**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.

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

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# BRIEF OF WAGNER HODGSON, INC., IN SUPPORT OF MOTION TO DISMISS

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## A. TABLES OF CASES, STATUTES, AND OTHER AUTHORITIES

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## B. QUESTION PRESENTED FOR REVIEW

The Interlocutory Transfer Statement, dated 10/15/18, 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 and improvement to real property which the injured plaintiff alleges was dangerous and did not meet applicable building codes?

(Appendix of Wagner Hodgson, Inc., in Support of Motion to Dismiss, dated 1/14/19; ("Wagner Appendix" or "W.A.") 14, p. 375.) Third-Party Defendant Wagner Hodgson, Inc., ("Wagner") believes that this question is too narrow and that the following is a more appropriate question before the Court: Does RSA 508:4-b (1990), a statute of repose, bar indemnity and contribution claims that the statute does not otherwise exempt from its terms? This was the central issue raised below with respect to the objection by Defendant South Street Downtown Holdings, Inc., ("South Street") to the motion to dismiss filed by Wagner. If the answer to this question is "yes," the lower Court must grant Wagner's motion. Because this issue arose via motion, Wagner does not here cite a volume and page of a transcript where a party raised this issue.

## C. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUES, ORDINANCES, RULES and REGULATIONS

The only statute at issue is RSA 508:4-b (1990). (Wagner Appendix (W.A.) 1.) South Street alleges that the 1965 version of the statute, (W.A. 2), also is relevant.

### 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. <u>RSA 508:4-B (1965) – Damages from Construction</u>**

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 any 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. Circa 2002, construction began on the South Block project, a mixed-use development owned by South Street spanning two blocks of downtown Hanover, New Hampshire, adjacent to the Dartmouth College campus. (Proposal for Hanover Downtown South Block, dated Sept. 2002. (W.A. 7, Ex. I, p. 76.)
2. South Street retained Wagner as an early-project general-concept layout designer and as a landscape architect. (W.A. 7, Ex. I, p. 76; Affidavit of M. McCann, dated 12/3/17 (W.A. 7, Ex. D), p. 53, ¶9.)
3. Wagner personnel have affirmed that Wagner's work on the project ended in 2007 or 2008. (W.A. 7, Ex. D, p. 54, ¶15; Aff. of K. Wagner (W.A. 7, Ex. E), p. 59, ¶14; Aff. of J. Hodgson (W.A. 7, Ex. F), p. 63, ¶14.)
4. A certificate of occupancy for the subject location issued on 1/26/09. (W.A. 7, Ex. H, p. 74.)
5. On 3/15/15, Plaintiff John Rankin allegedly tripped, fell, and suffered substantial injuries while descending a set of exterior stairs / ramp in the vicinity of 70-72 South Main Street, Hanover, New Hampshire, which is owned by South Street and is part of the South Block project. (Complaint (W.A. 3), p. 10.)
6. Plaintiffs claim that Mr. Rankin tripped at that location because the stairs/ramp were too steep and/or were affixed with handrails that were "inappropriate." (W.A. 3, p. 10, ¶¶ 6-9.)
7. On 3/6/17, i.e., more than eight years after the Town of Hanover issued the certificate of substantial completion for the South Block project, Plaintiffs filed suit against South Street for the reasons noted above. (Rankin v. South Street Downtown Holdings, et al., 215-2017-CV-00051; Grafton). (W.A. 3, p. 9.)

8. On 5/30/17, South Street filed a third-party complaint against both TruexCullins and Partners Architects ("Truex") and Wagner, alleging that one or both had been responsible for designing the subject stairs/ramp and that South Street had a "right of indemnification and/or contribution" against both. (W.A. 4, p. 16, ¶8.)

9. On 10/12/17, South Street filed an amended third-party complaint against Truex and Wagner seeking "implied indemnity, contractual indemnity, and/or contribution." (W.A. 5, p. 21, ¶11.)

10. On 12/5/17, Wagner filed a motion to dismiss, (W.A. 6, p. 24), supported by a separate memorandum of law, (W.A. 7, p. 28), arguing (1) that all claims against Wagner were barred by the eight-year statute of repose established by RSA 508:4-b (1990) and (2) that its duties on the South Block project had not included the design nor construction of the subject stairs and ramp.

11. On 12/14/17, Plaintiffs filed an objection to Wagner's motion to dismiss. (W.A. 8, p. 118.)

12. On 12/15/17, South Street filed an objection to Wagner's motion to dismiss. (W.A. 9, p. 124.)

13. On 12/28/17, South Street filed a memorandum of law in support of its objection. (W.A. 10, p. 130.)

14. On 1/5/18, Wagner filed a brief in reply to Plaintiffs' objection to the motion. (W.A. 11, p. 184.)

15. On 1/9/18, Wagner filed a brief in reply to South Street's objection to the motion. (W.A. 12, p. 282.)

16. On 7/23/18, Judge Lawrence A. MacLeod, Jr., issued an Order for Interlocutory Transfer pertaining solely to whether South Street's claims against Wagner were barred by RSA 508:4-b (1990) (W.A. 13, p. 370.)

17. On 10/15/18, Judge MacLeod filed an interlocutory transfer statement pertaining to that issue. (W.A. 14, p. 373.)

## E. SUMMARY OF ARGUMENT

For the following reasons, this Court should interpret RSA 508:4-b (1990) to bar all of South Street's indemnity and contribution claims against Wagner.

### 1. Expansive Language of RSA 508:4-b (1990)

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. 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 those claims arise from a deficiency in the creation of an improvement to real property." Phaneuf Funeral Home v. Little Giant Pump, 48 A.3d 912, 916 (N.H. 2012)(emphasis added).

### 2. Statute Does Not Exempt Indemnity nor Contribution Claims

The statute specifically exempts from its protection several types of claims. The New Hampshire General Court could have added to that list indemnity and contribution claims. It did not.

### 3. Parties May Avoid Statute via Contract

Parties may avoid the statute by contract, including by agreeing to exempt indemnity and contribution claims. South Street and Wagner did not.

### 4. Exempting Indemnity and Contribution Claims Frustrates Fundamental Purpose of Statute: To Protect Building Professionals

The legislative history of RSA 508:4-b (1990) makes clear that the fundamental purpose of the statute is to protect building professionals, many of whom, prior to the passage of the statute, were forced to carry liability insurance decades after they had performed work on a building project and often well into retirement. Exempting indemnity and contribution claims from the protection of the statute would substantially weaken the statute's protection and effectively negate the primary goal of the statute by requiring such building professionals to maintain insurance coverage for many years after the completion of their work.

### 5. Counterarguments of South Street

In opposing Wagner's reliance on the statute in the Superior Court, South Street argued two points: First, that because the 1965 version of the statute specifically articulated protection against indemnity and contribution claims and because the 1990 version of the statute does not do so, the legislature must have intended to exempt from the statute's protection indemnity and contribution claims. Second, South Street argued that multiple states having statutes of repose similar to New Hampshire's have found that their statutes do not bar indemnity and contribution claims.

These arguments are flawed for multiple reasons. First, because the language of the 1990 statute is clear and unambiguous, an examination of any aspect of the 1965 version of the statute for comparative purposes, including why

its relevant text changed in 1990, is inappropriate. Second, even if such an examination were appropriate, such an examination yields nothing helpful to South Street. The legislative record of the statute provides no guidance as to why, in amending the statute in 1990, the legislature eliminated "any action for contribution or indemnity" and added "all actions to recover damages for . . . economic loss. . . ." Based on currently-available information, the parties and this Court only can guess. Finally, the foreign decisions that South Street claims support its interpretation of the statute do not. Both the language of the foreign statues and the underlying facts distinguish those cases from the present matter.

## F. ARGUMENT

### 1. Expansive Language of RSA 508:4-b (1990)

#### a. "All Actions, Without Limitation" 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 identified by the statute from infinite liability perpetuated by the discovery rule. 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.

Big League Entertainment v. Brox Indus., 149 NH 480, 484 (2003)(emphasis added).

> [The plaintiff] first argues that, because the statute does not use the words "product," "products," or "product liability," it does not afford protection against product liability claims, but rather is "limited to claims of negligence for design or construction of an improvement." RSA 508:4-b provides, however, 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. *That 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, 48 A.3d 912, 916 (N.H. 2012; emphasis added)(affirming summary judgment to interior designer who affixed a wall-mounted water fountain to the plaintiff's building more than eight years prior to the plaintiff filing of suit); see also Ingram v. Drouin, 111 A.3d 1104, 1107-09 (N.H. 2015)(citing Phaneuf, affirming summary judgment to the defendant, and rejecting the plaintiffs' claim that RSA 508:4-b did not apply to builder-homeowners).

**b. Contribution and Indemnification Claims are Claims for Actual or Potential Economic Loss**

South Street's indemnification and contribution claims seek redress for potential "economic loss." While the meaning of the word "loss" is plain, the word "economic" and its derivatives can mean various things. In a more narrow sense, the word concerns commerce and a greater economy:

> Definition of *economic*
> 1a**:** of, relating to, or based on the production, distribution, and consumption of goods and services: *economic* growth
> b**:** of or relating to an economy: a group of *economic* advisers
> c**:** of or relating to economics: *economic* theories

Miriam-Webster Dictionary (2019). (W.A. 15, p. 382.) It also is a generally-recognized synonym for "financial" "fiscal" and "monetary." Thesaurus.com/Dictionary.com (W.A. 16, p. 387); CollinsDictionary.com (W.A. 17, p. 393.) The latter is the approach taken by this state. See, e.g., Plourde Sand & Gravel v. JGI Eastern, Inc., 19 A 2d 1250, 1254 (N.H. 2007)(addressing the scope economic-loss rule and contrasting situations involving the "physical

consequences of negligence" and "purely economic or commercial losses"); Lempke v. Dagenais, 130 NH 782, 784, 790, 792 (1988)(equating "economic loss" with "economic harm," finding that repair costs associated with the defective roof of a residential garage constituted economic loss, noting that "economic policies" relate to "financial risk," and stating that "economic harm" generally is the financial cost to repair or replace a product.); see also State v. Pinault, 120 A. 3d 913, 916 (N.H. 2015)("'Economic loss' is defined as 'out-of-pocket losses or other expenses incurred as a direct result of a criminal offense,' including the 'value of damaged, destroyed, or lost property.' RSA 651:62, III (2007).") Further, the use by this Court in Plourde of the phrase "purely economic or commercial losses" suggests that "economic" means something other than "commercial."

Here, should Plaintiffs prevail against South Street, South Street must pay damages to Plaintiffs. Payment of such damages would be an "economic loss" that "arises from" the alleged deficiency in the subject stairs and ramp. An indemnity action is an attempt to recover an economic loss. Thus, South Street's attempt to recover from Wagner its potential economic loss to Plaintiffs violates RSA 508:4-b.

**2. Statute Does Not Exempt Indemnity nor Contribution Claims**

RSA 508:4-b(1990), which limits exceptions to its application to the four corners of its own text ("Except as otherwise provided in this section . . . ."), does not except contribution nor indemnity claims. It does except the following:

- Sections I and II: Claims re: work not substantially complete 8 years earlier
- Section III: Claims re: work warranted or guaranteed beyond 8 years
- Section V(a): Claims re: fraudulent misrepresentation or concealment
- Section V(b): Claims re: nuclear power, nuclear waste, or hazardous materials

- Section VI: Actions against property owners and others responsible for care and maintenance.

None of these are contribution nor indemnity claims. If the New Hampshire legislature had wished to exclude contribution or indemnity claims, it specifically could have articulated its intent to do so. It did not. The Court should not read into the statute exemptions that the state legislature has not articulated.

### 3. Parties May Avoid Statute via Contract

The South Street / Wagner contract, (W.A. 7, Ex. I, p. 28.), contains no indemnity clause, and the parties could have, but did not, negotiate into their contract an indemnity clause that survived RSA 508:4-b.

> 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.

RSA 508:4-b (III).

> I wrote Section III, and I included both words expressly warranted or guaranteed, because I wanted to make sure that I included both concepts. The purpose is simply to insure that if by contract the two parties to a construction agreement agree to a longer period of [time] guaranteed by the builder or architect, that that longer period, the period longer than [the repose period], then becomes the period in which suit may be brought.
>
> If someone can negotiate in good faith with a building firm or an architect to design a building which includes a warranty for a longer period, they should be allowed to do that and the statute shouldn't stop them from doing that.

(Tr. of Senate Judiciary Comm., HB No. 348, 1/31/90 (comments of Rep. Peter H. Burling)(W.A. 12: Ex. AA) p. 307).) South Street is a sophisticated entity. It and Wagner could have agreed to a warranty/guarantee that exceeded the eight-year

period of RSA 508:4-b and that would have allowed for contribution and/or indemnity claims beyond the eight-year period. They did not.

### 4. Exempting Indemnity and Contribution Claims Frustrates Fundamental Purpose of Statute: To Protect Building Professionals

Exempting indemnity and contribution claims from the statute critically would undermine critically the primary purpose of the statute, i.e., to protect those in the building trades from "an almost infinite period of liability." Big League Entertainment v. Brox Indus., 149 NH 480, 484 (2003)(citing Laws 1990, 164:1).

#### a. Goal of RSA 508:4-b: Protect Building Trades from "Infinite Liability"

The preeminent goal of 508:4-b was, and is, to protect building trades operating in New Hampshire. In fact, this protection was so important that, to the best of Wagner's knowledge, 508:4-b is the only statute of repose in New Hampshire. "We interpret statutes in the context of the overall statutory scheme and not in isolation." Big League at 483. "[S]tatutes of repose . . . extinguish a cause of action after a fixed period of time regardless of when the action accrues, potentially barring a plaintiff's suit before there has been an injury or before the action has arisen. They thereby establish an absolute outer boundary in time within which a claim may be asserted [and] operate as a grant of immunity serving primarily to relieve potential defendants from anxiety over liability for acts committed long ago." Id. "[T]he legislature's intent in enacting [RSA 508:4-b] . . . was to protect the building industry." Ingram v. Drouin, 111 A. 3d 1104, 1109 (N.H. 2015).

> [T]he Supreme Court of Washington found that state's statute of repose for claims arising out of real estate improvements . . . serves the legitimate purposes of (1) limiting the discovery rule and thereby avoiding the placement of too great a burden on defendants involved in the construction trades and (2) preventing plaintiffs from bringing stale claims where evidence might be lost or witnesses might no longer be available. A number of courts also have noted that such statutes serve the legitimate purpose of protecting architects and builders from the potentially unlimited exposure to liability which results from the abandonment of the privity of contract defense. There comes a time when [a construction-improvement] defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when evidence has been lost, memories have faded, and witnesses have disappeared. In addition, several courts 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.
>
> The legislative history of the 1990 version of RSA 508:4-b reflects that, in enacting this statute, members of the general court sought to achieve the same legitimate objectives identified above.

Simpson v. Net Properties Management, No. 01-C-244, 2003 WL 367741 **3-4 (N.H. Superior Ct. (Lynn, J.); Feb. 9, 2003)(W.A. 12, Ex. CC, p. 316)(internal citations omitted).) Indeed, the general court and others in favor of the statute spoke much about protecting the building trades and the consequences of not doing so.

> David N. Page, N.H. Chapter, American Institute of Architects: . . . Spoke to the cost of insurance for architects, even once they retire.
>
> Gary Abbott, Executive Director, Assoc. Gen. Contractors of N.H.: [As to] benefits to the consumer . . . . costs will rise even faster than they will if it isn't passed. (Presumably due to pass-through cause and effect.)

> H. Edmund Bergeron, Consulting Engineers of N.H.: . . . . Stated that he now paid $25,000 per year for insurance with a $15,000 deductible and had never had a claim against his company.

House Comm. Jud., Public Hearing, 9/14/89. (W.A. 12, Ex. DD, p. 318.)

> Currently, an Architect who designs a building in 1989 . . . remains responsible for eternity for the design, etc. . . . even though they have no control over the structure for maintenance, repairs, alternations, use, etc., all of which affect its lifespan and long-term safety. As it stands now, because of no existing statute of repose, an Architect is in effect potentially liable to defend a claim against him for alleged faulty building design forever.
>
> Recently, a senior N.H. Architect getting ready to retire was advised by a retired colleague in another part of the country "Don't be the last one in your firm! I'm carrying a million dollars of insurance still!" The cost of this insurance for a newly-retired, successful single practitioner is prohibitive. . . . In the first two years of my retirement, I might need to pay $50,000 each year to continue my liability insurance for only 5 years!

Testimony of David N. Page, Architect, A.I.A. on House Bill 348-FN; 9/14/89 (W.A. 12: Ex. EE), pp. 322-323.)

> We all know in this litigious environment that we live in that unnecessary and unfounded suits can drive the cost of doing business in this State up unnecessarily. And under the status quo, it is necessary, for example, for architects to carry liability insurance long after they leave the profession, or the dissolve their partnerships. And this really isn't necessary.

Senate Journal, 2/8/90, p. 416, (W.A. 12, Ex. FF, p. 326), comments of Sen. Charles Bass.

**b. Excepting Indemnity and Contribution Claims Undermines RSA 508:4-b**

What South Street proposes would significantly undermine the statute by allowing property owners, property possessors, property managers, and other

entities to bring against building professionals the same claims that RSA 508:4-b bars everyone else from bringing. "Allowing a claim for indemnification under these circumstances would indirectly thwart the intention of the legislature." Gwinnett Place v. Pharr Eng., 215 Ga. App. 53, 55 (1994)(W.A. 12, Ex. GG, p. 328)(finding that contribution claims are barred by Georgia's statute of repose, despite contribution not being specifically mentioned in the subject statute). See also, Facility Construction Management, Inc., v. Ahrens Concrete Floors, Inc., 2010 WL 1265184 (N.D. Ga. 2010)(W.A. 12, Ex. HH, p. 332)(finding the plaintiff's indemnity claim barred by the subject statute of repose concerning claims against building professionals and stating that to do otherwise would allow the plaintiff to "skirt the statute of repose in § 9-3-51 by bringing indemnification or defense claims that are essentially claims for deficient construction."); Nevada Lakeshore Corp. v. Diamond Electricity, Inc., 511 P.2d 113, 114 (Nev. 1973)(W.A. 12, Ex. II, p. 343)(declaring the plaintiff's indemnity claim barred by the subject statute of repose and stating "The statute says, 'No action in tort (or) contract or otherwise... .' We take that inclusive language to include actions in indemnity. To hold otherwise would thwart the purpose of the enactment.").

Here, South Street's position produces absurd results. Exempting indemnification and contribution claims from the statute effectively would destroy the intended protections of the statute and continue to force building professionals to insure their work well beyond eight years after substantial completion of that work. Additionally, it essentially would allow allegedly-injured plaintiffs who cannot directly sue building professionals indirectly to reach those professionals via claims against another party. Any owner, possessor, or manager of real property facing a claim alleging defective construction-design or construction-build - no matter how questionable – would be able to drag into litigation one or more building professionals who may not have provided services for the subject construction element for decades. That would include such

situations as common as slip-and-falls on ice, where plaintiffs frequently claim that ice forms as a result of such things as improperly-erected gutters and walking surfaces having an improper slope.[1] RSA 508:4-b was designed to prevent such situations.

**5. Regarding Counterarguments of South Street**

In opposing Wagner's reliance on the statute in the Superior Court, South Street argued (1) that because the 1990 version of the statute does not specifically mention barring indemnity and contribution claims, like the 1965 version did, it must be "presumed" that the legislature must have intended the latter not to bar indemnity and contribution claims and (2) that other jurisdictions having statutes of repose similar to the 1990 version of RSA 508:4-b have concluded that indemnity and contribution claims are not barred by such statutes. (W.A. 9, p. 3, ¶6; W.A. 10, pp. 9-15.) The first claim is completely unsupported by the legislative record. The second simply is incorrect.

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1 In fact, Plaintiffs' liability expert, Mr. George Melchior, claimed in another recent case that the plaintiff in that matter fell on a patch of ice in a parking lot due, in part, to the allegedly-defective design of both the parking lot and the roof of a building adjacent to the parking lot. Specifically, the roof and lot allegedly did not adequately shed melting snow. Lavoie v. Joe Kelly's Restaurant, Docket Number: 216-2017-CV-40 (NH. Superior Ct., Hillsborough N.). Per South Street's reasoning, the defendant in that matter would be justified in filing third-party claims against the designer and constructor of the lot and building, even if they had performed their work decades ago.

**a. Clear Language of 1990 Version of Statute Bars Examination of 1965 Version of Statute**

Because the words of the current version of the subject statute are unambiguous, the Court cannot, as South Street requests, consider the terms of the prior version of the statute.

> In matters of statutory construction, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. We read words and phrases not in isolation, but in the context of the entire statute and statutory scheme. When the language of a statute is plain and unambiguous, we do not look beyond it for further indications of legislative intent.

Phaneuf at 916.

> We interpret 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*. . . . Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent.

Bank of New York Mellon v. Dowgiert, 145 A.3d, 138, 141 (N.H. 2016) (emphasis added). Here, nothing about RSA 508:4-b (1990) is ambiguous. Although the phrase "economic loss" is a broad one, as addressed above at pages 14-15, it is not an ambiguous one. Claims for indemnification and contribution fit well within the scope of what constitutes a claim for an economic loss. Thus, because the terms of the 1990 statute are clear, examination of the 1965 version of the statute is improper.

**b. No Legislative History Supports "Presumption" of Intent to Except Contribution and Indemnification Claims**

Even if an examination of legislative history were appropriate here, which it is not, South Street's analysis of why "contribution" and "indemnity"

disappeared from the 1990 version of RSA 508:4-b amounts to a self-serving guess.

(1) No Citation to Legislative History

South Street claimed to know for certain the intent of the New Hampshire legislature in eliminating "contribution or indemnity" from the 1965 version of the statute, yet, it provided the lower court no legislative history supporting that allegation. "The scope of the statute as it exists today was circumscribed to eliminate the bar against suits for contribution or indemnity." (W.A. 10, p. 132.) In support of this statement, South Street cited nothing. It provided the lower court no evidence of any kind, including correspondence, a committee note, or a transcript from a legislative hearing that anyone associated with the 1990 amendment intended exempt contribution and indemnity claims exempt from RSA 508:4-b. South Street simply asked the court to "give consideration and effect" to the "historical evolution" of the statute and "confirm" the legislature's intent to allow indemnity and contribution actions to survive the statute of repose. In essence, South Street asked the court to accept its opinion as fact and jump to the same unsupported conclusion that South Street did.

(2) A Better Explanation for Text Change: Broader Application and Simplification of Text

While preparing its trial court briefs, counsel for Wagner spent three days working with state law librarian, Mary Searles, and her staff at the state library and at the state archives looking for legislative history that might provide the reason(s) for the elimination of "contribution and indemnity" from the 1965 version of the statute. We found none. In the spirit of joint speculation, however, Wagner offers its own suggestion for why the legislature omitted that language from the 1990 version of the statute. Perhaps the general court altered the text of

the statute both to simplify the language of and to broaden the scope of the statute. The prior version of the statute did not protect materialmen and laborers (and, for that reason, this Court declared it unconstitutional on equal-protection grounds).[2] The current version does. The prior version of the statute barred actions seeking recovery for "damages for injury to property, real or personal." The current version replaces that simply with "damages to injury to property." The prior version specifically barred actions for "contribution or indemnity." The current version eliminated those terms and added "economic loss," which, as argued above, logically encompasses contribution actions, indemnity actions, and others. Rather than narrow the scope of the statute in 1990, the goal of the amendment clearly was to expand the application of 508:4-b to encompass "all types of claims" against building professionals - an opinion shared and twice recently articulated by this Court[3] -, save for those specifically excepted by the statute itself. See Agus v. Future Chattanooga Development Corporation, 358 F. Supp. 246, 251 (E.D. Tenn. 1973)(W.A. 12, Ex. BB, p. 308)(finding indemnity claims barred by Tennessee's building-improvement statute of repose despite no explicit text within the statute barring indemnity claims and stating "While the legislature arguably might have expressly enumerated each and every type of action which was to be affected by [the statute of repose], the absence of such an enumeration does not serve to limit a statute obviously intended on its face to be all inclusive.")

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2 Henderson Clay Products, Inc., v. Edgar Wood and Assocs., 122 N.H. 800 (1982).

3 See Phaneuf and Ingram, above at pg. 3.

**c. Foreign Decisions Inapposite**

South Street offered the Superior Court a number of foreign decisions that allegedly support its position. (W.A. 10, pp. 142-144.) None of those decisions actually do.

- Ray & Sons Masonry v. USF&G, 114 S.W. 3d 189, 200-03 (Ark. 2003)(W.A. 12, Ex. JJ, p. 346.)

In this matter, an indemnity clause existed in the contract between a project general contractor and the subcontractor. The subject statute of repose barred claims for damages "caused by" deficient construction brought five years post substantial completion. The court permitted the indemnity claim to survive the statute, noting that the subject cause of action was "an alleged breach of the contractual obligation to indemnify. This case is not one based on damages from alleged defective construction." In the present case, no contractual indemnification clause exists. Further, RSA 508:4-b is broader than the Arkansas statute because it at also bars claims for "economic loss" that "arise from" deficient construction.

- South Dearborn School v. Duerstock, 612 N.E. 2d 203, 208-09 (Ind. 1993)(W.A. 12, Ex. KK, p. 357)

As in *Ray & Sons*, the *South Dearborn* court allowed the plaintiff's indemnity claim to survive the subject statute of repose for the same two reasons that do not exist in the present case. First, a contractual indemnity clause existed between the subject parties. No such clause exists in the South Street / Wagner contract. Second, the statute at issue only barred damages for (a) building deficiencies, (b) injuries to real or personal property from same, and (c) personal injury or death from same. The court noted: "[I]n the indemnity action, the damages sought are not for any of the categories of actions covered by the statute. . . . [The] damages could include items, such as [the plaintiff's] expenditures in

defending the Duerstock lawsuit, which do not compensate for any injury to Bradley's person. Thus, the indemnity action falls outside the coverage of the statute of repose." In the present case, RSA 508:4-b bars claims for "economic loss," "arising out of" the alleged defect, of which a plaintiffs' verdict would be one type. Like the Arkansas statute in *Ray &* Sons, the Indiana statute of repose at issue in this decision did not bar claims for economic loss.

- Fredrickson v. Alton M. Johnson Co., 402 N.W.2d 794 (Minn. 1987)(W.A. 12, Ex. LL, p. 364)

This case is irrelevant to the matter before the Court. The Minnesota statute at issue mirrored the pre-1990 version of RSA 508:4-b in that it specifically barred "any action for contribution or indemnity." Thus, the court barred one defendant's indemnity and contribution claims against another defendant. The scenario there is not analogous to the one before this Court.

## G. CONCLUSION

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

## H. STATEMENT ON ORAL ARGUMENT

A notice from Clerk Eileen Fox issued to the parties on 11/28/18 states "Interlocutory transfer without ruling is accepted and will be scheduled for oral argument before the full court." Although Attorney Staar would consider such oral argument a distinct honor, he recognizes here no obvious need for oral argument. Thus, Wagner waives oral argument should the Court desire not to schedule it.

## I. DECISIONS BELOW BEING APPEALED

This does not apply. The questions before the Court have come via interlocutory transfer.

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Date: January 14, 2019

## CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. 2018 Supp. R. 18, I hereby certify that the copy of the foregoing was served on the following counsel of record, all of whom will receive the foregoing via electronic service:

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