STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23CVS002076-590
JOHNSON BROS. CORPORATION, A SOUTHLAND COMPANY, Plaintiff, v. CITY OF CHARLOTTE, Defendant.	**ORDER AND OPINION ON THIRD-PARTY DEFENDANT URS CORPORATION'S MOTION TO DISMISS THIRD-PARTY CLAIMS ASSERTED BY PLAINTIFF/THIRD-PARTY PLAINTIFF JOHNSON BROS. CORPORATION, A SOUTHLAND COMPANY**
JOHNSON BROS. CORPORATION, A SOUTHLAND COMPANY, Third-Party Plaintiff, v. URS CORPORATION, Third-Party Defendant.	

1. **THIS MATTER** is before the Court upon Third-Party Defendant URS Corporation's ("URS") Motion to Dismiss Third-Party Claims Asserted by Johnson Brothers Corporation, a Southland Company ("JBC") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)") in the above-captioned case (the "Motion").[1]

[1] (URS Corporation's Mot. Dismiss, ECF No. 77.)

2. Having considered the Motion, the parties' briefs in support of and in opposition to the Motion, the relevant pleadings, the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion as set forth below.

Cokinos Young, by John P. DiBiasi and Branson Rogers, and Windle Terry Bimbo, by Steele B. Windle, III and Louis Segreti, for Plaintiff/Third-Party Plaintiff Johnson Bros. Corporation, a Southland Company.

Troutman Pepper Hamilton Sanders LLP, by Kiran H. Mehta, William J. Farley, III, David C. Mancini, and Jason C. Spang, for Third-Party Defendant URS Corporation.

Bledsoe, Chief Judge.

I.

FACTUAL BACKGROUND

3. The Court does not make findings of fact on motions to dismiss under Rule 12(b)(6). Rather, the Court recites the allegations asserted and the documents referenced in the challenged pleading that are relevant to the Court's determination of the Motion.

4. JBC is a Texas corporation with its principal place of business in Grapevine, Texas.[2] URS is a corporation registered with the North Carolina Secretary of State and authorized to do business in North Carolina.[3]

5. On 5 May 2014, Defendant City of Charlotte (the "City") and URS entered into a written contract for Engineering/Design Services and Other Project Services (the "Design Contract") for the CityLYNX Gold Line – Phase 2 Project in Charlotte, North Carolina (the "Project").[4] The Project contemplated a 2.5 mile extension of the CityLYNX Gold Line streetcar system, and, on 21 December 2016, JBC, as general contractor, and the City, as owner, entered into a contract for the construction of the Project (the "Construction Contract").

6. Pursuant to the Design Contract, URS developed design plans for, among other things, "light rail track alignment geometry, track plans and profiles, structural plans for the Hawthorne Lane Bridge crossover, new and SSP stop layouts, stop details, cross sections, and storm drainage."[5] The drawings and specifications that URS created in accordance with the Design Contract were ultimately incorporated into and included in the Construction Contract (the "Design Documents").[6]

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[2] (Pl.'s Reply and Affirmative Defenses Def.'s Countercl. and Pl.'s Third-Party Compl. Against URS Corporation ¶ 1 [hereinafter, "Third-Party Compl."], ECF No. 7.) The Court's citations to this document reference the section titled "Third-Party Complaint Against URS Corporation" beginning on page ten.

[3] (Third-Party Compl. ¶ 3.)

[4] (Third-Party Compl. ¶¶ 6–7.)

[5] (Third-Party Compl. ¶¶ 7–8.)

[6] (Third-Party Compl. ¶ 8.)

7. JBC alleges that the Design Documents were "inaccurate, deficient, and inadequate" as to storm drainage[7] and included numerous errors, omissions, and discrepancies in regard to the Hawthorne Lane Bridge.[8] JBC further alleges that "URS's negligence and failure to use reasonable care in undertaking the scope of the Design Contract, including, but not limited to, design issues, errors, and omissions, directly led to" the damages the City asserts that JBC is responsible for in the City's counterclaims.[9]

II.

PROCEDURAL HISTORY

8. JBC filed the Complaint initiating this litigation on 12 April 2023, asserting ten claims against the City.[10] The City answered JBC's Complaint on 1 June 2023 and asserted counterclaims against JBC for breach of contract and breach of warranty.[11] In response to the City's counterclaims, JBC filed a Third-Party Complaint against URS on 31 July 2023, asserting claims for: (i) indemnity/ contribution, (ii) negligence, and (iii) professional negligence/malpractice.[12]

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[7] (Third-Party Compl. ¶ 10.)

[8] (Third-Party Compl. ¶ 11.)

[9] (Third-Party Compl. ¶ 12.)

[10] (First Am. Verified Compl.)

[11] (Def. City Charlotte's Mots. Dismiss, Answer First Am. Verified Compl. & Countercl., ECF No. 3.)

[12] (Third-Party Compl. ¶¶ 13–25.)

9. On 23 October 2023, URS filed the pending Motion, seeking the dismissal of JBC's third-party claims pursuant to Rule 12(b)(6).[13]

10. After full briefing, the Court convened a hearing on the Motion on 14 December 2023, at which all parties were represented by counsel (the "Hearing"). The Motion is now ripe for resolution.

III.

LEGAL STANDARD

11. When deciding whether to dismiss a claim pursuant to Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

12. "[D]ismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the [claimant's] claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the [claimant's] claim.' " *Corwin*, 371 N.C. at 615 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166 (2002)).

13. Under Rule 12(b)(6), "the trial court is to construe the pleading liberally and in the light most favorable to the [claimant], taking as true and admitted all well-pleaded factual allegations contained within the [pleading]." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up).

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[13] (URS Corporation's Mot. Dismiss.)

IV.

ANALYSIS

A. Economic Loss Rule

14. URS seeks dismissal of all of JBC's third-party claims on grounds that they are barred by the economic loss rule.[14]

15. "Originating in the products liability context, the economic loss rule, in its simplest form, holds that purely economic losses are not ordinarily recoverable under tort law." *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 49, at *14 (N.C. Super. Ct. Aug. 14, 2019) (citation omitted), *aff'd*, 376 N.C. 54 (2020) (hereinafter, "*Crescent II*"). Our Supreme Court embraced the principles underlying the economic loss rule in *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73 (1978), explaining that "ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor,"[15] *id.* at 81, and the Court

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[14] (URS Corporation's Mem. Supp. Mot. Dismiss [hereinafter, "URS's Br. Supp."], ECF No. 78.)

[15] In *Ports Authority*, the Supreme Court noted that, while it had never held that "a tort action lies against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill," 294 N.C. at 83, there are four, non-exclusive situations in which the North Carolina courts have recognized that "a promisor [may be held] liable in a tort action for a personal injury or damage to property proximately caused by his negligent, or wilful, act or omission in the course of his performance of his contract," *id.* at 82. *Ports Authority*'s four exceptions are as follows:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.

of Appeals formally adopted the rule in *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 432 (1990) ("The majority of courts which have considered this question have held that purely economic losses are not ordinarily recoverable under tort law. We adopt this rule[.]" (internal citation omitted)).

16. The rule's rationale posits that while "[t]he average plaintiff in a tort lawsuit does not choose his or her tortfeasors[, c]ontracting parties, by comparison, have the ability to allocate risk among themselves at the outset of a transaction and are encouraged to do so." *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 46, at *76 (N.C. Super. Ct. Aug. 8, 2019) (hereinafter, "*Crescent I*") (citing *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639 (2007)). The result is that "[t]he tort claim 'must be grounded on a violation of a *duty* imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties.' " *Window Gang Ventures, Corp. v. Salinas*, 2019 NCBC LEXIS 24, at *24 (N.C. Super. Ct. Apr. 2, 2019) (quoting *Rountree v. Chowan County.*, 252 N.C. App. 155, 160 (2017)).

> (3) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.
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> (4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Id. (cleaned up).

17. In short, to avoid the reach of the economic loss rule, "a plaintiff must allege a duty owed to him by the defendant [that is] separate and distinct from any duty owed under a contract." *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at *48 (N.C. Super. Ct. Nov. 3, 2011). As this Court has previously observed, in determining whether the economic loss rule bars a negligence claim, "the true question the Court must answer is whether [the defendant owed the plaintiff] a duty of care to avoid causing [the plaintiff] purely economic loss." *Crescent II*, 2019 NCBC LEXIS 49, at *42.

18. URS contends that the economic loss rule bars JBC's third-party claims because "[t]he tort theories now advanced by JBC and the damages it seeks vis-à-vis its third-party claims against URS are precisely the type of 'pure economic losses' barred by *Ports Authority* and the [economic loss rule,]"[16] and none of *Ports Authority*'s exceptions apply.[17] URS further contends that the Court should not recognize a new public policy exception to the economic loss rule to permit JBC to assert its negligence claims here.[18]

19. JBC argues in opposition that the Court need not recognize a new exception to the economic loss rule to deny the Motion because "clear, settled, and binding North Carolina precedent" provides that a general contractor, like JBC, "in the absence of privity of contract, [may] sue design professionals[, like URS,] based on the

[16] (URS's Br. Supp. 14–16.)

[17] (URS's Br. Supp. 16–19.)

[18] (URS's Br. Supp. 19–26.)

professionals' breach of a common law duty of care."[19] After careful consideration, the Court agrees with JBC.

20. As this Court recognized in *Crescent II*, our Court of Appeals, through its decisions in *Davidson & Jones, Inc. v. New Hanover County*, 41 N.C. App. 661, 666–68 (1979), and *Shoffner Indus., Inc. v. W. B. Lloyd Constr. Co.*, 42 N.C. App. 259 (1979), has "recognized a duty of care imposed upon architects for the benefit of construction contractors in the absence of contractual privity because of the parties' working relationship[.]" *Crescent II*, 2019 NCBC LEXIS 49, at *39 (cleaned up).

21. More specifically, the Court of Appeals held in *Davidson & Jones* as follows:

> [a]n architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. Where breach of such contract results in foreseeable injury, economic or otherwise, to persons so situated by their economic relations, and community of interests as to impose a duty of due care, we know of no reason why an architect cannot be held liable for such injury. Liability arises from the negligent breach of a common law duty of care flowing from the parties' working relationship. Accordingly, we hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner.

Id. at 667.

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[19] (Third-Party Pl. Johnson Bros. Corporation, a Southland Company's Br. Opp'n Third-Party Def. URS Corporation's Mot. Dismiss 3–5 [hereinafter, "JBC's Br. Opp'n"], ECF No. 83.) JBC also contends that the economic loss rule does not apply because it is not in privity with URS. (JBC's Br. Opp'n 5–7.) Our Supreme Court held in *Crescent University City Venture, LLC v. Trussway Manufacturing, Inc.*, however, that "[t]he lack of privity in the commercial context . . . is immaterial to the application of the economic loss rule." 376 N.C. 54, 60 (2020). As such, JBC's contention falls flat in the commercial context pleaded here.

22. The Court of Appeals reached a similar conclusion in *Shoffner Industries*, in which it held that "a contractor hired by the client to construct a building, although not in [contractual] privity with the architect, may recover from the architect any extra costs resulting from the architect's negligence." 42 N.C. App. at 265–66. The Court of Appeals most recently explained its rationale for this legal rule in *Wright Construction Services, Inc. v. Hard Art Studio, PLLC* as follows:

> First, there is nothing peculiar about these duties—when this Court first recognized them, we described them as ordinary legal duties arising out of the need for architects and engineers to use due care in the exercise of their skills and abilities to avoid foreseeable harm to others. Second, these negligence claims are entirely separate from any rights or responsibilities that exist between [a] property owner and [a] builder under [a] construction contract.

275 N.C. App. 972, 975–76 (2020) (cleaned up).

23. Numerous North Carolina state and federal decisions have followed *Davidson & Jones* to permit negligence claims against design professionals in the absence of privity of contract. *See, e.g.*, *Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 406–09 (2004) (applying *Davidson & Jones* to permit contractor to pursue negligence claim against project expediter with whom it was not in privity of contract); *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 46 (2003) (recognizing that there is a "discrete common law tort between a general contractor and an architect specifically applicable when there is no contractual relationship between the two[ ]"); *Browning v. Maurice B. Levien & Co.*, 44 N.C. App. 701, 704–05 (1980) (concluding from *Davidson & Jones* and *Shoffner Industries* that "it is the law that an architect who contracts to perform services is liable for damages proximately

caused by his negligence to anyone who can be reasonably foreseen as relying on that architect's performing his services in a reasonable manner[ ]"); *see also, e.g.*, *Walbridge Aldinger, LLC v. Cape Fear Eng'g, Inc.*, 2022 U.S. Dist. LEXIS 17111, at *20 (E.D.N.C. Jan. 31, 2022) (concluding that a third-party plaintiff contractor had stated a claim for negligence against a third-party defendant engineer since it "alleged a breach of a duty other than any contractual duties binding upon [the] third-party defendant[ ]"); *Ellis-Don Constr., Inc. v. HKS, Inc.*, 353 F. Supp. 2d 603 (M.D.N.C. Dec. 29, 2004) (relying on *Davidson & Jones* to permit a contractor's negligence claim against an architect in the absence of contract privity).

24. Here, JBC alleges that URS agreed under its Design Contract with the City to create the Design Documents,[20] that URS owed a common law duty to the City and to foreseeable beneficiaries of the Design Contract to exercise reasonable care in creating the Design Documents and performing its work under the Design Contract,[21] and that URS breached this common law duty by failing to prepare and provide the Design Documents in accordance with the required standard of care.[22] Considering these allegations in the light most favorable to JBC, the Court concludes that JBC has alleged facts showing that URS owed a common law duty of reasonable care to JBC arising from both URS's role as a design professional under its Design Contract with the City and JBC and URS's working relationship and community of interests

[20] (Third-Party Compl. ¶ 7.)

[21] (Third-Party Compl. ¶¶ 17, 22.)

[22] (Third-Party Compl. ¶¶ 18, 22, 23.)

as participants in the Project. Since JBC has alleged that it was not in privity of contract with URS and that, under North Carolina law, URS owed JBC a common law duty of reasonable care under *Davidson & Jones* and its progeny, the Court concludes that JBC's allegations are sufficient to state its claims against URS and require the Court to deny URS's motion on this ground.

25. URS attempts to distinguish *Davidson & Jones*, arguing that the damages at issue in *Davidson & Jones* resulted from property damage, not purely economic loss, and thus that *Davidson & Jones* fits neatly within the second exception enumerated in *Ports Authority,* whereas JBC's negligence claim, which asserts purely economic losses, does not.[23] The Court finds this argument unpersuasive for two reasons.

26. First, the plain language of the holding in *Davidson & Jones* specifically provides for the recovery of *economic loss* for a breach of an architect's common law duty of due care. *See Davidson & Jones,* 41 N.C. App. at 667 ("[W]e hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for *economic loss* foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner." (emphasis added)).

27. Second, the Court of Appeals has applied *Davidson & Jones* when the tort claim at issue, like the negligence claim here, sought recovery for only economic losses. For example, in *Pompano Masonry Corp.*, the defendant was hired to oversee

[23] (URS's Br. Supp. 25.)

project design work related to the construction of a building, and the plaintiff was hired as a subcontractor to perform masonry work on that building. 165 N.C. App. at 403–04. The plaintiff asserted a tort claim against the defendant, alleging that the defendant "failed to properly schedule and coordinate the work on the project, and that as a result, plaintiff was forced to perform out-of-sequence work and incurred significant disruptions to its work, substantially impairing plaintiff's ability to efficiently perform its work thereby increasing plaintiff's costs to perform its work." *Id.* at 404 (cleaned up). The defendant sought dismissal of the plaintiff's claim, in part based on the economic loss rule. *Id.* at 405.

28. The Court of Appeals concluded that the defendant could be "held liable for the foreseeable economic injury resulting from its alleged negligent performance of its duties as project expediter[,]" reasoning that "*Davidson* [*& Jones*] authorize[d] plaintiff to sue defendant for the *economic loss* resulting from defendant's alleged breach of its common law duty of care[,]" which arose from the "working relationship and community of interests" between the defendant and the plaintiff. *Id.* at 408 (cleaned up) (emphasis added).

29. URS seeks to distinguish *Pompano* on grounds that the court partially relied upon the absence of a contractual remedy for the plaintiff, while here the existence of JBC's contract rights against the City should "compel this Court to defer to those contractual terms as the sole means to resolve the instant disputes."[24] The court in *Pompano*, however, did not base its ruling on the availability of a contractual or

[24] (URS Corporation's Reply Supp. Mot. Dismiss 8, ECF No. 85.)

statutory remedy for the plaintiff. Rather, the court concluded that the plaintiff, who did not have contract rights against the defendant, nonetheless had a common law duty of care arising from the defendant design professional's working relationship and community of interests with the plaintiff, which was wholly separate from any duty or remedies arising under statute or by contract.

30. Based on the above, the Court concludes that JBC has sufficiently pleaded that URS, independent of any contract, owed and breached a common law duty of due care to JBC in rendering its services on the Project and that, under *Davidson & Jones* and its progeny, JBC has adequately stated its negligence claims against URS. Accordingly, URS's Motion to dismiss JBC's Third-Party Complaint through application of the economic loss rule must be denied.[25]

[25] The Court recognizes that tension exists between *Davidson & Jones* and its progeny, on the one hand—which permit a negligence claim based on a breach of a duty of reasonable care that is tied to the design professional's performance of a contract with a party other than the plaintiff—and *Ports Authority*, *Crescent II*, and their progeny, on the other hand—which find privity of contract immaterial and reject claims based on the negligent performance of a contract. The Court's response is that *Davidson & Jones*, *Pompano*, and the other cases cited above are squarely on point with the instant case, have established the law of design professional liability in this State for many years, and therefore must be applied, even if to do so may be characterized as recognizing another exception to the economic loss rule. *See, e.g.*, *Provectus Biopharmaceuticals, Inc. v. RSM US, LLP*, 2018 NCBC LEXIS 101, at *54 (N.C. Super. Ct. Sept. 2, 2018) (holding that accountants have a common law duty of care independent of contract); *Austin v. Regal Inv. Advisors, LLC*, 2018 NCBC LEXIS 3, at *27 (N.C. Super. Ct. Jan. 8, 2018) (finding investment advisor had duty of care independent of contract).

B. Statute of Limitations

31. Separate and apart from the economic loss rule, URS also seeks dismissal of JBC's claims for negligence and professional negligence on grounds that they are barred by the applicable three-year statute of limitations.[26]

32. "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136 (1996). "Whether a statute of limitations defense may be determined at the 12(b)(6) stage depends on whether the facts necessary to adjudicate the defense are demonstrated by the complaint itself or whether additional evidence must be considered." *Window World of Baron Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *23 (N.C. Super. Ct. July 12, 2017) (citation omitted). Importantly for this Motion, under Rule 12(b)(6), a trial court "may not consider materials that are not mentioned, contained, or attached in or to the pleading; otherwise, a Rule 12(b)(6) motion will be converted into a Rule 56 motion and subject to its standards of consideration and review." *Alamance Fam. Prac., P.A. v. Lindley*, 2018 NCBC LEXIS 83, at *8 (N.C. Super. Ct. Aug. 14, 2018) (citing *Fowler v. Williamson*, 39 N.C. App. 715, 717 (1979)).

33. URS argues that JBS's Third-Party Complaint was filed on 31 July 2023 and that "[i]nsofar as JBC's claims are premised upon issues raised in correspondence prior to July 31, 2020 and/or issues JBC otherwise knew about prior to July 31, 2020 . . . , such claims are barred by the applicable three-year statute of

[26] (URS's Br. Supp. 26–28.)

limitations."[27] The "correspondence" URS relies upon to establish the accrual of JBC's claims, however, are letters JBC sent to the City between 18 March 2020 and September 2020 that are referenced in JBC's Complaint against the City (the "Letters")[28] but are not attached to or referenced anywhere in the Third-Party Complaint.

34. At the Hearing, JBC objected to the Court's consideration of the Letters and to the conversion of URS's motion into one under Rule 56. The Court agrees with JBC that it cannot consider the Letters under Rule 12(b)(6) because they are not "mentioned, contained, or attached in or to the [Third-Party Complaint]," and the Court finds it inappropriate to exercise its discretion to treat URS's Motion as one under Rule 56 at this early stage of the litigation. As a result, the Court will not consider the Letters on URS's Motion.

35. Looking then to the allegations of the Third-Party Complaint (and without considering the Letters), the Court cannot conclude that JBC's claims accrued more than three years prior to the filing of that pleading under either party's view of the date of accrual of those claims.[29] As a result, the Court will deny the Motion to the

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[27] (URS's Br. Supp. 28.)

[28] (*See* First Am. Verified Compl. ¶¶ 49–53.)

[29] URS argues that JBC's negligence claims accrued "when the wrong giving rise to the right to bring suit is committed," quoting *Harrold v. Dowd*, 149 N.C. App. 777, 781 (2002). According to URS, the wrongs on which JBC bases its negligence claims occurred more than three years prior to the filing of JBC's Third-Party Complaint. (URS's Br. Supp. 26.) There are no allegations in the Third-Party Complaint, however, from which the Court can ascertain the date upon which JBC's claims accrued under URS's theory of accrual. JBC argues in opposition that "a cause of action accrues, so as to start the running of statute of limitations, as soon as the right to institute and maintain a suit arises," quoting *Thurston Motor Lines, Inc. v. Gen. Motors Corp.*, 258 N.C. 232, 235 (1962). According to JBC, its right

extent it seeks dismissal of JBC's negligence and professional negligence claims on statute of limitations grounds.

C. Indemnity

36. JBC asserts a claim against URS for indemnity, alleging that "[s]everal of the claims made by the City against JBC in its [counterclaims] arise out of, or are connected with URS'[s] negligence and failure to perform design services in conformance with its Design Contract with the City[.]"[30]

37. URS contends that this claim should be dismissed because the claims the City asserts against JBC do not sound in tort, and in the absence of a tort claim, JBC cannot seek indemnification from URS.[31] The Court agrees.

38. "In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law." *Kaleel Builders, Inc.*, 161 N.C. App. at 38. JBC does not allege an express contract or a contract implied-in-fact giving rise to a right to indemnity, so JBC's right to indemnity, if it exists at all, is based on a right to indemnity implied-in-law.

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to institute and maintain suit did not arise until the City filed its counterclaims in 2023, because that was when JBC first suffered injury. (JBC's Br. Opp'n 12–13.) Under JBC's theory of accrual, JBC filed its third-party claims well within the applicable three-year statute of limitations. Given that URS's motion necessarily fails on the pleaded facts under either party's theory of accrual, however, the Court need not, and therefore does not, determine which theory of accrual shall prevail in resolving the Motion.

[30] (Third-Party Compl. ¶¶ 13–15.) URS also seeks dismissal of JBC's third-party claim against URS for contribution. (URS's Br. Supp. 30.) Since JBC agreed in its opposition brief to withdraw that claim, (JBC's Br. Opp'n 15), the Court will grant the Motion to this extent and dismiss JBC's contribution claim.

[31] (URS's Br. Supp. 29.)

39. "For indemnification implied-in-law, more an equitable remedy than an action in and of itself, North Carolina law requires there be an underlying injury sounding in tort. The party seeking indemnity must have imputed or derivative liability for the tortious conduct from which indemnity is sought." *Id.* at 41.

40. Our appellate courts have held that:

> [p]rimary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff; *and* (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

Id. (emphasis in original) (citing *Edwards v. Hamill*, 262 N.C. 528, 531 (1964)).

41. The Third-Party Complaint makes plain that the claim for which JBC seeks indemnity is the City's claim for breach of contract. There is no tort claim for which indemnity is sought. As a result, JBC's claim does not fit the "active-passive tort-feasor framework" required to state a claim for a right to indemnity implied-in-law. *See id.* at 47 (holding that "the parties do not fit the active-passive tort-feasor framework required to support an equitable right to indemnity implied-in-law" where the plaintiff's claim sought indemnification from a claim for breach of contract and not one sounding in tort). Since JBC has not sufficiently alleged any of the three bases that permit a right to indemnity, the Court will grant the Motion dismissing JBC's claim for indemnification.

IV.

CONCLUSION

42. **WHEREFORE**, for the reasons set forth above, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as follows:

a. The Motion is hereby **GRANTED** as to JBC's third-party claims against URS for contribution and indemnity, and those claims are hereby **DISMISSED with prejudice**; and

b. The Motion is hereby **DENIED** as to JBC's third-party claims against URS for negligence and professional negligence, and those claims shall proceed to discovery.

SO ORDERED, this the 27th day of February, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge