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Tort Statute of Repose Did Not Bar Indemnification Claim

Defendant Clough, Harbour & Associates (“CHA”) designed a new athletic field for the plaintiff, the Trustees of Boston University (“BU”). As part of that agreement, the parties negotiated an express indemnification provision in which CHA promised to indemnify BU for expenses incurred as a result of negligent design. BU eventually did incur expenses to fix a defect in the new athletic field, but CHA

declined to cover the cost of those expenses. BU brought a claim for breach of the indemnification clause more than six years after the field opened.

CHA obtained summary judgment in the Superior Court based on its argument that the tort statute of repose in G.L. c. 260, § 2B barred the action. That statute eliminates a cause of action in tort six years after the opening of an improvement to real estate.

The Supreme Judicial Court (“SJC”) disagreed with the Superior Court’s conclusion. The SJC stated that the tort statute of repose does not apply to contract actions. The SJC distinguished between tort and contract actions by stating that, in a contract action, “the standard of performance is set by the defendants’ promises, rather than imposed by law.” The SJC went on to state, “here, the gist of [BU’s] action is essentially contractual – the enforcement of a contract of indemnification . . . CHA’s duty to indemnify [BU] . . . is not one imposed by law; rather, it is a promise to which CHA freely and intelligently chose to be bound.” The fact that the parties chose to incorporate the negligence standard of care into the indemnification provision did not change the contractual nature of the action.

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