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)

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

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Attorney Staar will argue the case.

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(Per Rule 16(5))

A. TABLES OF CASES, STATUTES, AND OTHER AUTHORITIES

B. ARGUMENT

Wagner addresses the following portions of the South Street Brief.

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

South Street first argues as follows:

> 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 principal of *expression unius*, that the Legislature did not bar all other types of claims, including indemnity or contribution claims.

(South Street Brief, p. 19 (emphasis added).) This statement ignores the principle argument in Wagner's Brief, i.e., that indemnity losses are a *type of* economic loss. Further, the presumption that South Street asks the Court to adopt is an extremely substantial one, given (1) the complete absence of any available legislative history suggesting that the Legislature intended to exempt indemnity or contribution claims from the scope of the statute nor (2) how doing so would promote the essential goal of this statute, i.e., to protect building professionals against claims brought more than eight years after a project is completed.

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

Second, South Street states as follows:

> The history of unambiguous language in the 1965 version of RSA 508:4-b explicitly covering indemnity and 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.

(South Street Brief, pp. 21-22 (emphasis added).) First, the best way for the legislature to express this alleged intent would have been specifically to exclude indemnity and contribution claims in Section V of the statute, where the state notes exceptions for fraud, nuclear sites, and hazardous-materials sites. Second, South Street cites no legislative history supporting this alleged intent. Third, if the Legislature wished the statute to be an effective one, i.e., one that allows building professionals generally to stop carrying insurance for a particular project eight years post substantial completion, logic does not support this alleged intention. Finally, the re-drafting of the statute involved a number of changes to the statute. South Street has not articulated why the Legislature added "economic loss" nor any evidence that the Legislature did not intend indemnity and contribution losses to fall under the umbrella of "economic loss."

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

South Street states as follows:

> 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 claims.

(South Street Brief, p. 23.) The fundamental purpose of the statute is to prohibit after eight years "*all actions*" against building professionals "arising out of any deficiency in the creation of an improvement to real property." Presumably, the phrase "all actions" in Section I of the statute really does mean "all actions." Section I does not differentiate between actions arising from contract, tort, another statute, or otherwise. It does not explicitly bar what arguably is the most prominent of all common-law claims, i.e., negligence, yet negligence claims older than eight years not otherwise excepted by the statute clearly are barred.

D. Wagner's Textual Arguments Are Unpersuasive

First, South Street states as follows:

> [A]s 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.

(South Street Brief, p. 23.) South Street's point here is unclear. "Arise. To spring up, originate, to come into being or notice." Black's Law Dictionary (Sixth Ed., 1990), p. 108. The genesis of South Street's claims against Wagner is Plaintiffs' claim that the subject stairs/ramp upon which Mr. Rankin fell were designed improperly. South Street's claims against Wagner did not originate with South Street; they "arose out of" Plaintiff's claims construction-defect claims against South Street.

South Street further argues that a contracted warranty or guaranty negotiated by South Street and Wagner would not aid South Street, specifically stating the following:

> 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 damage for indemnity and/or contribution.

(South Street Brief, p. 24.) Wagner disagrees. Again, any financial loss - including a loss linked to a tort claim against it - that South Street might suffer as a result of Wagner's work proven to be defective and having caused injury to any third party would constitute an economic loss to South Street. If South Street and Wagner had contracted for a guaranty/warranty of the subject work that extended beyond the period covered by the statute, South Street could seek redress against Wagner.

Additionally, putting aside the issue of warranty/guarantee, to the best of Wagner's knowledge, nothing prevented South Street and Wagner from waiving the application of RSA 508:4-b, generally. South Street admits as much: "[T]he 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 . . . ." (South Street Brief, p. 24.)

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

South Street essentially argues that this Court should limit the meaning of the phrase "economic loss" to the definition of "economic loss doctrine." (South Street Brief, pp. 25-26.) The Legislature, however, did not place the phrase "economic loss doctrine" in the subject statute. It used the broader term "economic loss." Further, no rational reason is apparent for limiting the coverage of the statute to damages recoverable under economic-loss-doctrine. The goal of the statute is to protect building professionals and allow those professionals, in most cases, to cease carrying insurance for a particular project beyond eight years after the date of substantial completion. Interpreting "economic loss" in the narrow way that South Street does directly counters that goal.

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

South Street states the following:

> 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 damage for breach of the express and/or implied duty to indemnify arise from contract, not deficiencies in the creation of improvements to real property.

(South Street Brief, pp. 27.) This appears to be the same argument appearing in Section I(D) of South Street's Brief, and South Street's definition of "arise from" is tortured. RSA 508:4-b is expansive. It applies to "all actions to recover damages . . . arising out of any deficiency in the creation of an improvement to real property." The point of origin for South Street's claims against Wagner is Plaintiffs' construction-defect claim against South Street. Without Plaintiffs' claim, South Street would have brought no claim against Wagner. South Street's claims against Wagner did not "arise from" themselves.

As for the foreign decisions cited by South Street, (South Street Brief, pp. 28-30), Wagner addressed them in its original brief. All are distinguishable from the present matter.

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

South Street's public-policy arguments, (South Street Brief, pp. 31-36), including that Wagner's approach leaves property owners "holding the bag," are misplaced. They are better brought before the state Legislature. To protect the building trades within New Hampshire, the Legislature has decided to issue special protection to those trades. Further, Section VI of the statute makes clear

the Legislature's intent to hold property owners responsible for the acts of building professionals: "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. . . ." Further, to protect themselves against a variety of risks, as a practical matter, property owners will maintain insurance on their real property for as long as they own the property. Building professionals' exposure, however, arguably increases with every project that they are a part of, and, without protection from RSA 508:4-b, they would suffer exposure arising from all such projects well after they ceased to have any ongoing connection with those projects.

South Street also argues that building professionals are not at "significantly increase[d]" liability risk beyond the eight-year period proscribed by RSA 508:4-b. (South Street Brief, p. 33.) This argument misses the point. The chance of one getting into an auto accident also are relatively slim, yet the financial effects of one can be devastating. For that reason, most drivers carry auto insurance. Similarly, many building professionals carry insurance. As noted in Wagner's original brief, the Legislature was very concerned about the enormous insurance-related financial burden placed on building professionals. South Street seems to ask such professionals to play roulette, not carry such insurance, cross their fingers, and hope that they are not made party to a building-defect suit more than eight years after parting ways with a particular project. South Street further states "Any financial burden placed on design professionals forced to secure extended coverage would ultimately be passed off to the customer (e.g., property owners)." (South Street Brief, p. 34.) Again, as noted in the legislative history of this statute, legislators mentioned that architects, in particular, were maintaining insurance well into retirement, when no new customers existed to offset the cost of that insurance.

C. CONCLUSION

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

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Date: March 6, 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 on this 6th day of March 2019:

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