THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0604

JOHN C. RANKIN and MARY ANNE RANKIN,
Plaintiffs

v.

SOUTH STREET DOWNTOWN HOLDINGS, INC.,
Defendant/Third-Party Plaintiff

v.

TRUEXCULLINS AND PARTNERS ARCHITECTS,
AND WAGNER HODGSON, INC.
d/b/a WAGNER HODGSON LANDSCAPE ARCHITECTURE,
Third-Party Defendants

INTERLOCUTORY TRANSFER FROM
THE NEW HAMPSHIRE SUPERIOR COURT
(GRAFTON COUNTY)

REPLY BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF/ APPELLEE SOUTH STREET DOWNTOWN HOLDINGS, INC.

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QUESTION PRESENTED

> Does RSA 508:4-b ("the statute of repose") as amended in 1990 apply to and bar third-party actions by a property owner defendant (in a premises-liability action) for indemnity and/or contribution against architects involved in the design and improvement to real property which the injured plaintiff alleges was dangerous and did not meet applicable building codes?

Interlocutory Transfer Statement at 2 (Oct. 15, 2018) (MacLeod, J.), attached to the Appendix of Wagner Hodgson, Inc., In Support of Motion to Dismiss (the "Wagner Appendix" or) at 373.[1]

[1] Third-Party Defendant/Appellant Wagner Hodgson, Inc. ("Wagner") has proposed that this Court address "a more appropriate question" in its Brief. See Brief of Wagner Hodgson, Inc., In Support of Motion to Dismiss ("Wagner Brief") at 6. This attempt to revise the question presented as drafted by the Grafton County Superior Court to include a question that was previously rejected by Judge MacLeod violates the letter and spirit of Supreme Court Rule 16(3)(b).

STATEMENT OF THE CASE AND MATERIAL FACTS

- The question presented was raised by Wagner by Motion – based upon New Hampshire's statute of repose, RSA 508:4-b – to Dismiss Defendant/Third-Party Plaintiff/Appellee South Street Downton Holding, Inc.'s ("South Street") third-party action for indemnity.
- John C. Rankin ("Rankin") tripped on March 5, 2015 and sustained bodily injuries from a fall on the steps leading from the entrance to 70-72 South Main Street in downtown Hanover, New Hampshire. Complaint at ¶¶ 3-5, attached to Wagner Appendix at 7.
- On March 6, 2017, Rankin sued South Street, alleging that it was liable to him for his personal injury as the property owner because the stairs "did not meet applicable building codes." Id. at ¶¶ 6-8.
- In 2002, South Street retained TruexCullins and Partners Architects ("TruexCullins") to serve as project architect for the renovation of the South Street Block. Wagner was retained to serve as the landscape architect. See Letter from Melissa McCann, Partner, Wagner, to John Caulo, Dartmouth College Real Estate Office, re: Proposal for Hanover Downtown South Block at 1, attached to Wagner Appendix at 151.
- Wagner proposed the design of the stairs where Rankin tripped as a recommended solution to deal with the change in elevation at the entrance to the building at 70-72 South Main Street. See Memo from C. Kees to P. Olsen and H. Grace re: South Block Site Plan Submission at 1 (June 17, 2003), attached to Wagner Appendix at 168-70. TruexCullins incorporated Wagner's design scheme in the construction

drawings. See Facsimile to Kevin Worden re: Option "B" (June 24, 2003), attached to Wagner Appendix at 167.

- On May 30, 2017, after both TruexCullins and Wagner rejected South Street's tenders, South Street brought the present third-party action against both TruexCullins and Wagner, seeking all costs and legal fees incurred in defending itself against Rankin's claims, and for any liability or judgment that Rankin obtains.
- On December 5, 2017, Wagner filed a Motion to Dismiss arguing that South Street's claims were time barred by RSA 508:4-b, where the indemnity action was brought more than 8 years after the renovation project's date of substantial completion. See generally Motion to Dismiss at 4-5, attached to Wagner Appendix at 24.
- South Street objected on the grounds that the statute of repose as amended in 1990 omitted indemnity as among the list of damage claims barred by the statute's predecessor, which had previously been found to be unconstitutional in Henderson Clay Prods. v. Edgar Wood & Assocs., 122 N.H. 800, 802 (1982). See generally Memorandum of Law in Support of Objection to Motion to Dismiss at 9-14, attached to Wagner Appendix at 130.
- The Grafton County Superior Court (MacLeod, J.) issued the Order for Interlocutory Transfer on July 23, 2018. After briefing and hearing, on October 15, 2018, the question presented herein was incorporated in the Interlocutory Transfer Statement. See Interlocutory Transfer Statement at 2, attached to Wagner Appendix at 373.

SUMMARY OF THE ARGUMENT

I. RSA 508:4-b DOES NOT BAR THIRD-PARTY ACTIONS FOR INDEMNITY AND/OR CONTRIBUTION

A. The Plain Language of RSA 508:4-b Unambiguously Excepts Indemnity and/or Contribution Damage Claims

The plain language of RSA 508:4-b bars actions which satisfy three elements. First, the action must have been brought more than 8 years from the date of substantial completion of the improvement. Second, the action must have arisen out of a deficiency in the creation of an improvement to real property. Third, the action must be to recover damages for: (i) injury to property; (ii) injury to the person; (iii) wrongful death; or (iv) economic loss. Given the inclusion of language specifically barring actions for personal injury, property damage, wrongful death and economic loss, it must be presumed that the legislature excluded all other types of actions. See Appeal of Cover, 168 N.H. 614, 622 (2016) (applying axiom of *expressio unius*).

B. The Legislature Did Not Include Indemnity and/or Contribution Damage Claims Within the Bar When it Amended the Statute in 1990

Assuming *arguendo* that RSA 508:4-b is ambiguous, the legislative history reflects the Legislature's intent to exempt indemnity and/or contribution damage claims from the statute. The 1965 version of RSA 508:4-b expressly stated that, "[n]o action to recover damages for injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death . . . *nor any action for contribution or indemnity for damages sustained on account of such injury* . . . may be brought . . . more than six years after the performance or furnishing of such services and

construction." Laws 1965: 118:1 (emphasis added), attached to Wagner Appendix at 7. The omission of the language covering indemnity and/or contribution damage claims in the predecessor statute by the Legislature when it amended the statute in 1990 is a reflection of its intent to exempt actions for indemnity and/or contribution from the current statute. See, e.g., Anderson v. Estate of Mary D. Wood, No. 2017-0559, slip op. at 5 (N.H. Nov. 28, 2018) ("'[A]ny material change in the language of' a statute by amendment is 'ordinarily . . . presumed to indicate a change in legal rights.'") (citation and quotations omitted).

C. Legislation in Derogation of Common Law Must Be Strictly Construed

Also assuming *arguendo* that RSA 508:4-b is ambiguous, this Court will not interpret a statute to take away a common law right absent clear legislative intent to do so. Sweeney v. Ragged Mt. Ski Area, Inc., 151 N.H. 239, 241 (2004). Indemnity and contribution rights are based upon common law. Jaswell Drill Corp. v. General Motors Corp., 129 N.H. 341, 346 (1987). There is no clear legislative intent showing that the Legislature intended to abolish the common law right to bring actions to recover damages for indemnity and/or contribution.

D. Wagner's Textual Arguments are Unhelpful

Wagner argues that the plain language of RSA 508:4-b applies to indemnity and/or contribution damage claims based on three arguments that are incorrect interpretation of law irrelevant to the resolution of the question presented in the Interlocutory Transfer Statement. First, the prefatory language of RSA 508:4-b, I does not operate to except indemnity and/or contribution damage claims. Second, the inclusion of the language

"without limitation" in Paragraph I of RSA 508:4-b operates to define "improvement to real property," and does not expand the scope of the statute's bar. Third, the availability of the right to contract for warranty and/or guaranty does not relate to the question of the statutes applicability to indemnity and/or contribution damage claims. Warranty and guaranty rights are different than indemnity and contribution rights.

II. INDEMNITY AND CONTRIBUTION DAMAGES ARE NOT DAMAGES FOR ECONOMIC LOSS

"Economic loss" is a term of art which must be defined in accordance with its common law meaning when construing RSA 508:4-b. See RSA 21:2. This Court defines an economic loss as "that loss resulting from the failure of the product to perform to the level expected by the buyer and is commonly measured by the cost of repairing or replacing the product." Lempke v. Dagenais, 130 N.H. 782, 792 (1988). South Street has not brought an action to recover damages to repair and/or replace the stairs, but has brought actions to recover damages for indemnity and/or contribution.

III. SOUTH STREET'S INDEMNITY CLAIMS DO NOT ARISE FROM A DEFICIENCY IN THE CREATION OF IMPROVEMENTS TO REAL PROPERTY

Even if RSA 508:4-b barred indemnity and/or contribution claims, South Street's indemnity claims survive for the additional reason that actions to recover damages for breach of the express and/or implied duty to indemnify arise from contract, not deficiencies in the creation of improvements to real property. See Phaneuf Funeral Home v. Little Giant Pump Co., 163 N.H. 727, 731 (2012) (the language of RSA 508:4-b "unambiguously encompasses all types of claims, *as long as they arise*

from a deficiency in the creation of an improvement to real property.")
(emphasis added). South Street's actions are for breach of the express and implied duty to indemnify. As such, the claims arise from contract, not a deficiency in an improvement to real property. See, e.g., South Dearborn Sch. Corp. v. Duerstock, 612 N.E.2d 203, 209 (Ind. App. Ct. 1993) (express indemnity claim based in contract); Sears, Roebuck & Co. v. Philip, 112 N.H. 282, 285-86 (1972) (implied indemnity claims based in contract).

IV. PUBLIC POLICY DOES NOT FAVOR EXTENDING THE REPOSE BAR TO INDEMNITY AND/OR CONTRIBUTION DAMAGE CLAIMS

A. It is New Hampshire Public Policy to Hold Professionals Responsible for Their Own Negligence

It is public policy to hold professionals liable for their own negligence. See, e.g., Penta Corp. v. Town of Newport, Inc., No. 212-2015-CV-00011, 2015 N.H. Super. LEXIS 12, at *16-*17 (N.H. Super. Ct. Nov. 20, 2015) (McNamara, J.) (collecting cases and discussing the common law recognition of independent, extra-contractual duties of care imposed upon professionals), and RSA 338-A:1 (prohibiting contracts to indemnify architects and other design professionals). Absent clear legislative intent indicating otherwise, RSA 508:4-b should not be extended in contravention of this policy or the State's general policy of holding negligent parties accountable. Compare RSA 507:7-e with DeBenedetto v. CLD Consulting Eng'rs, Inc., 153 N.H. 793, 803-04 (2006) (defendants are only held responsible for their own fault).

B. Excepting Indemnity and/or Contribution Damage Claims Is Not Burdensome

Excepting indemnity and/or contribution damage claims is unlikely to have a practical impact upon the liability of design professionals because the overwhelming majority of cases are brought before the statute's bar. See, e.g., Margaret A. Cotter, Limitation of Action Statutes for Architects and Builders – Blueprints for Non-Action, 18 CATH. UNIV. L. REV. 361, 366 (1969) (noting that 84% of all claims against architects are brought within four years from the date of substantial completion). In addition, virtually all design professionals carry professional malpractice insurance which relieves the burdens of defending claims. Id. Relatedly, the financial burden of increased insurance costs will ultimately be passed to the client, e.g. property owners. Id.

C. South Street's Indemnity Claims Do Not Frustrate the Purpose of RSA 508:4-b

The purpose of RSA 508:4-b's is to relieve liability risk arising from "errors or omissions in the planning, design and construction of improvements to real estate," Laws 1990, 164:1. South Street's indemnity claims arise from contract and are not dependent upon proof of professional negligence.

STANDARD OF REVIEW

Resolution of the question presented in the Interlocutory Transfer Statement requires the interpretation of RSA 508:4-b. The construction of a statute presents a question of law which this Court addresses *de novo*. Ingram v. Drouin, 167 N.H. 416, 418 (2015).

ARGUMENT

I. RSA 508:4-b DOES NOT BAR THIRD-PARTY ACTIONS FOR INDEMNITY AND/OR CONTRIBUTION

The question before this Court is whether South Street's third-party action seeking indemnity and/or contribution damages falls within the bar of New Hampshire's statute of repose, RSA 508:4-b. The statute states in relevant part that,

> all actions to recover damages *for injury to property, injury to the person, wrongful death or economic loss* arising out of any deficiency in the creation of an improvement to real property, . . . shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.

RSA 508:4-b, I. (emphasis added). The legislature did not include indemnity or contribution within the serial listing of damage claims within the bar of the current statute while its predecessor specifically referenced claims for *indemnity and contribution* damages along with personal injury, wrongful death and property damage. The plain language of RSA 508:4-b therefore unambiguously answers the question presented in the negative.

In matters of statutory interpretation, this Court is "the final arbiter of the intent of the legislature *as expressed in the words of the statute* considered as a whole." Langevin v. Travco Ins. Co., 170 N.H. 660, 664 (2018) (citation omitted; emphasis added). When interpreting the meaning of a statute, this Court firsts looks "to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Id. at 664 (citation omitted). The "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy

sought to be advanced by the entire statutory scheme." Ingram v. Drouin, 167 N.H. 416 (2015). "Absent an ambiguity, [this Court] will not look beyond the language of the statute to discern legislative intent." Langevin, 170 N.H. at 664 (citation omitted).

A. The Plain Language of RSA 508:4-b Unambiguously Excepts Indemnity and/or Contribution Damage Claims

The statute clearly and *unambiguously* bars actions which satisfy three elements. First, the action must have been brought more than 8 years from the date of substantial completion of the improvement.[2] Second, the action must "arise out of" a deficiency in the creation of an improvement to real property. Phaneuf Funeral Home v. Little Giant Pump Co., 163 N.H. 727, 731 (2012) ("While RSA 508:4-b, I, applies to all types of claims regardless of the theory of liability, *the statute's reach is limited to actions arising out of any deficiency in the creation of an improvement to real property*.") (emphasis added).[3] Third, the action must be to recover damages for: (i) injury to property; (ii) injury to the person; (iii) wrongful death; or (iv) economic loss.

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[2] It is undisputed that South Street's third-party actions was brought more than 8 years after the date of substantial completion.

[3] Wagner's reliance on Phaneuf for the proposition that RSA 508:4-b includes all damage claims even if not referenced in serial list is misplaced. See Wagner Brief at 14-15. Phaneuf only resolves the question that all *theories of liability* are subject to the limitations of RSA 508:4-b and is irrelevant with respect to the question presented before this Court. The Phaneuf court was dealing with a discrete issue of the statute's application to a claim resulting from a defective product incorporated in the improvement. 163 N.H. at 729-30. South Street does not dispute that RSA 508:4-b applies to all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss regardless of the *theory of liability*. The plain language of the statute only bars actions to recover the types of claims for damages specified by RSA 508:4-b, I. South Street seeks to recover damages for indemnity and contribution which are not one of the categories of damage claims listed in the statute. When this Court referenced *theories of liability* as applying to "all actions" in Phaneuf, it was talking about the legal theories on which the claims are based (i.e., negligence, products liability, breach of contract, breach of warranty, etc.). See 163 N.H. at 731.

This Court has consistently applied the familiar axiom of *expressio unius est exclusio alterius* when interpreting statutes. See, e.g., Appeal of Cover, 168 N.H. 614, 622 (2016) ("Normally the expression of one thing in a statute implies the exclusion of another.") (citation and quotations omitted); see also Appeal of Campaign for Ratepayers' Rights, 162 N.H. 245, 251 (2011) (party was not one of the specifically enumerated persons or entities that could bring an action pursuant to applicable statute and therefore lacked standing); St. Joseph Hosp. v. Rizzo, 141 N.H. 9, 11-12 (1996) (same); Ransmeier v. Camp Cody, 117 N.H. 736, 737-38 (1977) (wrongful death action brought by administrator not included within the employee bar by the predecessor version of RSA 281-A:8 (the workmen's compensation statute in effect prior to June 27, 1978), because the language of the statute only applied to the employee, not to a spouse or legal representative), superseded by statute as stated in Park v. Rockwell Int'l Corp., 121 N.H. 894, 896-97 (1981) (amendment of employee bar to include death actions by an administrator unconstitutional). Given the inclusion of language in RSA 508:4-b specifically barring damage claims for personal injury, property damage, wrongful death and economic loss, it must be presumed, in accordance with the principle of *expressio unius*, that the Legislature did not bar all other types of claims, including indemnity and/or contribution damage claims.

It is also an elementary principle of statutory construction that, "all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words." Merrill v. Great Bay Disposal Serv., 125 N.H. 540, 543 (1984) (citing State v. Tardiff, 117 N.H. 53, 56 (1977) ("If possible, every word of a statute

should be given effect.")), and 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 103 (4th ed. 1973)). As such, this Court must give effect to the serial list in RSA 508:4-b, I setting forth the specific types of damage claims subject to the bar. To read RSA 508:4-b to apply to any action regardless of the category of damage the claim seeks to recover would render the serial list in RSA 508:4-b, I superfluous.

Moreover, this Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Langevin, 170 N.H. at 664 (citation omitted). RSA 508:4-b does not include language which applies its bar to indemnity and/or contribution damage claims. The statute cannot be read to bar indemnity and/or contribution damage claims.

B. The Legislature Did Not Include Indemnity and/or Contribution Damage Claims Within the Bar When it Amended the Statute in 1990

Assuming *arguendo*, that the plain language of RSA 508:4-b does not clearly and unambiguously exclude indemnity and/or contribution damage claims from its scope, the history of amendment of RSA 508:4-b supports a finding that the Legislature intended to exempt these actions from the scope of the statute. As was first codified in 1965 by the amendment of RSA Chapter 508 with the insertion of Section 4-b, entitled "Damages from Construction," New Hampshire's statute of repose read as follows:

> *No action to recover damages for injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death*, arising out of any deficiency in the design, planning, supervision or observation of

> construction, or construction of an improvement to real property, *nor any action for contribution or indemnity for damages sustained on account of such injury*, may be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six years after the performance or furnishing of such services and construction . . . .

Laws 1965: 118:1 (emphasis added), attached to Wagner Appendix at 8. The Legislature's intent in specifically laying out the statute's application to "any action for contribution or indemnity for damages sustained on account of such injury" was then manifest.

In 1982 this Court ruled that the 1965 version of RSA 508:4-b was unconstitutionally discriminatory on the grounds that it represented an unreasonable and arbitrary legislative classification favoring particular classes of defendants (e.g., design professionals). Henderson Clay Prods. v. Edgar Wood & Assocs., 122 N.H. 800, 802 (1982). The entire section was subsequently deemed invalid because the fundamental structure of the statute was affected. Antoniou v. Kenick, 124 N.H. 606, 609 (1984). The Legislature adopted the current version of RSA 508:4-b in 1990, and, in doing so, left out the language from the 1965 version of the statute which applied to actions to recover damages for indemnity and/or contribution when it amended and adopted the current language of the statute in 1990. See Laws 1990, 164:1, *et seq.*

The Legislature was aware that when it amended the statute in 1990 that the statute of repose as worded in 1965 barred actions for indemnity and/or contribution. The history of unambiguous language in the 1965

version of RSA 508:4-b explicitly covering indemnity and/or contribution actions and the decision of the Legislature not to include similar language in the current version of RSA 508:4-b is a reflection of its intent to exclude indemnity and/or contribution damage claims from the bar of the statute. As this Court has explained,

> [W]e acknowledge that the legislature's choice of language is deemed to be meaningful, and that we generally assume that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. Therefore, unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense. Conversely, *where the legislature uses different language in related statutes, we assume that the legislature intended something different*.

In re Williams, 159 N.H. 318, 323 (2009) (quoting State Employees Assoc. of N.H. v. N.H. Div. of Personnel, 158 N.H. 338, 345 (2009)) (quotations omitted; emphasis in original); see also Anderson, No. 2017-0559, slip op. at 5 ("'[A]ny material change in the language of' a statute by amendment is 'ordinarily . . . presumed to indicate a change in legal rights.'") (quoting Appeal of Manchester Transit Auth., 146 N.H. at 458 (2001)) (brackets omitted).

C. Legislation in Derogation of the Common Law Must Be Strictly Construed

Again, assuming *arguendo* that RSA 508:4-b is ambiguous, application of the bar to actions to recover damages for indemnity and/or contribution would abolish common law rights. Jaswell Drill Corp. v.

General Motors Corp., 129 N.H. 341, 346 (1987) (indemnity and contribution rights based in common law). "While a statute may abolish a common law right, there is a presumption that the legislature has no such purpose." Sweeney v. Ragged Mt. Ski Area, Inc., 151 N.H. 239, 241 (2004) (citation and quotations omitted). For this reason, this Court "will not interpret a statute to abrogate the common law unless the statute *clearly expresses* that intent." Id. (citation and quotation omitted) (emphasis in original). Moreover, "immunity provisions barring the common law right to recover are to be strictly construed." Id. The Legislature did not provide a clear expression that it intended RSA 508:4-b to bar the common law right to bring indemnity and/or contribution damage claims.

D. Wagner's Textual Arguments Are Unpersuasive

Wagner argues that the plain language of RSA 508:4-b applies to actions to recover damages for indemnity and/or contribution, based on three arguments that are incorrect interpretation of law irrelevant to the resolution of the question presented in the Interlocutory Transfer Statement.

First, Wagner argues that the prefatory clause of RSA 508:4-b ("Except as otherwise provided in this section . . .") limits the statute's exceptions to: (1) claims involving works not substantially completed within the 8 year bar; (2) claims warranted or guaranteed beyond the 8 year bar; (3) claims involving fraudulent misrepresentations or concealment; (4) claims involving improvements on nuclear power generation, nuclear waste storage, or long-term storage of hazardous materials; and (5) actions against property owners and others responsible for care and maintenance. Wagner Brief at 16-17. However, as this Court has already held, claims which do not arise from a deficiency in the creation of an improvement to real

property are not subject to RSA 508:4-b. Cf. Phaneuf, 163 N.H. at 731. Moreover, as argued above, the plain language of the statute limits its reach to actions to recover damages for (i) injury to property, (ii) injury to the person, (iii) wrongful death, or (iv) economic loss.

Second, Wagner asserts that the inclusion of the language "without limitation" in Paragraph I of RSA 508:4-b is indicative of the expansive scope of its language. Wagner Brief at 14. This language, however, plainly operates to define "improvement to real property." Wagner appears to acknowledge as much in its Brief. See id. ("The paragraph goes on to apply to, 'without limitation,' any type of building-improvement deficiency.").

Third, Wagner argues that South Street could have negotiated a guaranty or warranty but chose not to. Id. at 17-18. This is true; but this exemption is irrelevant for the purposes of answering the narrow question presented. Simply stated, warranty and guaranty protect different rights than indemnity and contribution. Even without the specific exemption in the statute, the parties to an architectural professional contract – and parties to any generic agreement in any field of endeavor – are free to extend, contract away, or limit the time for bringing suit, choose the forum for any dispute, limit resolution of disputes to arbitration, require mediation or otherwise modify common law rights for resolving disputes. A warranty or guaranty extending beyond 8 years would permit South Street to bring an action against Wagner for economic losses at any time, for example, but it would not permit South Street to bring a third-party action to recover damages for indemnity and/or contribution. Compare Construction Warranty, BLACK'S LAW DICTIONARY (6th ed. 1990) ("An undertaking or

promise by seller or building contractor of new home that such home is fit for the purpose intended") and Guaranty, BLACK'S LAW DICTIONARY (6th ed. 1990) ("A collateral agreement for performance of another's undertaking."), with Indemnity against liability, BLACK'S LAW DICTIONARY (6th ed. 1990) ("[A]n obligee's right to indemnification at the time a liability arises.") and Contribution, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Right of one who has discharged a common liability to recover of another also liable").

II. INDEMNITY AND CONTRIBUTION DAMAGES ARE NOT DAMAGES FOR ECONOMIC LOSS

Wagner principally argues that the plain language of RSA 508:4-b prohibits South Street's third-party actions because indemnity and/or contribution damage claims seek to recover damages for actual or potential "economic loss." Wagner Brief at 15-16. In asserting this argument, Wagner accepts South Street's reading of the statute, that only those actions to recover damages as set forth in serial list at RSA 508:4-b, I fall within the bar. However, Wagner's argument misunderstands the definition of "economic loss." Contrary to the definition Wagner suggest this Court should adopt, see Wagner Brief at 15-16 (citing lay definitions of "economic" and "loss"), "economic loss" is a term of art which has acquired a meaning at common law. In matters of statutory construction, the Legislature has directed that "[w]ords and phrases shall be construed according to the common and approved usage of the language; *but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and*

understood according to such peculiar and appropriate meaning." RSA 21:2 (emphasis added).

The economic loss doctrine is a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." Plourde Sand & Gravel Co. v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007) (citation and quotations omitted). As this Court has explained, "economic loss is characterized as damage that occurs to the inferior product itself, through deterioration or non-accidental causes. . . . [E]conomic losses encompass both damage to the defective product itself and the diminution in value of the product because it is inferior quality." Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 835 (2005) (citing Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 364 (1986)), overruled on other grounds by Lempke v. Dagenais, 130 N.H. 782, 795 (1988)); see also MATTHIESEN, WICKERT & LEHRERM, S.C., ECONOMIC LOSS DOCTRINE IN ALL 50 STATES 1-2 (2018) (defining economic loss generally and noting that it encompasses, *inter alia*, "loss of the bargain"). In contrast, "when a defective product accidentally causes harm to person or property [other than the defective product itself], the resulting harm is treated as personal injury or property damage." Kelleher, 152 N.H. at 835 (citation omitted). This Court – and courts nationally – have interpreted insurance policy language in precisely the same manner. See, e.g., McAllister v. Peerless Ins. Co., 124 N.H. 676, 679-80 (1987) (noting that a claim for faulty workmanship was not a claim for property damage and therefore not subject to coverage); Hull v. Berkshire Mut. Ins. Co., 121 N.H. 230, 230-31 (1981) (claim to recover money damages for defective

work on unaesthetic work where the work product was not physically injured is not property damage and therefore not covered damages under a construction contractor's general liability policy).

In the present case, the alleged failure of the stairs to meet applicable building codes could have given rise to claims subject to the limitations of RSA 508:4-b in several ways. For example, if South Street brought an action against Wagner because a deficiency in the design of the stairs made them unaesthetic, made the property as a whole less valuable, or caused loss in value to South Street's abutting property. Similarly, if South Street brought a claim against Wagner for the cost to repair and/or replace the stairs, that would be a claim for economic loss. See Lempke, 130 N.H. at 792 (an economic loss is "that loss resulting from the failure of the product to perform to the level expected by the buyer and is commonly measured by the cost of repairing or replacing the product.") (citation omitted). South Street seeks to recover indemnity and/or contribution damages, which have no relation to the diminishment in value and/or cost of repair associated with the underlying negligence.

III. SOUTH STREET'S INDEMNITY CLAIMS DO NOT ARISE FROM A DEFICIENCY IN THE CREATION OF IMPROVEMENTS TO REAL PROPERTY

Even if indemnity and/or contribution damage claims were barred by RSA 508:4-b (or considered to be a category of economic loss damage), South Street's indemnity claims survive for the additional reason that actions to recover damages for breach of the express and/or implied duty to indemnify arise from contract, not deficiencies in the creation of improvements to real property. See Phaneuf, 163 N.H. at 731 (the language

of RSA 508:4-b "unambiguously encompasses all types of claims, *as long as they arise from a deficiency in the creation of an improvement to real property*.") (emphasis added). South Street's action against Wagner is based upon a duty to indemnify implied in the contract. See, e.g., Bruzga v. PMR Architects, P.C., 141 N.H. 756, 759 (1997) (recognizing that architects and contractors have independent extra-contractual duties to design and construct in accordance with their professional standards of care); see also Penta Corp. v. Town of Newport, Inc., No. 212-2015-CV-00011, 2015 N.H. Super. LEXIS 12, at *16-*17 (N.H. Super. Ct. Nov. 20, 2015) (McNamara, J.) (same).[4]

In questions of statutory interpretation, this Court may consider analogous laws from other states and federal laws where the language in those statutes is sufficiently similar. See Appeal of City of Portsmouth, Bd. of Fire Comm'rs, 140 N.H. 435, 438-39 (1995) (looking to similar state and federal law for guidance in matter of statutory interpretation). Courts analyzing statutes of repose similar to New Hampshire's have found that actions to recover damages based upon breach of the duty to indemnify arise from contract, not deficiencies in the creation of improvements to real property. See, e.g., Ray & Sons Masonry Contrs. v. United States Fid. & Guar. Co., 114 S.W.3d 189, 203 (Ark. 2003) ("At issue before us is an action alleging breach of the indemnity provision in the construction contract, or in other words, an alleged breach of the contractual obligation to indemnify. This case is not one based on damages from alleged defective construction. Therefore, the statute of repose is not applicable to

[4] South Street's action against TruexCullins is based upon an express contractual duty.

this case.")[5]; South Dearborn Sch. Corp. v. Duerstock, 612 N.E.2d 203, 209 (Ind. App. Ct. 1993) ("If [the plaintiff] has a right to recover damages . . . the damages recovered would not be 'for' a deficiency or any injury to property or person arising out of a deficiency. Instead, any damages [the plaintiff] would be entitled to recover would be grounded solely in rights granted pursuant to the contract.").[6]

The rationale employed by other courts is that these actions are based on breach of contract, and the recoverable damages arise from defending the lawsuit not the liability to the plaintiff in the underlying case. E.g., Duerstock, 612 N.E.2d at 208-09; see also Nat'l Serv. Indus., Inc. v. Georgia Power Co., 670 S.E.2d 444, 447 (Ga. App. Ct. 2008) (declining to apply Georgia's statute of repose to a contractual indemnity claim because the indemnification provision in question did not require a showing of

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[5] The relevant portion of the Arkansas statute of repose reads:

> No action in contract . . . to recover damages caused by any deficiency in [design or construction] . . . for injury to real or personal property caused by such deficiency, shall be brought against any person [for furnishing the design services] . . . more than five (5) years after substantial completion of the improvement.

ARK. CODE ANN. § 16-56-112(a).

[6] The relevant portion of the Indiana statute of repose interpreted in Duerstock read as follows:

> No action to recover damages whether based on contract, tort, nuisance, or otherwise, for
>
> (a) any deficiency, or alleged deficiency, in [design] . . .;
> (b) an injury to property, either real or personal, arising out of any deficiency; or
> (c) injury to the person, or for wrongful death, arising out of any such deficiency;
>
> shall be brought against any [design professional] . . . unless the action is commenced within the earlier of ten (10) years from the date of substantial completion of the improvement or twelve (12) years after the submission of plans and specifications to the owner if the action is for deficiency in design.

612 N.E.2d at 205. The statute applied in Duerstock has since been repealed and replaced by the Indiana General Assembly. See IND. CODE § 32-30-1-5 (2005).

deficient construction). In other words, the duty to indemnify is defined by the contract, and could require the indemnitor to pay for costs which have no connection to the underlying negligence, such as defense costs. Duerstock, 612 N.E.2d at 208-09.

Actions to recover damages arising from a breach of an implied duty to indemnify fall outside the coverage of RSA 508:4-b for the same reasons. An implied agreement to indemnify exists "when an indemnitor performs a service under contract negligently and, as a result, causes harm to a third party in breach of a nondelegable duty of the indemnitee." Gray v. Leisure Life Indus., 165 N.H. 324, 328 (2013) (citation omitted). "The rationale for finding an implied agreement to indemnify under such circumstances is akin to the rationale for finding a right of indemnity in tort actions in that it is based upon 'the fault of the indemnitor as the source of the indemnitee's liability in the underlying action and, conversely, the indemnitee's freedom from fault in bringing about the dangerous condition.'" Id. (quoting Jaswell Drill Corp., 129 N.H. at 346) (brackets omitted).

While the rationale for finding an implied agreement to indemnify is *akin* to finding a right of indemnity in tort actions, the right "springs" from contract. See Sears, Roebuck & Co. v. Philip, 112 N.H. 282, 285-86 (1972) (noting that the third-party plaintiff's claim was not based upon tort theory, but that it clearly "springs" from its contract with the third-party defendant); see also Wentworth Hotel v. F.A. Gray, Inc., 110 N.H. 458, 461 (1970) (noting that while the allegations for implied indemnification were phrased in the language of tort, they relied "upon obligations alleged to have arisen out of" contract). Just like in an action to recover damages for

breach of a contractual duty to indemnify, a third-party plaintiff seeking damages for breach of an implied duty to indemnify "is entitled to restitution from the other expenditures properly made in the discharge of such liability." Sears, Roebuck & Co., 112 N.H. at 284-85 (quoting and noting that courts in New Hampshire follow RESTATEMENT OF RESTITUTION § 95 (1937)) (quotations omitted).

IV. PUBLIC POLICY DOES NOT FAVOR EXTENDING THE REPOSE BAR TO INDEMNITY AND/OR CONTRIBUTION DAMAGE CLAIMS

A. It is New Hampshire Public Policy to Hold Professionals Responsible for Their Own Negligence

Wagner argues that this Court should construe RSA 508:4-b expansively – well beyond the words used by the Legislature in the 1990 amendment – to give expression to a public policy, the purpose of which is to protect trade professionals from an almost infinite period of liability, to persons who sustain bodily injury liability out of the professional's negligent design. This same sentiment should not be extended by implication to indemnity and/or contribution damage claims. Doing so leaves property owners solely "holding the bag" for the same liability to bodily injury victims of an architect's negligent design of an improvement to property. Leaving the property owner without recourse against at fault parties from its own infinite imputed liability from the statute from the at fault party is manifestly unfair and frustrates the public policy expressed by the Legislature in adopting the comparative negligence statute, RSA 507:7-g,[7] which calls for each party to bear its share of proportionate fault. This Court reaffirmed this principle in DeBenedetto v. CLD Consulting

[7] Adopted as part of the Tort Reform Act of 1986.

Eng'rs, Inc., 153 N.H. 793, 803-04 (2006) (defendants are only held responsible for their own fault).

It has always been public policy to hold professionals liable for their own negligence. See, e.g., Penta Corp., 2015 N.H. Super. LEXIS 12, at *16-*17 (collecting cases and discussing the common law recognition of independent, extra-contractual duties of care imposed upon professionals, including architects and contractors, and the traditional practice of allowing professional negligence claims to proceed in both tort and contract). Moreover, if RSA 508:4-b is construed to bar South Street's indemnity and/or contribution damage claims, as Wagner urges this Court to find, it would impose upon South Street a duty to assume full responsibility for Wagner's negligence, thereby granting Wagner a protection which, if Wagner sought via contract, would be prohibited as against public policy pursuant to RSA 338-A:1:

> Any agreement or provision whereby an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons *shall be against public policy, void and wholly unenforceable*. (emphasis added).

Design professionals are not the only professionals to face indefinite periods of liability brought on by the advent of the discovery rule. See, e.g., Shillady v. Elliot Community Hosp., 114 N.H. 321, 324 (1974) (medical malpractice claim arising from procedure performed 30 years earlier allowed to proceed pursuant to discovery rule). Attorneys, for example, must secure insurance to cover potential malpractice claims which

may not arise for years or decades after services were rendered, such as is the case when an attorney negligently fails to include an heir in a will (where the loss occurs many years after the testator dies). See, e.g., Simpson v. Calivas, 139 N.H. 1, 7 (1994) (finding that the lawyer who drafted a will owed a duty to an intended beneficiary such that the intended beneficiary could maintain a malpractice suit after the testator's passing). There is no public policy reason why design professionals should be afforded liability protection against long tail claims which is not available to other professionals.

B. Excepting Indemnity and/or Contribution Damage Claims Is Not Burdensome

As a legal and practical matter it is unlikely that excepting indemnity and/or contribution damage claims from the repose bar will significantly increase the duration for which design professionals are potentially liable or otherwise increase costs for the profession. As the New Hampshire Superior Court has already noted, several courts interpreting statutes of repose have pointed to a study "which indicated that approximately 93% of claims against architects and builders were brought within six years of a project's completion and 99.6% were brought within ten years of completion." Simpson v. Net Props. Mgmt., Inc., No. 01-C-244, 2003 N.H. LEXIS 8, at *12 (N.H. Super. Ct. Feb. 9, 2003) (Lynn, J.) (citing Gibson v. W. Va. Dep't of Highways, 406 S.E.2d 440, 447 (W. Va. 1991)); see also Margaret A. Cotter, Limitation of Action Statutes for Architects and Builders – Blueprints for Non-Action, 18 CATH. UNIV. L. REV. 361, 366 (1969) (noting that 84% of all claims against architects are brought within four years from the date of substantial completion). As the New Hampshire

Superior Court observed, "the statutes of the kind here at issue are apt to wipe out very few legitimate claims." Simpson, 2003 N.H. Super. LEXIS 8, at *12; see also Cotter, Blueprints for Non-Action, 18 CATH. UNIV. L. REV. at 385 (noting that "[t]here are probably few plaintiffs who have meritorious and provable claims after a given number of years").

Excepting indemnity and contribution damage claims from the statutes bar would impose very few burdens on the design profession. This Court should also take into consideration that design professionals are generally insured.[8] Any financial burden placed on design professionals forced to secure extended coverage would ultimately be passed off to the customer (e.g., property owners). Cotter, Blueprints for Non-Action, 18 CATH. UNIV. L. REV. at 385 ("Economically, the financial burden of insurance eventually shifts to the owner."). In addition, to the extent that it is unfair to subject design professionals to claims arising years after substantial completion because evidence has been lost, memories have faded, and witnesses have disappeared, this burden falls equally on plaintiffs and defendants alike. Id. ("In assessing the merits of the merits of theses statutes, a legislature may question the competency of a court to fairly adjudicate when lapse of time and complex causative factors are

[8] Design professionals in the construction industry are generally insured for professional liability by insurance on a "claims made" basis. This policy provides coverage for the entity, employees, and former employees for claims during a covered period arising out of work performed after inception of the first of serial renewed policy terms. If, however, the entity ceases to exist or fails to purchase serial claims made coverage, both the entity and the employees have the option to be covered indefinitely by purchasing an extended reporting endorsement or "tail." Construction entities are insured by occurrence form policies which extend coverage to claims arising out of damages that occur while the policy is in effect (regardless of when the work causing the loss was performed or when the claim is made). If the loss occurs or the claim is made after the entity no longer exists, there is no coverage, but then there is no exposure either because the entity doesn't exist.

involved, but the burdens of proving and defending are substantially equivalent, and thus it seems legislation should not favor the potential defendant on that basis alone). Contrary to Wagner's contention, excluding indemnification and/or contribution damage claims from RSA 508:4-b's bar would not, practically speaking, "destroy the intended protections of the statute." Wagner Brief at 21.

C. South Street's Indemnity Claims Do Not Frustrate the Purpose of RSA 508:4-b

Wagner claims that allowing indemnity damage claims to survive RSA 508:4-b's bar frustrates the statutes purpose. The indemnity damage claims, however, are not dependent upon proof of professional negligence. For this reason, exempting these actions from the bar of RSA 508:4-b would not "indirectly thwart the intention of the legislature." See Wagner Brief at 21 (quoting Gwinnett Place v. Pharr Engineering, Inc., 449 S.E.2d 889, 891 (Ga. App. Ct. 1994)). In fact, the cases cited by Wagner in support of this argument actually support South Street's position.

In Gwinnett Place, the Georgia Appellate Court held that a common law indemnification claim was barred by the applicable statute of repose. 449 S.E.2d at 890. In support of this holding, the court relied upon the reasoning in Kraseath v. Parker, 441 S.E.2d 868 (Ga. 1994), whereby the Georgia Supreme Court held that a medical malpractice statute of repose barred a contribution action because the claim was dependent upon proof of professional negligence. Gwinnett Place, 449 S.E.2d at 891 (citing Kraseath, 441 S.E.2d at 870). It was for this reason that the Federal District Court for the Northern District of Georgia dismissed the indemnification action in Facility Constr. Mgmt. v. Ahrens Concrete Floors, Inc., No. 08-

cv-01600, 2010 U.S. Dist. LEXIS 29242, at *21-*23 (N.D. Ga. March 24, 2010) (noting that the parties agreed that there must have been proof of deficient construction in order to invoke the contractual provision in question). However, Wagner overlooks that Georgia's statute of repose only applies when a showing of deficient construction is required. See id. (citing Nat'l Serv. Indus., Inc. v. Georgia Power Co., 670 S.E.2d 444, 447 (Ga. App. Ct. 2008) (declining to apply Georgia's statute of repose to a contractual indemnity claim because the indemnification provision in question did not require a showing of deficient construction)). Wagner's reliance on Nevada case laws is also similarly misplaced. Compare Nevada Lakeshore Corp. v. Diamond Elextricity, Inc., 511 P.2d 113, 114 (Nev. 1973) (barring an action for common law indemnification), with State ex rel. Dep't of Transp. v. Central Tel. Co., 822 P.2d 1108, 1110 (Nev. 1991) (excepting an action for contractual indemnification).[9] South Street's claims for express and implied indemnity, as argued above at Section III, do not arise from the underlying negligence. As such, South Street's claims do not frustrate RSA 508:4-b's purpose of relieving liability risk arising from "errors or omissions in the planning, design and construction of improvements to real estate," Laws 1990, 164:1, for the additional reason that they are not dependent upon proof of professional negligence.

[9] It is also worth noting that in 2015 the Nevada legislature repealed the version of the statute of repose applied in both Nevada Lakeshore Corp. and State ex rel. Dep't of Transp. and replaced it with a statute of repose that specifically exempts indemnification and contribution actions. See NEV. REV. STAT. § 11.202 (2015).

CONCLUSION

The plain language of RSA 508:4-b clearly and unambiguously bars actions which arise from a deficiency in the creation of an improvement to real property and which seek to recover damages for: (i) injury to property; (ii) injury to the person; (iii) wrongful death; or (iv) economic loss. South Street's third-party actions are for the recovery of damages for indemnity and/or contribution, which are not subject to RSA 508:4-b's bar. For this and all other reasons state herein, South Street's claims are not barred by RSA 508:4-b.

Respectfully submitted,

SOUTH STREET DOWNTOWN HOLDINGS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: February 14, 2019 By: */s/ Andrew Dunn*

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* * * * * * * *

STATEMENT REGARDING ORAL ARGUMENT

Clerk Eileen Fox issued a notice on November 28, 2018 which states: "Interlocutory transfer without ruling is accepted and will be scheduled for oral argument before the court." Counsel for South Street believes oral argument before the full Court would be helpful in considering the question presented in the Interlocutory Transfer Statement as this is a complex issue of first impression which the Grafton County Superior Court (MacLeod, J.) believed was close enough that a substantial basis for a difference of opinion existed and that resolution of this question would clarify further proceedings for the litigants and other future litigants similarly situated. South Street designates Attorney Dunn to be heard at oral argument.

DECISION BEING APPEALED OR REVIEWED

Rule 16(i) of the Rules of the Supreme Court of New Hampshire does not apply. The question before the Court has come via interlocutory transfer.

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CERTIFICATE OF COMPLIANCE

As counsel of record for Defendant/Third-Party Plaintiff/Appellee South Street Downtown Holdings, Inc., I hereby certify that this brief complies with the 9,500 word limitation set forth by Rule 16(11) of the Rules of the Supreme Court of New Hampshire. I am relying upon the word count feature of the word-processing system used to prepare this brief, which indicates that 8,431 words appear in this brief, exclusive of the table of contents and table of authorities.

Dated: February 14, 2019 By: */s/ Tavish Brown*

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CERTIFICATE OF SERVICE

I hereby certify that a copy this brief was served on the following counsel of record this 14th day of February, 2019, all of whom will receive the foregoing via electronic service:

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