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., et al.
Defendants.

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

BRIEF OF TRUEXCULLINS AND PARTNERS ARCHITECTS IN SUPPORT OF MOTION TO DISMISS

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Attorney Walton will argue the brief.

TABLE OF CONTENTS
(Pursuant to Rule 16(3))

I. TABLES OF CASES, STATUTES, AND OTHER AUTHORITIES ……………………..3
II. QUESTION PRESENTED FOR REVIEW ……………………………..…………………4
III. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES and REGULATIONS …………………………………………...………………..…5
IV. STATEMENTS OF THE CASE AND MATERIAL FACTS ……………………………...7
V. SUMMARY OF ARGUMENT ……………………………………………………………..8
VI. ARGUMENT ……………………………………………………………………………..9
VII. CONCLUSION ……………………………………………………………..………...11
VIII. STATEMENT REGARDING ORAL ARGUMENT …………………………..……….11
IX. DECISION BELOW BEING APPEALED OR REVIEWED ……..…………………..…..11

A. TABLES OF CASES, STATUTES, AND OTHER AUTHORITIES

1. Cases

Big League Entm't, Inc. v. Brox Indus., 149 NH 480 (2003)……………………………………..9
John C. Rankin, et al v. South Street Downtown Holdings, Inc., 215-2017-CV-00051; Grafton Superior Court…………………………………………………………………………………..7
Phaneuf Funeral Home v. Little Giant Pump Co., 48 A.3d 912, 163 N.H. 727 (2012)…...8, 9, 10

2. Statutes & Other Authorities

RSA 508:4-b (1990) …………………………………………………………4, 5, 7, 8, 9, 10, 11
RSA 508:4-b (1965) ……………………………………………………………5, 6, 8, 9, 10, 11

B. QUESTION PRESENTED FOR REVIEW

Grafton County Superior Court's Interlocutory Transfer Statement dated October 15, 2018 ("Interlocutory Transfer Statement"), at Page 2 presents the question before the Court as follows:

> 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 of the improvement to real property which the injured plaintiff alleges was dangerous and did not meet applicable building codes?

As noted in the Interlocutory Transfer Statement, on December 5, 2017, third-party defendant Wagner Hodgson Landscape Architecture ("Wagner") filed a motion to dismiss, asserting as grounds therefore that all claims against Wagner are time barred because the plaintiff filed suit outside of the eight-year repose period.

C. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES and REGULATIONS

The only statute at issue is:

1. **RSA 508:4-b (1990), "Damages from Construction."**

I. Except as otherwise provided in this section, 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, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.

II. The term "substantial completion" means that construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended. In the case of a phased project with more than one substantial completion date, the 8-year period of limitations for actions involving systems designed to serve the entire project shall not begin until all phases of the project are substantially complete.

III. If an improvement to real property is expressly warranted or guaranteed in writing for a period longer than 8 years, the period of limitation set out in paragraph I shall extend to equal the longer period of warranty or guarantee.

IV. In all actions for negligence in design or construction described in paragraph I, the standard of care used to determine negligence shall be the standard of care applicable to the activity giving rise to the cause of action at the time the activity was performed, rather than a standard applicable to a later time.

V. (a) The limitation set out in paragraph I shall not apply to actions involving fraudulent misrepresentations, or to actions involving the fraudulent concealment of material facts upon which a claim might be based. Such actions shall be brought within 8 years after the date on which all relevant facts are, or with due care ought to be, discovered by the person bringing the action.
(b) The 8-year limitation period in paragraph I shall not apply to actions arising out of any deficiency in the design, labor, materials, planning, engineering, surveying, observation, supervision, inspection or construction of improvements which are for nuclear power generation, nuclear waste storage, or the long-term storage of hazardous materials.

VI. Nothing in this section shall affect the liabilities of a person having actual possession or control of an improvement to real property as owner or lawful possessor thereof, and nothing contained in this section shall alter or amend the time within which an action in tort may be brought for damages arising out of negligence in the repair, maintenance or upkeep of an improvement to real property.

2. **RSA 508:4-B (1965), "Damages from Construction."**

No action to recover damages for injury to property, real or personal, or for an 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. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

D. STATEMENT OF THE CASE AND MATERIAL FACTS

1. This matter arises out of a lawsuit originally filed by Plaintiffs John Rankin ("Mr. Rankin") and his wife, Maryanne Rankin ("Mrs. Rankin") (collectively "Plaintiffs"), against South Street Downtown Holdings, Inc. ("South Street") in Grafton County Superior Court ("lawsuit").
2. Plaintiffs allege that in March of 2015, as Mr. Rankin was exiting a South Street-owned building located on South Main Street in Hanover, New Hampshire (the "Property"), he fell off of an "inadequate and dangerous ramp or partial stair," allegedly sustaining substantial injury ("incident").
3. Plaintiffs' Complaint alleges South Street, as property owner, was negligent in its duty to construct and otherwise maintain the "ramp or partial stair" in a manner safe for pedestrians.
4. On or around March 8, 2017, Plaintiffs filed suit against South Street. (John C. Rankin, et al v. South Street Downtown Holdings, Inc., 215-2017-CV-00051; Grafton Superior Court).
5. South Street, in turn, filed a third-party complaint against Wagner and TruexCullins and Partners Architects ("TruexCullins"), who served as landscape architect and design architect, respectively, for a renovation of the Property (the "Project"). Notably, a certificate of occupancy for the subject location had issued in January of 2009.
6. On or around October 16, 2017, South Street filed an amended third-party complaint against Wagner and TruexCullins seeking indemnification and/or contribution from them both.
7. On December 5, 2017, Wagner filed a motion to dismiss, arguing (1) that all claims against it were barred by the eight-year statute of repose established by RSA 508:4-b (1990) and (2) that, as the project's landscape architect, its duties had not included the design nor construction of the subject stairs or "ramp."
8. Plaintiffs and South Street each filed objections to Wagner's motion to dismiss on or around December 15, 2017 and December 18, 2017,[4] respectively.
9. On October 15, 2018, Judge Lawrence A. MacLeod, Jr., issued the Interlocutory Transfer Statement concerned exclusively with the question set forth above in Section B regarding RSA 508:4-b.

E. SUMMARY OF ARGUMENT

For the following reason, this Court should rule that RSA 508:4-b as amended in 1990 (the "Statute") applies to and bars third party actions by a property owner defendant in a premises liability action for indemnity and/or contribution against architects involved in the design of the improvement to real property which the injured plaintiff alleges was dangerous and did not meet applicable building codes.

I. Expansive Language of Statute: "All Actions"

Save for the Statute's own articulated exceptions, the scope of the Statute appears to be all encompassing: "Except as otherwise provided in this section, *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. . . ." (Section I, emphasis added.) The paragraph goes on to apply to, "without limitation," any type of building-improvement deficiency. Indemnity and contribution claims linked to building-improvement-deficiency claims are "actions" to recover "economic loss" that "arise out of" such improvements. This Court already has declared that the subject language "unambiguously encompasses *all types of claims*, as long as they arise from a deficiency in the creation of an improvement to real property." Phaneuf Funeral Home v. Little Giant Pump Co., 48 A.3d 912, 163 N.H. 727, 731 (2012) (emphasis added).

II. 1965 Version of Statute Inapposite

As noted by the Grafton County Superior Court in its Interlocutory Transfer Statement, the 1965 version of the Statute made express reference to "indemnity" and "contribution" actions, whereas the current version of the Statute does not. However, the Statute as amended in 1990 is unambiguous. Accordingly, the 1965 version of the Statute is inapposite. In any case, the language "all actions to recover damages for . . . economic loss arising out of any deficiency in the creation of an improvement to real property" appearing in the current version of the Statute is broader than the 1965 version's language, "any action for contribution or indemnity."

F. ARGUMENT

I. Expansive Language of Statute: "All Actions"

A. "All Actions" is All-Inclusive

Save for the statute's own articulated exceptions, the scope of the statute appears to be all inclusive: "Except as otherwise provided in this section, *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. . . ." (Section I, emphasis added.) The paragraph goes on to apply to, "without limitation," any type of building-improvement deficiency. "[T]he legislative findings and purpose [of 508:4-b] clearly demonstrate that the purpose of the statute is to relieve potential defendants from infinite liability perpetuated by the discovery rule." Big League Entm't, Inc. v. Brox Indus., 149 NH 480, 484 (2003).

As stated in Laws 1990, 164:1:

> The general court finds that, under current law, builders, designers, architects and others in the building trade are subject to an almost infinite period of liability. This period of liability, based on the discovery rule, particularly affects the building industry and will eventually have very serious adverse effects on the construction of improvements to real estate in New Hampshire. Therefore, it is in the public interest to set a point in time after which *no action* may be brought for errors and omissions in the planning, design and construction of improvements to real estate.

Id. (emphasis added).

In Phaneuf Funeral Home v. Little Giant Pump Co., 48 A.3d 912, 163 N.H. 727, 731 (2012), "[the plaintiff] first argue[d] that, because the statute [did] not use the words 'product,' 'products,' or 'product liability,' it [did] not afford protection against product liability claims, but rather [was] 'limited to claims of negligence for design or construction of an improvement.'" The Phaneuf Court held, however, that "RSA 508:4-b provides … that '*all actions* to recover damages ... arising out of any deficiency in the creation of an improvement to real property' must be brought within eight years from the date of substantial completion of the improvement." Id. The Court then ambiguously held, that "[t]hat language unambiguously encompasses all types of

claims, as long as they arise from a deficiency in the creation of an improvement to real property." Id. (emphasis added). Should Plaintiffs prevail against South Street, South Street would presumably be required to pay damages to Plaintiffs. Payment of such damages would be an "economic loss arising out of … deficiency[ies] in the creation of an improvement to real property," namely, the alleged "inadequate and dangerous ramp or partial stair." An indemnity action is an attempt to recover an economic loss. Accordingly, the logic applied in Phaneuf should be applied to the question before the Court to answer it in the affirmative: that RSA 508:4-b as amended in 1990 (the "Statute") applies to and bars third party actions by a property owner defendant in a premises liability action for indemnity and/or contribution against architects involved in the design of the improvement to real property which the injured plaintiff alleges was dangerous and did not meet applicable building codes.

II. 1965 Version of Statute Inapposite

As noted by the Grafton County Superior Court in its Interlocutory Transfer Statement, the 1965 version of the Statute made express reference to "indemnity" and "contribution" actions, whereas the current version of the Statute does not. See Interlocutory Transfer Statement, p. 3. In fact, the 1965 version of the Statute specifically articulated that it protected certain building professionals from contribution and indemnity claims, where it provided,

> No action to recover damages for injury to property, real or personal, or for an 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.

RSA 508:4-B (1965). However, the Statute as amended in 1990 is unambiguous. Accordingly, the 1965 version of the Statute is inapposite. And, in any case, the language "all actions to recover damages for . . . economic loss arising out of any deficiency in the creation of an improvement to real property" appearing in the current version of the Statute is broader than the

1965 version's language, "any action for contribution or indemnity." Thus, South Street's attempt to recover from Wagner (and from TruexCullins) its potential economic loss to Plaintiffs violates and is barred by RSA 508:4-b.

G. CONCLUSION

For all reasons provided above, TruexCullins asks that this Court rule that South Street's claims against Wagner and TruexCullins are time-barred.

H. STATEMENT ON ORAL ARGUMENT

A notice from Clerk Eileen Fox dated November 28, 2018 states, "[i]nterlocutory transfer without ruling is accepted and will be scheduled for oral argument before the full court." Although Attorney Walton would consider such oral argument a distinct honor, he recognizes here no obvious need for oral argument. Thus, TruexCullins hereby waives oral argument should the Court choose not to proceed with it.

I. DECISIONS BELOW BEING APPEALED

Supreme Court Rule 16(3)(i) does not apply. The question before the Court has arrived before the Court through a Rule 9 interlocutory transfer without ruling.

Respectfully submitted,
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Date: January 14, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, a copy of the foregoing was timely served on the following through the electronic filing system's electronic service:

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