective milk feed alternative was not "other property" under the economic loss doctrine because the plaintiff could have contracted for recovery of such foreseeable damages. Id.

The disappointed expectations approach to application of the economic loss doctrine barring tort claims is well-aligned with Rhode Island precedent. Under Rhode Island law, "The rationale for abiding by the economic loss doctrine centers on the notion that commercial transactions are more appropriately suited to resolution through the law of contract than through the law of tort." Franklin Grove Corporation v. Drexel, 936 A2.d 1272, 1275 (R.I 2007). "Contract principles . . . are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement." Bos. Inv. Prop. No. 1 State v. E.W. Burman, Inc., 658 A.2d 515, 518 (R.I. 1995) (quoting Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 579-80 (1985). "When 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 Corporation, supra.

Indeed, the disappointed expectations test expands the scope of the economic loss doctrine so that what could be argued as "other property damage" does not provide a basis for recovery in negligence "if the damage was within the scope of bargaining, or . . . 'the occurrence of such

damage could have been the subject of negotiations."' Grams, 283 Wis. 2d at 516 (quoting Neibarger v. Universal Coops., Inc., 486 N.W.2d 612, 620 (Mich. 1992)). "To determine whether the loss is one that the [Owner] should have protected against through contractual terms, we ask whether the risk of the damage suffered was reasonably foreseeable . . . .." Kmart Corp. v. Herzog Roofing, Inc., 384 Wis. 2d 632 (WI App. 2018). Put simply, "tort recovery is precluded when the purchaser should have protected against the suffered loss through damage provisions set forth in the contract." Id., see also Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc., 651 N.W.2d 738 (WI App. 2002) (to "recover in tort what are essentially contract damages would allow … an end run.").

Here, the loss of use of the Westbound Washington Bridge requiring alternative accommodation for traffic was undeniably foreseeable to the State at the time it contracted with defendant AECOM to address needed structural repairs. In fact, the State reasonably foresaw that it would have to close all or part of the Westbound Washington Bridge at some point during the repairs, meaning the State must have anticipated rerouting traffic, including, if necessary, to the Eastbound Washington Bridge. The State's Amended Complaint identifies nothing more than alleged foreseeable consequences of the alleged failure of those with whom the State has contracted over the years to meet the State's alleged expectations regarding work and services on the Westbound Washington Bridge. Courts conclude that there is "damage to the product itself" for purposes of the economic loss doctrine when "the product has not met the customer's expectations, or that the customer did not receive the benefit of his bargain." Trans States Airlines v. Pratt & Whitney Canada, Inc., 177 Ill. 2d 21, 35 (1997). The State should be held to the remedies

it negotiated/imposed by its contracts and should not be permitted to do an "end run" of it contracts by reliance on tort principles. [5]

Cases in other jurisdictions illustrate the reluctance of courts to include in the category of "other property damage" the foreseeable consequences of damage to the product itself. For example, in Wood Products, Inc. v. CMI Corp., 651 F.Supp. 648 (D.Md.1986), the court dismissed the negligence claims arising from a defective boiler, ruling that the damages, which included the repair to a building made necessary by the removal of the defective boiler, were solely economic in nature. Id. at 648, 651-53. In Winchester v. Lester's of Minnesota, Inc., 983 F.2d 992 (10th Cir.1993), the court held that the plaintiff had suffered purely economic damages as a result of a defective ventilation system installed in a hog house the defendant designed, manufactured and installed. Those "economic damages" included extra labor, lost hogs, losses due to the sale of underweight hogs, extra veterinary bills, lost profits and costs expended to correct the ventilation system. Id. The court stated that "although plaintiffs' loss of hogs due to poor ventilation is property damage of a sort, the **essence of their claim is the loss of the benefit** of a properly ventilated hog house, plus consequential damages." Id. (emphasis added).

[5] The State cannot avoid the consequences of this policy applying the economic loss doctrine to foreseeable loss subject to risk allocation in a contract by arguing it had no contract with Steere. Indeed, the State's lack of privity with Steere only reinforces the unfairness of the negligence claim asserted and the State's effort to recover against Steere for damages that should be governed exclusively by the State's contract with AECOM. See Hexagon Holdings, Inc. v. Carlisle Syntec Inc., 199 A.3d 1034, 1043 (R.I. 2019) (holding a lack of privity does not bar application of the economic loss doctrine). The fact that no contract with Steere exists does not suggest the rule should be abandoned here. The State has no greater rights against a subcontractor or employee or agent of a principal than it would have against the principal or entity with whom it contracted. See Kennett v. Marquis, 798 A.2d 416, 418 (R.I. 2002) ("[A]n agent acting on behalf of a disclosed principal is not personally liable to a third party for acts performed within the scope of his authority.") Just as a plaintiff could not avoid the economic lass doctrine by suing an employee of a product manufacturer based on that employee's role in creating a defect that was or should have been addressed by the purchase contract, the State here cannot sue Steere in negligence because the State is dissatisfied with the remedies it negotiated with AECOM.

Here, the **essence of the State's wear and tear claim is the loss of the benefit** of a functioning Westbound Washington Bridge. The strongest argument the State can make is that wear and tear on the substitute roadway is "property damage of a sort," but that does not take this case out of the economic loss doctrine. As the courts hold that damage to a building resulting from the removal and replacement of a defective boiler, and damage to livestock due to a defective ventilation system, do not take claims out of the economic loss doctrine, the wear and tear on the Eastbound Washington Bridge to accommodate the loss of use of the Westbound Washinton Bridge creates no basis for tort-based recovery in favor of the State.

Accordingly, Count II should be dismissed as against Steere.

VII. Counts XIX and XX of the State's Amended Complaint Should Be Dismissed as to Steere as No Viable Claim Exists Against Steere

This Court held in its Decision that the State's non-contractual indemnity and contribution claims were not yet ripe for judicial review, but instead of dismissing the claims issued a stay of their prosecution "pending amendment or action by a third-party" due to the pendency of other claims against the Defendants. Decision at 40. As a stay may be practical and of no adverse consequence for parties with other viable claims against them to litigate, Steere submits it would be unfair and prejudicial if it were to defend this case only to "wait" to see if currently invalid claims are made valid by some new event on some future date.

As the Court noted in its Decision, it is not only uncertain on what basis the State may or may not seek to hold Steere liable, but also entirely unknown whether any third-party will ever file suit. "[A] necessary predicate to a court's exercise of its jurisdiction is an actual justiciable controversy." State v. Gaylor, 971 A.2d 611, 613 (R.I. 2009). Ripeness is a requirement the prevent courts from rendering "advisory opinions" or functioning "in the abstract." Rhode Island Ophthalmological Society v. Cannon, 113 R.I. 16, 28 (1974). Courts ***should dismiss*** declaratory

judgment claims as unripe unless "there is a substantial controversy, between parties having adverse legal interests, of ***sufficient immediacy and reality*** to warrant the issuance of a declaratory judgment." Gun Owners' Action League, Inc. v. Swift, 284 F.3d 198, 205–06 (1st Cir. 2002) (emphasis added).

Here there is still no valid claim against Steere and thus the request for declaratory judgment is still not justiciable. Because there is no claim by any third party, there is no claim for indemnity or contribution, and thus, there is nothing for the Court to declare. It would be unjust to force Steere to remain and defend an unripe action pending the speculative contingency of a viable claim at some unascertainable point in the future.

Accordingly, Counts XIX and XX should be dismissed as to Steere.

VIII. CONCLUSION

For the reasons stated herein, Steere requests this Honorable Court dismiss all claims against it.

Respectfully submitted,

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Dated: June 13, 2025

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this day, June 13, 2025, a true copy of the foregoing has been filed and served on all parties of record through the Rhode Island electronic filing system. The document electronically filed and/or served is available for viewing and/or download from the Rhode Island Judiciary's Electronic Filing System.

/s/ Christopher J. Fulmer
Christopher J. Fulmer