COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13685

SUFFOLK COUNTY.

Trustees of Boston University

Plaintiff/Appellant

v.

Clough, Harbour & Associates LLP

Defendant/Appellee

On Appeal from a Judgment of the Superior Court

C.A No. 2084-cv-01405

BRIEF OF AMICUS CURIAE

AMERICAN COUNCIL OF ENGINEERING COMPANIES OF MASSACHUSETTS

This Amicus Curiae Brief is filed in support of the Appellees, Clough Harbor & Associates LLP

Dated: January 13, 2025

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, American Council of Engineering Companies of Massachusetts ("Amicus" or "ACEC/MA"), makes the following disclosure pursuant to Supreme Court Rule 1:21:

ACEC/MA is a non-profit, 501(c)(6) organization with no parent corporations. No publicly held corporation owns 10% or more of its stock.

DECLARATION AS TO AUTHORSHIP AND SPONSORSHIP

Pursuant to Mass. R. App. P. 17 (c)(5), *Amicus* states that:

(A) no party or party's counsel authored this brief in whole or in part; and

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; nor did any other person or entity contribute money intended to fund its preparation or submission.

Pursuant to Mass. R. App. P. 17 (c)(5)(C), *Amicus* states that undersigned counsel does not presently represent any of the parties to this appeal, or in any other appeal or transaction involving the matters at issue herein. *Amicus* further states that Eric Howard, then a partner of Donovan Hatem LLP, previously represented Defendant/Appellee, Clough, Harbour & Associates LLP ("CHA") in the underlying proceedings in the Superior Court. Since February 2024, CHA has been represented by Attorney Howard and the law firm of Gordon Rees Scully Mansukhani LLP. Donovan Hatem LLP has had no further involvement in this matter since that time. Undersigned counsel states further that on August 1, 2024, Donovan Hatem LLP was acquired by Manning Gross + Massenburg LLP ("MG+M-The Law Firm"). MG+M-The Law Firm is counsel of record for the *Amicus*.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

ACEC/MA is the business association of the Massachusetts engineering industry and represents over one hundred and twenty (120) independent engineering, architectural and land surveying companies operating in the Commonwealth.

ACEC/MA members are frequently engaged to provide professional services in connection with improvements to real property and enter into contractual indemnification agreements pertaining to those services. They are also one of the classes of persons whom the Legislature determined are entitled to protection from claims by property owners or others that are not asserted within the 6-year repose period prescribed by G.L. c. 260, § 2B. ACEC/MA members therefore have a direct interest in the issue presented on this appeal.

ACEC/MA respectfully requests that the Supreme Judicial Court take the opportunity presented by this appeal to confirm whether, and in what circumstances, a contractual indemnification claim sounds in tort and is therefore subject to the application of the statute of repose. This clarification will ensure that design professionals are protected, as intended, by the statute of repose prescribed in G.L. c. 260, § 2B. It will also encourage design professionals to continue providing services in the Commonwealth by elucidating the risks

and potential liabilities attendant to such services and related contractual indemnification obligations.

STATEMENT OF THE ISSUES

In an announcement dated October 23, 2024, the Supreme Judicial Court notified interested parties that it was seeking Amicus Briefs on the following issue:

> Whether, in ruling on the defendant's renewed motion for summary judgment following the Appeals Court's unpublished decision in University of Mass. Bldg. Auth. v. Adams Plumbing & Heating, Inc., 102 Mass. App. Ct. 1107 (2023), the motion judge erred in concluding that the plaintiffs' contractual indemnification claim sounds in tort and is therefore barred by the six-year statute of repose applicable to tort claims, G. L. c. 260, § 2B.

ARGUMENT

This appeal raises an important issue that impacts all design professionals who offer services in the Commonwealth related to the design, planning, construction or general administration of improvements to real property and who typically are requested or advised to enter into contractual indemnification agreements concerning the performance of those services. ACEC/MA supports and adopts the following propositions asserted by CHA in the Superior Court: (1) the contractual indemnification claim at issue in this appeal is subject to the 6-year statute of repose, as set forth in G.L.c.260, § 2B; (2) the Court should adopt the reasoning of the Appeals Court in the unpublished decision, University of Mass. Bldg. Auth. v. Adams Plumbing & Heating, Inc., 102 Mass. App. Ct. 1107 (2023), on which the Superior Court relied in dismissing the Owner/ Appellant Trustees of Boston University's ("BU") contractual indemnification claim; and (3) if BU's tort claim, disguised as a contract claim, were allowed to proceed to trial, this would subvert and circumvent the purpose and intent of the statute of repose, and undermine the contractual risk allocation terms of the agreement between the Owner and the Architect.

Consistent with these positions, ACEC/MA respectfully requests that this Court, consistent with the legislative intent and purpose of the statute of repose, provide a clear, predictable guideline for the application of the statute to claims nominally characterized as contract claims, but which are in essence tort-based claims. Such a holding will allow professional service firms to fairly and predictably assess and allocate risks when entering into agreements to provide professional services. The statute of repose is intended to provide just such a bright line to bar liability after the statutory period expires; this bright line should not be blurred or eradicated by allowing litigants to recast negligence or other tort-based claims as contract claims in order to circumvent the clear purpose, intent and applicability of G.L. c. 260, § 2B.

The Court's decision in this matter is of paramount importance to ACEC/MA members who, through ACEC/MA, encourage the Court to adopt the rule set forth in University of Mass. Bldg. Auth., supra, 102 Mass. App. Ct. 1107, that when, as here, a contractual indemnification claim sounds in tort and is pursued under a negligence or other tort-based indemnification provision, it cannot be brought after expiration of the 6-year repose period.

I. The Contractual Indemnification Clause At Issue Incorporates A Negligence Standard And Is Therefore Subject To The Statute Of Repose.

The statute of repose provides, in relevant part, as follows:

> Action[s] of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; ***provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.***

(emphasis added). G.L.c.260, § 2B pertains to "action[s] of tort," i.e., not to claims for breach of contract. The central issue on this appeal is whether BU's claim for contractual indemnification is time barred under G.L.c.260, § 2B because it is, in essence, an action of tort, actual or potential.

In the foundational case of Klein v. Catalano, the Court made clear that the scope of the statute of repose's applicability encompasses all tort-based claims, not only claims that are pled as torts. 386 Mass. 701, 719-720(1982). The Court in reaffirming this fundamental principle stated that, "[a] plaintiff may not, of course, escape the consequences of a statute of repose or statute of limitations on tort actions merely by labelling the claim as contractual. The court must

look to the 'gist of the action.'" Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 823 (1986). In making this determination, "a key difference between an action in tort and an action in contract is that the latter, 'the standard of performance is set by the defendants' promises, rather than imposed by law.'" Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 355 (2018), quoting Anthony's Pier Four, Inc., supra, 396 Mass. at 822.

The facts in the present matter involve an indemnification provision in an owner-architect agreement between the Owner/Appellant Boston University and the Architect/Appellee Clough Harbor & Associates. The Owner, BU, alleged that CHA's design was negligent, resulting in the formation of depressions over time in a turf field constructed at the university, and the necessity to repair the field, causing damages. (Addendum, p.24-25). Section 10.10 of the BU-CHA contract states as follows:

> To the fullest extent permitted by law, [CHA] shall indemnify and hold [BU] harmless from and against any and all claims, demands, liabilities, actions, causes of action and expenses, including, but not limited to, reasonable attorney's fees, ***to the extent caused by [CHA's] failure to meet its obligations under this Agreement or by the negligence of [CHA].*** **(emphasis added)** (Add., p.24)

The "gist of [BU's] action" clearly sounds in tort, despite the Owner's attempt to label the claim as one for breach of contract based on the indemnification clause of the Owner-

Architect agreement. Indeed, the only reasonable interpretation of the indemnity provision is that the architect's obligations are ***not*** "set by [its] promises," but rather are imposed by law, namely whether the architect complied with the applicable standard of care. Thus, the nature of the cause of action, regardless of its label, is grounded in tort. See Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Engineers, Inc., 45 Mass. App. Ct. 120, 124 (1998) (contractual claim of implied warranty was in reality a tort claim for professional malpractice barred by the statute of limitations under G.L.c.260 § 2B). Similarly, the damages purportedly caused by the depressions in the turf field do not constitute a breach of a contractual promise, but rather arise from a violation of the applicable standard of care for similarly situated professionals, a negligence-based concept. See e.g., Hendrickson v. Sears, 365 Mass. 83, 84-87 (1974) (court should disregard labels in discerning the essence, or "gist" of the claim).

In its brief, BU argues that the statute of repose does not apply under Anthony's Pier Four. In that case, the Court ruled that a claim for breach of express warranty was not barred by the statute of repose. The Court described the distinction between express warranties and negligence as follows:

> A claim for breach of express warranty differs, however, from a negligence claim because the plaintiff must

> demonstrate that the defendant promised a specific result … Here the plaintiff alleges that the defendants promised that the mooring system would be sufficient and adequate to keep the Stuyvesant permanently moored under expected wind and tidal conditions. This promise, if given, imposes a higher duty on the defendants than the implied promise that in designing the mooring system they would exercise that standard of reasonable care required of members of [their] profession.

396 Mass. at 823.

Unlike the present matter, the contractual provision and the allegations at issue in Anthony's Pier Four "expressly warranted that the cradle and mooring system was 'reasonably fit for the purpose of keeping the S.S. Peter Stuyvesant stable, intact, and permanently attached to the solid filled pier.'" Id. at 826. That promise was in the nature of a warranty. In comparison, CHA's agreement to "indemnify and hold [BU] harmless," is premised on the architect's failure to meet its obligations under the Agreement, i.e., a negligence standard. There is no heightened standard imposing a higher duty on the architect. While the alleged damage to the turf field may form the basis for a negligence claim, it does not elevate the architect's obligation to one of express warranty or create a contractual cause of action.

BU further argues incorrectly that Gomes v. Pan Am. Assocs., 406 Mass. 647, 647 (1990), controls in determining the application of the statute of repose. The Superior Court below disagreed, stating correctly:

> … the indemnification provision in *Gomes* was not limited to injuries arising from the contractor's *negligent* performance of its work. The provision encompassed *any* injury arising from *any* work under the contract, whether that work had been performed negligently or not. The breadth of the indemnification provision at issue in *Gomes*, coupled with the SJC's description of its holding as applicable to actions 'founded on an indemnification agreement *of the type in this case*,' id at 648 (emphasis added), undercuts BU's characterization of the decision as categorically barring application of the tort statue of repose to any contractual indemnification claim whatsoever, even claims predicated exclusively on tort standards of care. The Court does not read *Gomes* to sweep so broadly. Trustees of Boston University vs. Clough Harbour & Associates, LLP, Mass. Super. Ct., No. 2084CV01405, at 9(Suffolk County May 8, 2024);(Add., p.30)

Thus, the Superior Court properly determined that the contract did not contain any language that would impose a higher standard than the ordinary duty, even though the contract contained a contractual provision providing for indemnity *in the event the architect were determined to be negligent*. In Univ. of Massachusetts Bldg. Auth. (hereinafter "UMass"), the Appeals Court noted, "it has long been held that claims for breach of express warranty are not barred by the statute of repose because they require proof that the defendant guaranteed a heightened level of workmanship, and in that way differ from claims for negligence." 102 Mass. App. Ct. 1107 at * 2.

As in UMass, BU "relies on general contract provisions that set forth the nature of the work to be completed and that required nothing more than compliance with the implied duty of

reasonable care." Id. at *3. On this basis, the court in UMass correctly distinguished the circumstances presented in Gomes: "Here, unlike in Gomes, there was no injury separate and distinct from the shoddy work, and the issue was whether the defendants were negligent. That is precisely the sort of claim that the statute of repose bars, whether asserted as a claim for negligence, indemnification, or something else. (citations omitted). We conclude that UMass may not escape the consequences of the statute of repose by recasting its negligence claims as indemnification claims." Id. at *4. The same result should apply here.

In sum, as a matter of law, BU cannot demonstrate that CHA's obligation to "defend and indemnify" is anything more than an agreement by the architect that its professional services will be governed by the applicable standard of care. The indemnification provision does not transform or, much less, elevate this tort-based obligation into a contractual or warranty obligation. Moreover, because the indemnification provision does not establish any obligation other than a reasonable standard of care, rooted in the tort-based concept of negligence, it is subject to the statue of repose. Therefore, consistent with the statute's purpose and intent, the Court must uphold the lower court's holding that BU is barred from pursuing

these claims by the 6-year limitations period of G.L. c. 260, § 2B.

II. The Clear Legislative Intent Of The Statute Of Repose Is to Establish An Outer Time Limit for Tort-Based Claims Such As Those At Issue Here.

Massachusetts courts have long recognized the legislative intent of G.L. c. 260, § 2B is to strike "a reasonable balance between the public's right to a remedy and the need to place an outer limit on the tort liability of those involved in construction." Klein, 386 Mass. at 710. Upholding this principle, this Court has found in similar disputes that the statute of repose applies when tort claims are asserted nominally as contractual claims for the purposes of circumventing the time bar of the statute. See McDonough v. Marr Scaffolding Co., 412 Mass. 636, 642-643 (1992) (rejecting attempt to recast a negligence claim by using a warranty label because it would defeat the purpose of G.L.c.260, § 2B). The statute of repose reflects the legislature's public policy purpose of providing reasonable guideposts which permit the construction industry to reasonably predict, assess, and undertake risks in the design and construction process. Reinforcing this notion, this Court has explained, "[t]he Legislature therefore 'placed an absolute outer limit on the duration of this liability.' The statute thus protects contractors from claims arising long after the completion of

their work." Bridgwood, 480 Mass. at 353 (internal citations omitted).

BU's attempt to avoid the time bar of the statute of repose by asserting an indemnification claim more than six (6) years after the project was substantially completed must be rejected. In Bridgwood, this Court ruled that a negligence claim disguised as a G. L. c. 93A claim could not circumvent the statute of repose. Id. at 358. The Court held, "it sounds in tort and, having been commenced well beyond the six-year deadline, is barred by Ch. 260, § 2B. Were we to hold otherwise, no contractor would ever be able to 'put a project to rest.'" Id. at 356. Likewise, in this matter, BU's indemnification claim sounds in tort and was commenced more than 6 years after substantial completion. This Court should affirm the grant of summary judgment by the Superior Court.

CONCLUSION

The six-year statute of repose applies to bar the Owner's claim of indemnification in this matter. The indemnification clause is rooted in tort-based liability and contains no language that heightens the standard of care beyond mere negligence. The Legislature has enacted a six-year outside time limit for bringing claims of negligence arising out of improvements to real property for legitimate public policy reasons. Stearns v. Metro. Life Ins. Co., 481 Mass. 529, 538

(2019). Design professionals are entitled to the benefit of this bright line rule, so that they can appropriately assess their potential risks in providing services in connection with improvements to real property. If the Court were to allow claims to be brought outside the statue of repose timeframe established by the Legislature, it would create serious consequences of open-ended liability for design professionals in violation of the legislative purpose of the statute of repose. Therefore, this Court should uphold the grant of summary judgment to CHA and adopt the rule set forth by the Appeals Court in the UMass decision.

Respectfully submitted,
Amicus Curiae
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Dated: January 13, 2025

CERTIFICATE OF COMPLIANCE

I, Jon C. Cowen, counsel for the Amicus Curiae, ACEC/MA, hereby certify pursuant to Mass. R. App. P. 17(c)(9) that this Brief complies with the requirements of Mass. R. App. P. 17 (Amicus Curiae briefs), and with Mass. R. App. P. 20 (form of briefs, appendices, and other papers), and that compliance with the length limit of Rule 20(a)(3)(E) was ascertained by using the monospace font, Courier New, size 12, with the 2951 of non-excluded words, using Microsoft Word for Office 365.

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CERTIFICATE OF SERVICE

I, Dillon Aisenberg, counsel for the Amicus Curiae, ACEC/MA, certify that on January 13, 2025, I filed the within Brief of the Amicus Curiae, The American Council of Engineering Companies of Massachusetts, with the Electronic Filing Service Provider, Tyler Technologies, for electronic service, and provided electronic copies through email to the counsel of record for the Appellant and Appellee as follows:

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ADDENDUM

NOTIFY notified by email 8 May 2024 (emh)

24

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 2084CV01405

TRUSTEES OF BOSTON UNIVERSITY

v.

CLOUGH HARBOUR & ASSOCIATES, LLP

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

This action arises from the design and construction of a parking garage and synthetic turf field on the campus of Boston University (the "Project"). Plaintiff Trustees of Boston University ("BU") allege that Defendant Clough Harbour & Associates, LLP ("CHA"), which designed the field and subterranean garage, failed sufficiently to account for the impact that movement of the garage ceiling's expansion joists would have on the field above it. Based on numerous problems with the field allegedly caused by such movement, BU filed this lawsuit against CHA, asserting claims for Contract Indemnification (Count I), Negligence (Count II), and Breach of Contract (Count III).

In a Memorandum of Decision and Order dated April 28, 2022 (the "Decision"), the Court (Roach, J.) (now retired) granted summary judgment to CHA on Counts II and III of the Complaint, after determining that both counts were subject to and barred by the statute of repose applicable to tort actions. *See* G.L. c. 260, § 2B. Judge Roach denied summary judgment, however, on BU's indemnification claim (Count I), citing *Gomes v. Pan American Associates*,

406 Mass. 647 (1990) (hereafter, *Gomes*) as precluding application of the tort statute of repose to contractual indemnification claims.

Approximately nine months later, the Appeals Court issued its decision in *University of Massachusetts Bldg. Authority v. Adams Plumbing and Heating, Inc.*, 102 Mass. App. Ct. 1107, 2023 WL 307432 (Jan. 19, 2023) (Rule 23.0 summary disposition) (hereafter, *UMass*). In *UMass*, after discussing and distinguishing *Gomes*, the Appeals Court held that the plaintiff's contractual indemnification claims sounded in negligence and were therefore subject to the tort statute of repose. *Id.* at *3-4. Based on that reasoning, the Appeals Court affirmed the trial court's grant of summary judgment to defendants on those claims.

Subsequent to the Appeals Court's decision in *UMass*, CHA filed a renewed motion for summary judgment in this action, arguing that, as in *UMass*, BU's indemnification claim sounds in tort and is therefore barred by the statute of repose.[1] BU opposes, contending that: (1) Judge Roach's denial of summary judgment on Count 1 constitutes the "law of the case" and cannot be revisited absent new controlling precedent or a finding that it was "clearly erroneous," and (2) the Appeals Court's decision in *UMass* satisfies neither criteria: as a Rule 23.0 disposition, it is

[1] The procedural history of this case between the date of Judge Roach's April 2022 summary judgment decision and the date of the Appeals Court's January 2023 decision in *UMass* is actually more involved. On June 10, 2022, CHA filed a petition with the Appeals Court seeking interlocutory review of Judge Roach's summary judgment decision pursuant to G.L. c. 231, § 118. The Appeals Court denied that petition. On June 21, 2022, CHA filed a motion with Judge Roach asking that she reconsider her summary judgment decision. Judge Roach denied that request. On March 27, 2023, after the Appeals Court issued its decision in *UMass*, CHA filed a motion (in which BU joined) asking the Court to report Judge Roach's summary judgment decision to the Appeals Court under Mass. R. Civ. P. 64(a). In light of Judge Roach's retirement, the motion went to a different Superior Court judge, who denied it as not satisfying the standards warranting reports under Rule 64(a). CHA then filed the renewed motion for summary judgment that is the subject of this decision.

not binding precedent; and its reasoning (according to BU) is flawed and therefore does not support revisiting or reversing Judge Roach's prior denial of summary judgment on Count I.

Following review of the parties' written submissions, and after hearing, the Court hereby **ALLOWS** CHA's renewed motion for the reasons set forth below.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The relevant facts and procedural history of this case, as they pertain to the issue presented to the Court for decision, are not in dispute:

On June 25, 2012, CHA entered into a contract with BU (the "Design Contract") to design the above-referenced garage and turf field (hereafter, the "Project").[2] The garage and turf field were subsequently constructed, and the field hosted its first game on August 31, 2013.

By letter dated September 6, 2017, BU notified CHA that since the Project's completion, BU had experienced numerous problems with the field, including physical depressions along the garage's expansion joints. BU demanded that CHA compensate it for the expenses associated with remedying the issues. When CHA declined to do so, BU filed this lawsuit on July 20, 2020.

Count I of the Complaint alleged breach of the Design Contract's indemnification provision, § 10.10, which stated:

> To the fullest extent permitted by law, [CHA] shall indemnify and hold [BU] harmless from and against any and all claims, demands, liabilities, actions, causes of action and expenses, including, but not limited to, reasonable attorney's fees, *to the extent caused by [CHA's] failure to meet its obligations under this agreement or by the negligence of [CHA].* (emphasis added).

[2] The Decision contained supporting citations to the Statement of Undisputed Facts that accompanied CHA's original Rule 56 motion. The Court does not repeat those citations here.

Count II of the Complaint alleged negligence and asserted that the damages BU had suffered from the physical depressions and instability in the field were caused by CHA's professional negligence.

Count III of the Complaint alleged breach of contract. BU asserted that CHA had breached its obligations under Section 2.2 of the Design Contract, which required CHA "to perform its services consistent with the professional skill and care ordinarily provided by architects specializing in projects of similar size, scope, and complexity." BU also alleged that CHA had violated Section 3.6.1.2 of the Design Contract, which provided that CHA would be "responsible for [its own] negligent acts or omissions."

In the Decision, Judge Roach concluded that BU's negligence claim – because it was filed nearly 7 years after the garage and field opened for use – was barred by the tort statute of repose. That statute provides in pertinent part that "tort [actions] for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property... in no event... shall be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." G.L. c. 260, § 2B. Decision at 2-3.

Judge Roach also concluded that BU's breach of contract claim was barred by the same statute of repose, because although styled as a contract claim, the "gist of the action" sounded in tort. Judge Roach based the latter determination on the language of the contractual provisions at issue, which made CHA liable "for [its own] negligent acts or omissions" (Section 3.6.1.2) as well as for any failure "to perform its services consistent with the professional skill and care ordinarily provided by architects specializing in projects of similar size, scope, and complexity."

(Section 2.2). Because these provisions did not impose any obligation on CHA beyond the generally accepted common law standard of care that would apply to professionals on comparable projects, and because BU's breach of contract claim accordingly centered on the allegation that CHA had "performed its contracted task negligently", Judge Roach concluded that the "gist" of the claim sounded in tort and was therefore subject to the statute of repose. Decision at 3-4. *See, e.g., Anthony's Pier Four, Inc. v. Crandall Dry Dock Engrs., Inc.*, 396 Mass. 818, 823 (1986) ("A plaintiff may not . . . escape the consequences of a statute of repose . . . on tort actions merely by labelling the claim as contractual. The court must look to the 'gist of the action.'") (internal quotation and citation omitted); *see also Bridgwood v. A.J. Wood Constr., Inc.*, 480 Mass. 349, 354 (2018) ("Where a claim does not obviously sound in tort, we have examined the nature of the underlying action to determine whether a statute of repose applies.").

Judge Roach reached a different conclusion with respect to BU's indemnification claim, which alleged breach of the Design Contract's indemnification provision, as excerpted at p. 3, above. Citing the SJC's decision in *Gomes*, as well as various trial court decisions, Judge Roach held that the tort statute of repose does not apply to contractual indemnification claims, which she concluded arise from contractual obligations separate and apart from the tort duty of care.

As noted above, subsequent to Judge Roach's summary judgment decision, the Appeals Court issued its decision in *UMass*. Distinguishing *Gomes*, and concluding that the tort statute of repose did apply to the contractual indemnification claims before it because the claims, at bottom, sounded in negligence, the Appeals Court affirmed the dismissal of the plaintiff's contract and indemnification claims as barred by repose. *UMass*, 102 Mass. App. Ct. 1107, at *3-4.

In its renewed motion, CHA contends that the reasoning of *UMass* applies equally to BU's indemnification claim here, necessitating the conclusion that Count I – like Counts II and III – is barred by the statute of repose. BU disagrees. It argues that Judge Roach's prior denial of summary judgment on Count I is the "law of the case," and that the Appeals Court's decision in *UMass* is neither binding nor persuasive. Although BU is correct that *UMass,* as a Rule 23.0 disposition, is not binding, the Court is unpersuaded by BU's other arguments.

DISCUSSION

I. Law of the Case

The Court does not agree that Judge Roach's initial denial of summary judgment on Count I constitutes "law of the case." That doctrine stands for the proposition that "[a]n issue once decided should not be reopened." *King v. Driscoll*, 424 Mass. 1, 8 (1996) (internal quotation and citation omitted). The doctrine applies, however, to the "reconsideration of questions previously decided on appeal, not to reconsideration of questions previously decided in a motion decision." *Winchester Gables, Inc. v. Host Marriott Corp.*, 70 Mass. App. Ct. 585, 593 (2007); *see also Goulet v. Whitin Mach. Works, Inc.*, 399 Mass. 547, 554 (1987) (trial judge not precluded from deciding anew pretrial judge's denial of a motion to amend a complaint). Moreover, the doctrine "is permissive and not mandatory." *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 413 n.19 (2000). CHA's renewed motion for summary judgment accordingly does not implicate the "law of the case" doctrine.

Whether the doctrine applies to CHA's motion or not, this Court is mindful of the respect properly accorded decisions rendered by prior judges in a matter. The Court also is cognizant of the potential for undesirable repercussions should litigants view the rotation of a new judge into a session as an invitation to renew motions previously lost. Against that

backdrop, however, it cannot be gainsaid that the Appeals Court's decision in *UMass* constitutes a new opinion that sheds clarifying (albeit nonbinding) light on a legal issue central to the viability of BU's contractual indemnification claim. Although Judge Roach did not have the benefit of that appellate decision, this Court now does. The Court accordingly turns to the merits of CHA's renewed motion.

II. The Statute of Repose

The Court begins with a noncontroversial proposition – that under the controlling law in the Commonwealth, a non-tort claim can be subject to the tort statute of repose if the "gist of the action" sounds in negligence. Put differently, a party cannot circumvent – and thereby defeat – the statute of repose by styling what is, in essence, a tort claim as something different, including, for example, labelling it a contract claim. *See, e.g., Anthony's Pier Four, Inc. v. Crandall Dry Dock Engrs., Inc.*, 396 Mass. 818, 823 (1986) ("A plaintiff may not, of course, escape the consequences of a statute of repose or statute of limitations on tort actions merely by labelling the claim as contractual. The court must look to the 'gist of the action.'"); *see also Bridgwood v. A.J. Wood Constr., Inc.*, 480 Mass. 349, 354 (2018) ("Where a claim does not obviously sound in tort, we have examined the nature of the underlying action to determine whether a statute of repose applies.").

The parties do not dispute the foregoing principle. In fact, that principle constituted the basis for Judge Roach's grant of summary judgment to CHA on BU's breach of contract claim. After examining the plain language of the contractual provisions CHA allegedly had breached, Judge Roach concluded that those provisions imposed only an obligation for CHA to comply with the professional standards of care applicable to architects on comparable projects. Because those standards are identical to those that would ground a negligence claim, Judge Roach

concluded that BU's contract claim was subject to the tort statute of repose. Decision at 4 (citing *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 395-396 (2003) ("Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort.") (internal quotations and citations omitted); *see also Jordan's Furniture, Inc. v. Carter & Burgess, Inc.*, 92 Mass. App. Ct. 1102, 2017 WL 3393465, *3 (2017) (summary disposition) (breach of contract and express warranty claims were duplicative of negligence claim where "[p]er the terms of the agreement, [defendant] agreed that it would exercise the standard of care required of its profession, no more, no less.").

In its renewed motion, CHA maintains that the same principle applies to BU's contractual indemnification claim. If the latter claim, at bottom, is based on a negligence theory, CHA argues that it, too, is subject to the statute of repose. According to CHA, that, in substance, is what the Appeals Court held in *UMass*. *See UMass*, 102 Mass. App. Ct. 1107, at *4.

BU disagrees and contends that the tort statute of repose cannot, under any circumstances, apply to contractual indemnification claims. It proffers two reasons in support. First, BU argues that such claims, by definition, are creatures of contract; they do not sound in tort and thus can never be subject to the statute of repose. The weakness in BU's argument is that breach of contract claims also, by definition, are creatures of contract. And yet, as discussed above, the law is clear that they are subject to the tort statute of repose if the theory of breach is failure to comply with a negligence standard of care. BU has advanced no principled reason why contractual indemnification claims should be treated differently.

Second, BU cites several cases, including *Gomes*, that BU contends treat indemnification claims differently and hold that such claims can never be subject to the tort statute of repose. A

close examination of the authority cited by BU, however, shows that the cases it cites neither discussed nor decided that issue in the sweeping manner that BU suggests.

For example, *Gomes* – on which BU leans heavily – addressed a contractual provision that imposed an obligation to indemnify encompassing more than just negligence-based claims. The provision in *Gomes* required the Contractor to indemnify for any injury "arising or resulting from the work provided for or performed under the contract, *or from* any actual or alleged act, omission or negligence of the Contractor, subcontractors and its or their agents or employees." *Gomes*, 406 Mass. at 648 n.1 (emphasis added). Comparison of the language before and after the italics makes clear that the indemnification provision in *Gomes* was not limited to injuries arising from the contractor's *negligent* performance of its work. The provision encompassed *any* injury arising from *any* work under the contract, whether that work had been performed negligently or not. The breadth of the indemnification provision at issue in *Gomes*, coupled with the SJC's description of its holding as applicable to actions "founded on an indemnification agreement *of the type in this case*," *id.* at 648 (emphasis added), undercuts BU's characterization of the decision as categorically barring application of the tort statute of repose to any contractual indemnification claim whatsoever, even claims predicated exclusively on tort standards of care. The Court does not read *Gomes* to sweep so broadly.

The same is true for the other cases BU cites in its brief. Opposition at 12. The Court has found no language in any of the cited decisions explicitly addressing – much less deciding – whether the tort statute of repose applies to contractual indemnification claims that are predicated exclusively on tort standards of care. As with *Gomes*, where these decisions reproduced the indemnification language at issue, examination of the language demonstrates that the provisions were worded more broadly than the provision before the Court here. *See A.C.*

Moore Arts & Crafts, Inc. v. Fellsway Plaza, LP, 2007 WL 3260987, at *2 (Mass. Super. Oct. 9, 2007) (indemnification provision encompassed, *inter alia*, "any and all claims . . . directly or indirectly arising or alleged to arise out of the performance of or the failure to perform the Work, or the conditions of the Work, the job site, adjoining land or driveways, or streets or alleys used in connection with the performance of the Work, and from any and all claims by workmen, suppliers or subcontractors who are involved in the performance of the Work"); *Lennar Northeast Properties, Inc. v. Barton Partners Architects Planners Inc.*, 2021 WL 1195629, at *1 (D. Mass. Mar. 30, 2021) (indemnification obligation encompassed "any damage, injury, loss, liability or expense . . . incurred by Contractor as a direct or indirect result of the Work")). Whether for that reason, or for other reasons, none of the decisions cited by BU – all of which predated *UMass* – squarely address the issue presented to this Court by CHA's renewed motion for summary judgment.

By contrast, *UMass* does address that issue, and its reasoning – even though not binding – persuasively supports CHA's position. The Appeals Court began its analysis with the well-established proposition – already discussed above – that the applicability of the tort statute of repose does not turn on the label assigned to a claim but rather on the underlying theory of liability. Where that theory is negligence-based, the manner in which a claim is styled cannot and does not exempt it from the statute. *UMass*, 102 Mass. App. Ct. 1107, at *1. BU does not contest the applicability of that principle to breach of contract claims. In *UMass*, the Appeals Court determined that the principle applies equally to contractual indemnification claims. *Id.* at *3-4. This Court agrees.

Application of that principle here compels the allowance of CHS's renewed motion for summary judgment on Count I. The plain language of the indemnification provision in the

parties' Design Contract makes clear that CHA's obligation to indemnify extends only to claims arising out of CHA's "failure to meet its obligations under this agreement or by the negligence of [CHA]." As Judge Roach determined, however, the only obligation the Design Contract imposed on CHA was the obligation to comply with the standard of care applicable to professionals on comparable projects. The obligation, in other words, is defined by tort standards.

It follows that CHA's contractual indemnification obligation likewise sounds exclusively in tort. If the Design Contract only obligates CHA to indemnify BU for claims arising out of a contractual breach, and if the Design Contract defines breach as failure to comply with industry standards of care, the ineluctable conclusion is that CHA's contractual indemnification obligations are defined exclusively by tort standards. In other words, although labelled a claim for contractual indemnification, the "gist of the action" – under the Design Contract's express terms – sounds in tort. The statute of repose accordingly applies. *See UMass*, 102 Mass. App. Ct. 1107, at *4 (finding plaintiff's indemnification claim subject to the tort statute of repose because the issue underlying the claim "was whether the defendants were negligent" and "[t]hat is precisely the sort of claim that the statute of repose bars, whether asserted as a claim for negligence, indemnification, or something else"),

BU launches two final salvos in an effort to forestall the foregoing conclusion. It first contends that any such determination "essentially would rewrite the statute of repose, which says nothing about contract claims." Opposition at 14-15. For reasons already set forth above, the Court disagrees. The tort statute of repose has long been understood to apply to breach of contract claims if those claims are based solely on tort standards of care. The holding of the Appeals Court in *UMass*, and the decision by this Court now, do not serve to "rewrite" that

understanding. To the contrary, they simply apply it – to contractual indemnification claims that, as here, are predicated exclusively on tort standards of care.

BU next contends that any grant of summary judgment to CHA on Count I "literally would rewrite the parties' [contractual] agreement," and thereby "defy the *Gomes* principle that sophisticated parties should be held to their agreements." Opposition at 15. The Court disagrees with this assertion as well. Contrary to BU's characterization, the Court's determination actually respects the language of the parties' written agreement, by honoring the decision of the sophisticated parties to draft a contract that: (a) defines CHA's obligations by reference to industry standards of care; and (b) limits BU's right of indemnification to claims arising from CHA's failure to meet those standards. The parties could have written the Design Contract's indemnification clause in a manner that tracked the broader language of the provision at issue in *Gomes*. But they didn't. Instead, they drafted an indemnification provision that, by virtue of its derivative interplay with the Design Contract's definition of CHA's contractual performance obligations, turns on tort-based standards of care. Like BU's contract claim, BU's indemnification claim therefore is subject to – and barred by – the statute of repose.

In reaching this conclusion, the Court wishes to underscore – as the Appeals Court did in *UMass* – the narrow contours of its decision. The Court is not holding that the tort statute of repose applies to contractual indemnification claims generally. Rather, consistent with the established jurisprudence directing courts to assess the "gist of the action," the Court holds only that because BU's indemnification claim against CHA in this case, pursuant to the express language of the Design Contract, derives exclusively from the application of tort-based standards of care, that claim is subject to the tort statute of repose.

CONCLUSION AND ORDER

For the reasons set forth above, CHA's Renewed Motion for Summary Judgment on Count I of the Complaint is hereby **ALLOWED.**

SO ORDERED.

Michael J. Pineault
Associate Justice of the Superior Court

Dated: May 8, 2024

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 2B

§ 2B. Tort actions arising from improvements to real property

Currentness

Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency, as defined in said section thirty-nine A shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

Credits
Added by St.1968, c. 612. Amended by St.1973, c. 777, § 2; St.1984, c. 484, § 53.

Notes of Decisions (185)

M.G.L.A. 260 § 2B, MA ST 260 § 2B
Current through Chapter 139 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

102 Mass.App.Ct. 1107
Unpublished Disposition

Appeals Court of Massachusetts.

UNIVERSITY OF MASSACHUSETTS BUILDING AUTHORITY & another [1]

v.

ADAMS PLUMBING & HEATING, INC., & others. [2]

22-P-426
|
Entered: January 19, 2023

By the Court (Green, C.J., Meade & Blake, JJ. [3])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** The plaintiffs, University of Massachusetts Building Authority and University of Massachusetts Amherst (interchangeably, UMass), appeal from a summary judgment dismissing their complaint against the defendants, numerous contractors and subcontractors who worked on the renovation of a UMass dining hall, as barred by the statute of repose. UMass asserted claims for negligence, breach of contract, and indemnification. UMass acknowledges that the statute of repose bars its claims for negligence but argues that its claims for breach of contract and indemnification were erroneously dismissed. Because we conclude that UMass's claims for breach of contract and indemnification sounded in negligence, we affirm.

We summarize the background of this case as set forth in the order on the defendants' motions for summary judgment, "supplemented by other uncontroverted facts in the summary judgment record and viewing the evidence in the light most favorable to [UMass]" (quotation and citations omitted). Williams v. Board of Appeals of Norwell, 490 Mass. 684, 685 (2022).

In 2013, UMass sought to renovate the Blue Wall, one of its dining halls. In 2013 and 2014, UMass entered into contracts with the following defendants: Leftfield, LLC (Leftfield), to serve as the project manager; Bruner/Cott & Associates, Inc. (Bruner/Cott), to provide architectural and engineering services; Lee Kennedy Company, Inc. (Lee Kennedy), to serve as the general contractor; and WSP Group and WSP USA Buildings, Inc. (collectively, WSP), to provide engineering and commissioning agent services, including designing and commissioning the heating, cooling, and ventilation systems. Also in 2013 and 2014, various subcontracts were entered into with the following defendants: Garcia, Galuska & DeSousa, Inc. (Garcia), to provide mechanical, electrical, and plumbing services; Tekon – Technical Consultants, Inc. (Tekon), to perform testing, adjusting, and balancing work; Adams Plumbing & Heating, Inc. (Adams), to fabricate and install the ductwork for the kitchen's exhaust system; and Halton Group Americas, Inc. (Halton), to install the ventilation system and associated sensor and control systems. [4]

On September 2, 2014, the dining hall opened for use. In the spring of 2018, UMass found that the ductwork of the kitchen's exhaust system had collapsed. The exhaust system also exhibited other deficiencies, including seam leaks, joint separations,

duct panel damage, and irregularities with control systems. On December 1, 2020, UMass commenced this action, bringing claims for negligence, breach of contract, and indemnification.

Discussion. 1. Statute of repose. "A statute of repose eliminates a cause of action at a specified time, regardless of whether an injury has occurred or a cause of action has accrued as of that date." Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 352 (2018). See Moran v. Benson, 100 Mass. App. Ct. 744, 746 (2022). As a statute of repose contained in G. L. c. 260, § 2B, places an absolute six-year time limitation on "[a]ctions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property." While the statute applies specifically to actions of tort, a plaintiff may not escape the consequences of the statute by recasting a negligence claim in the form of another claim. See McDonough v. Marr Scaffolding Co., 412 Mass. 636, 642 (1992); Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc., 396 Mass. 818, 823 (1986). In determining whether the statute of repose applies, we look to the nature -- or "gist" -- of the claim. See Bridgwood, supra at 354, and cases cited.

***2** On appeal, there is no dispute regarding the following: (1) the statute of repose's six-year time limitation began to run when the dining hall was opened for use on September 2, 2014, (2) UMass commenced this action just outside that time limitation on December 1, 2020, and (3) the statute of repose bars UMass's claims for negligence. The issue, instead, is whether UMass's claims for breach of contract and indemnification were properly dismissed as barred by the statute of repose on the basis that they sounded in negligence.

2. Breach of contract.[5] UMass claims that the defendants committed breaches of express warranties, that claims for breach of express warranty are contractual in nature, and that UMass's claims for breach of contract therefore survived the bar imposed by the statute of repose. While we agree that claims for breach of express warranty are not barred by the statute of repose, UMass's argument falters where UMass has not identified any express warranties that were breached.

It has long been held that claims for breach of express warranty are not barred by the statute of repose because they require proof that the defendant guaranteed a heightened level of workmanship, and in that way differ from claims for negligence. See Klein v. Catalano, 386 Mass. 701, 720 (1982). See also Anthony's Pier Four, Inc., 396 Mass. at 823. A defendant may guarantee a heightened level of workmanship by promising a specific result, see Anthony's Pier Four, Inc., supra; Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng'rs, Inc., 45 Mass. App. Ct. 120, 128-129 (1998), or by agreeing to comply with technical specifications in a written contract, see Melrose Hous. Auth. v. New Hampshire Ins. Co., 24 Mass. App. Ct. 207, 211 n.5 (1987), S.C., 402 Mass. 27 (1988). In either scenario, the plaintiff may not rely on general contract provisions that impose the implied duty of reasonable care, as such provisions do not guarantee a heightened level of workmanship. See id.[6]

UMass claims both that the defendants promised specific results and that the defendants agreed to comply with technical specifications in their written contracts. With respect to the technical specifications, UMass's argument is unavailing because UMass has not identified with specificity any problems that involved violations of technical specifications versus problems that amounted to shoddy work in violation of the implied duty of reasonable care.[7] See Melrose Hous. Auth., 24 Mass. App. Ct. at 211 n.5. Accordingly, we focus on whether any of the defendants promised specific results.

***3** UMass relies on Anthony's Pier Four, Inc., and Coca-Cola Bottling Co. of Cape Cod to argue that the following and other, similar contract provisions were promises of specific results: (1) "it is the obligation of [Lee Kennedy] to provide everything necessary to produce a complete and fully operational [p]roject" and (2) Adams "shall provide a complete and operable demand ventilation kitchen exhaust system" and shall "[a]ssemble and install ductwork in accordance with recognized industry practices which will achieve [airtightness]."[8] However, UMass reads Anthony's Pier Four, Inc., and Coca-Cola Bottling Co. of Cape Cod too broadly.

In Anthony's Pier Four, Inc., 396 Mass. at 819-820, the plaintiff hired engineers to design a system for permanently mooring a cruise ship alongside the pier adjacent to the plaintiff's restaurant. When the plaintiff expressed concern that the mooring

system, as designed, would be adequate, the engineers allegedly assured the plaintiff that the mooring system would keep the ship moored under expected wind and tidal conditions. See id. at 828. Similarly, in Coca-Cola Bottling Co. of Cape Cod, 45 Mass. App. Ct. at 121-122, 129, engineers hired to design a wastewater treatment system repeatedly assured the plaintiff, who questioned whether the system would work, that the system would keep the levels of biochemical oxygen demand, suspended solids, settleable solids, waste oils, phosphorus, and coliform within specified permit levels. Each case involved an explicit promise that the system would operate so as to deliver a specific result, and those promises imposed a heightened level of workmanship.

In contrast, UMass relies on general contract provisions that set forth the nature of the work to be completed and that required nothing more than compliance with the implied duty of reasonable care. The provisions required that the ventilation system operate -- a basic contract expectation -- and did not require that the ventilation system operate so as to deliver a specific result. Contrast Anthony's Pier Four, Inc., 396 Mass. at 823 (promise that mooring system would not just operate but would withstand expected wind and tidal conditions); Coca-Cola Bottling Co. of Cape Cod, 45 Mass. App. Ct. at 129 (promise that wastewater treatment system would not just operate but would treat water to specified levels). The provisions also required that the ductwork be assembled and installed in accordance with recognized industry practices, which on its face required nothing more than compliance with the implied duty of reasonable care. Where UMass relies on general contract provisions that required nothing more than compliance with the implied duty of reasonable care, UMass's breach of contract claims were properly dismissed as barred by the statute of repose.

3. Indemnification.[9] UMass also argues that its indemnification claims were contractual in nature, and that they therefore survived the bar imposed by the statute of repose. In support, UMass relies on Gomes v. Pan Am. Assocs., 406 Mass. 647, 647-648 (1990), in which the Supreme Judicial Court held that a third-party contractual indemnification claim was not barred by the statute of repose. The defendants urge us to distinguish Gomes on the basis that this case involves a first-party contractual indemnification claim.[10] While our analysis does not turn on a distinction between first-party and third-party contractual indemnification claims, we nonetheless conclude that the gist of UMass's indemnification claims sounded in negligence.

***4** In Gomes, 406 Mass. at 647, the plaintiff brought a negligence action against the owner of a shopping mall after falling and injuring herself on the premises, and the owner impleaded the architect who designed the mall. The owner alleged that, as a result of an indemnification provision in the architect's contract, the architect was liable for the plaintiff's injuries. See id. In other words, the issue was whether the indemnification provision shifted liability for the plaintiff's injuries from the owner to the architect. In that context, the gist of the claim was contractual.

Here, unlike in Gomes, there was no injury separate and distinct from the shoddy work, and the issue was whether the defendants were negligent. That is precisely the sort of claim that the statute of repose bars, whether asserted as a claim for negligence, indemnification, or something else. See Bridgwood, 480 Mass. at 353-357. We conclude that UMass may not escape the consequences of the statute of repose by recasting its negligence claims as indemnification claims.

As noted, our analysis does not turn on the distinction the defendants urge between first-party and third-party contractual indemnification claims. While the gist of UMass's indemnification claims sounded in negligence, other first-party contractual indemnification claims may not. For example, had the ventilation system caused damage to other property owned by UMass for which UMass brought a first-party contractual indemnification claim, that claim would be more like the claim in Gomes. We specifically do not address whether such a claim would be barred by the statute of repose and cite the example only to illustrate that the issue is more complex than the defendants' arguments suggest.[11]

Judgment affirmed.

All Citations

102 Mass.App.Ct. 1107, 203 N.E.3d 1179 (Table), 2023 WL 307432

Footnotes

1 University of Massachusetts Amherst.

2 Bruner/Cott & Associates, Inc.; Garcia, Galuska & DeSousa, Inc.; Halton Group Americas, Inc.; Lee Kennedy Company, Inc.; Leftfield, LLC; Tekon - Technical Consultants, Inc.; WSP Group; and WSP USA Buildings, Inc.

3 The panelists are listed in order of seniority.

4 UMass's appeal also presents the question whether UMass was an intended third-party beneficiary of the subcontractors' contracts. Where we conclude that UMass's claims were properly dismissed as barred by the statute of repose, we need not and decline to address the question.

5 UMass asserted breach of contract claims against all of the defendants.

6 In Melrose Hous. Auth., 24 Mass. App Ct. at 211 n.5, problems with a housing project were caused by the omission of angle irons and flashing, along with improperly installed bolts and improperly mixed mortar. We held that the omission of angle irons and flashing appeared to involve violations of technical specifications but that the other problems amounted to shoddy work in violation of the implied duty of reasonable care.

7 For example, UMass notes that the technical specifications required that the ventilation system be primarily controlled by a Halton Marvel system but provides no further information regarding what that meant, whether the defendants failed to use a Halton Marvel system, or what, if any, specific problems arose from deficiencies with respect to the Halton Marvel system. While UMass maintains that we should remand for further discovery on this and related points, we are not persuaded where this case turns on questions of contract interpretation and the contracts are in the record.

8 The contract provisions on which UMass relies all pertain to Lee Kennedy and Adams, but UMass argues generally that all of the defendants promised specific results.

9 UMass brought indemnification claims against Leftfield, Bruner/Cott, Lee Kennedy, WSP, and Tekon. We use the word "defendants" in this section to refer to the defendants against whom UMass brought indemnification claims.

10 The defendants also claim that, for a variety of reasons, the indemnification provisions on which UMass relies do not require the defendants to indemnify UMass for the losses at issue here. We need not and decline to address the argument.

11 UMass's request for appellate attorney's fees is denied.