

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

PLYMOUTH DIVISION SUPERIOR COURT
CIVIL ACTION NUMBER 2483CV00419

ANNMARIE GREENE & another¹

vs.

ARCHIA, INC. & others²

vs.

ML RILEY CONSTRUCTION & others³

vs.

VILEX, INC. & another⁴

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT MARVIN CEDAR
AND LUMBER COMPANY'S MOTION FOR SUMMARY JUDGMENT AND
DAUBERT- LANIGAN MOTION TO EXCLUDE UNTIMELY DISCLOSED EXPERT
WITNESSES (Paper # 112); DEFENDANT IN A 3RD PARTY CLAIM IPSWICH
ROOFING SIDING, INC.'S MOTION FOR SUMMARY JUDGMENT (Paper # 113);
DEFENDANT VILEX INC.'S MOTION FOR SUMMARY JUDGMENT (Paper # 114);
AND FOURTH PARTY DEFENDANT ALT CONSTRUCTION, LLC'S MOTION FOR
SUMMARY JUDGMENT (Paper # 115)**

Plaintiffs Annemarie Greene and Ken Gawrelski filed this action against general contractor Archia, Inc. ("Archia") and its principal Peter Stames ("Stames") and subcontractor Cape Cod Panel, LLC ("Cape Cod") to recover for defective construction of their single-family

¹Ken Gawrelski

²Cape Cod Panel, LLC and Peter Stames

³Clean Remodel, LLC; Marvin Lumber and Cedar Company, LLC; and Ipswich Roofing and Siding, Inc.

⁴Alt Construction, LLC

home at 57 Gurnet Road in Duxbury. For the reasons discussed below, Defendant Marvin Lumber and Cedar Company's Motion For Summary Judgment and Daubert-Lanigan Motion to Exclude Untimely Disclosed Expert Witness is **ALLOWED**. Defendant In a 3rd Party Claim Ipswich Roofing Siding Inc.'s Motion For Summary Judgment is **DENIED**. Defendant Vilex, Inc.'s Motion For Summary Judgment is **ALLOWED** and Defendant Alt Construction, LLC's Motion For Summary Judgment is **ALLOWED**.

BACKGROUND

The four summary judgment records reveal the following facts. Greene and Gawrelski hired Archia as the general contractor to build a new single-family home at 57 Gurnet Road in Duxbury, a seaside property which faces the Atlantic Ocean. The project consisted of a three-story main house and a two-story carriage house. On August 1, 2021, Greene and Gawrelski gave Archia a \$180,000 deposit to be applied to the purchase of windows and doors for the project. Marvin Lumber and Cedar Company LLC ("Marvin") is the manufacturer of Ultimate Collection windows and Ultimate Collection French doors. On August 6, 2021, Macleod & Moynihan Window and Doors ("Macleod"), an independent local dealer, submitted a purchase order to Marvin for more than fifty Ultimate Collection windows for the project. On August 24, 2021, Macleod submitted a purchase order to Marvin for six Ultimate Collection French doors for the project. Marvin manufactured, shipped, and delivered the windows between December 2021 and February 2022. Marvin manufactured, shipped, and delivered the doors between January 2022 and March 2022. Marvin did not perform or any of the flashing, installation, or reinstallation work for the windows and doors at the project.

Archia's lead carpenter, Eli Meharg ("Meharg"), inspected some of the windows and doors when they were delivered to the work site, then placed them in a storage pod. Meharg does not have any training related to identifying manufacturing or design defects in windows or doors. However, he looked for any visible damage to the windows and doors and if he had discovered any, the product would have been sent back immediately. Meharg did not send back any of the windows or doors. He believes that other Archia employees inspected additional shipments of doors and windows from Marvin. There is no contemporaneous documentation or record of any defects in the doors and windows at the time of delivery.

On February 4, 2022, Greene and Gawrelski entered into a written Residential Contracting Agreement to pay Archia more than \$2.5 million for the project. This agreement required Archia to begin work on February 15, 2022, and substantially complete the work by May 15, 2023.

On August 1, 2022, Archia entered into a "Purchase Order: Framing/Rough Carpentry" subcontract with ML Riley Construction ("ML Riley") which described the scope of work as "All necessary framing, deck and deck stairs framing, window and exterior door installation, exterior trim and general carpentry labor to complete the project as per plan." The ML Riley subcontract provided that ML Riley was responsible for covering openings in walls if there was a big storm and that they would prepare and install the exterior trim, windows, and doors per manufacturer detail including flashing and exterior casing. ML Riley did not perform the framing work itself.

ML Riley entered into an oral subcontract with Cape Cod, which appears to be a subsidiary of ML Riley, to perform the structural framing, install more than fifty windows and doors, apply the water-resistant barrier ("WRB"), and install the exterior trim. ML Riley and/or

Cape Cod then entered into an oral subcontract with Starbuck Construction Services, Inc. (“Starbuck”) to perform the rough carpentry for the project, including the deck and deck stairs framing, the garage to house stairs, soffits, windows and exterior door installation, exterior trim, and general carpentry. Roberto Maia of Starbuck testified that Starbuck had no formal procedures for inspecting doors and windows upon delivery, but Starbuck would have reported any visible defects in or damage to the Marvin windows.

Starbuck installed the windows on the main house under the subcontract with ML Riley but did not follow the directions for installation. Starbuck improperly wrapped the WRB into the openings, failed to put pitched sills on the windows, and put silicone over the flanges and then put waterproof tape over the silicone. The windows and doors on the carriage house were installed only once, by Archia, and there has never been any issue with the carriage house. Meharg testified that eight windows were installed out of square and were windows that were themselves not square; in his opinion, this is “a condition which would indicate manufacturing defects, as opposed to installation defects.”

On November 28, 2022, Archia entered into Purchase Order 225 with Ipswich Roofing and Siding (“Ipswich”), requiring Ipswich to provide all labor, equipment, and permit fees to complete rubber, cedar roofing, and lead coated copper flashing on the main house and carriage house. Ipswich agreed that its work would be completed up to code and in a workmanlike manner, per plans and specifications dated August 7, 2022, and updated on October 17, 2022.

On December 20, 2022, Archia entered into Purchase Order 221 with Ipswich, requiring Ipswich to provide all labor, equipment, and permit fees to complete the installation of the white cedar shingles as necessary. Ipswich agreed that its work would be completed up to code and in a workmanlike manner, per plans and specifications dated August 7, 2022, and in compliance

with OSHA regulations. Both purchase orders required Ipswich to “perform all work and [] furnish all supervision, labor, materials, plant, hoisting, scaffolding, tools, equipment, supplies and all other things necessary for the construction and completion of the work described in each individual Work Order, including work incidental thereto and reasonably inferable therefrom . . .”

Stames testified that Ipswich was responsible for putting the building exterior skin on the building, which was not sufficiently watertight. In addition, Stames opined that Ipswich incorrectly installed rubber roofing and copper flashing in the back deck area. Meharg was not aware of any deficiencies in how the cedar siding was installed, but there was a problem with the installation of the rubber membrane around the double door in the primary bedroom, which was installed by Ipswich. The membrane did not adhere properly, and Ipswich attempted to fix it with a copper pan, but the rubber roof still did not adhere underneath the copper pan.

Both purchase orders with Ipswich contained a provision entitled “Indemnification and Subcontractor’s Liability” which states:

Subcontractor hereby assumes the entire responsibility and liability for all Work, supervision, labor and materials provided under any Work Order issued pursuant to this Subcontract, whether or not erected in place and for all plant, scaffolding, tools, equipment, supplies and other things provided by Subcontractor until final acceptance of the entirety of the Work by Owner. In the event of any loss, damage or destruction thereof from any cause, Subcontractor shall be liable therefor, and shall repair, rebuild and make good said loss, damage or destruction at Subcontractor’s cost, subject only to the extent that any net proceeds are payable under any builder’s risk property insurance that may be maintained by Owner or Contractor, if any. Subcontractor shall be liable to Contractor for all costs Contractor incurs as a result of any failure of Subcontractor, or any of its suppliers or subcontractors of any tier, to perform. To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless the Contractor, Owner and their respective officers, directors, employees and agents (“Indemnified Parties”) from and against all claims, damages, demands, losses, expenses, fines, causes of action, suits or other liabilities, (including all costs, reasonable attorneys’ fees, consequential damages, and punitive damages), arising out of or resulting from, or alleged to arise out of or arise from, the performance

of Subcontractor's Work under the Subcontract, and any Work Order whether such claim, damage, demand, loss or expense is attributable to bodily injury, personal injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom; but only to the extent attributable to the negligence of the Subcontractor or any entity for which it is legally responsible or vicariously liable . . .

Archia drafted the two purchase orders and provided them to Ipswich. Ipswich's president, Jan Budzynski, then signed them.

Ipswich entered into an oral agreement with Vilex, Inc. ("Vilex") to perform the cedar shingle installation on the main house. Vilex agreed to name Ipswich as an additional insured on its insurance policy and to indemnify Ipswich for any claims made against Ipswich arising out of Vilex's work on the project. Vilex did not provide any materials for the project. Vilex installed the cedar shingle siding between January 10, 2023, and January 12, 2023. On March 2, 2023, Ipswich paid Vilex \$11,870 for this work. Vilex did not install any windows or doors, the WRB, or the black felt roofing paper. Nor did Vilex make any decisions about the order of the work on the project or whether to install a rain screen.

Ipswich entered into an oral agreement with Alt Construction ("Alt") to perform a small portion of the rubber roof installation on the peaks of the main house, along with a small portion of shingles in front of each peak. Ipswich provided all the materials for this task. Alt agreed to name Ipswich as an additional insured on its insurance policy and to indemnify Ipswich for any claims made against Ipswich arising out of Alt's work on the project. Alt performed limited rubber roof installation on the peaks above the third floor of the main house from December 1, 2022, to December 29, 2022. According to Alt manager Alex Turov, Alt installed the rubber roof and shingles on the peaks in accordance with construction industry standards and completed the job in a workmanlike manner, including installation of a copper drip edge. On December 29, 2022, Ipswich paid Alt \$8,800 for its work. Alt did not install any windows or doors for the

project, nor did it install the WRB. Alt did not make any decisions about the order of the work on the project or whether to install a rain screen.

Greene and Gawrelski first reported problems with water intrusion into the main house in early March of 2023. There was serious water intrusion around the doors and several of the ocean-facing east windows on the first and second floors. In addition, there was water intrusion in one of the bathrooms and in the mechanical room.

The windows and doors on the main house were installed, removed, and reinstalled once by Starbuck. When that did not remedy the problem, Archia uninstalled and then reinstalled all fifty windows on the main house. Meharg testified that seventeen window openings were framed incorrectly and did not conform to the plans and specifications for the project. Even after the reinstallation by Archia, three of the windows still leaked, which Meharg attributes to a product defect in the windows. A proposed work order dated March 6, 2023, noted: "Contractor is complaining leaks. Of course installer/finisher guys saying not our fault and has to be Marvin. Contractor is starting to remove exterior trim to inspect also but of course other saying must be Marvin's fault."

In late March, Greene and Gawrelski retained Building Enclosure Science ("BES") to perform a limited condition assessment of the building envelope, focusing on the window installation, and to perform investigative water testing at the windows. In an email dated March 29, 2023, Archia contacted Marvin to ensure that a representative would be present during BES water testing on March 30, stating that the framers would be on site ready to be instructed on proper window installation. A Marvin representative replied that its technician would be there to inspect for any manufacturing defect contributing to water infiltration but would not have time to conduct a full installation training.

On April 26, 2023, BES emailed Archia and attached photographs of certain windows, stating:

Attached is a photo (IMG_0140) from the test we did on 3/30/2023 showing the red tag had been removed. The previously sent image with the file name IMG_0142 documents the leakage that was observed from that test. The positive attachment of the sash to the frame and removing the shipping blocks had significantly reduced the amount of leakage breaching the interior; however, the window still leaked. This could be a manufacturing defect or damage during transit or installation. . .

Regarding photos showing the defective/damaged large window assembly. The following photos illustrate our concerns.

- Attached (IMG_9947) the stile (vertical member of the sash) kicks out which is likely indicative of a bow resulting from damage during transport or installation, however this may also be a manufacturer's defect

If the rough opening is square and the window is racked then the racked window is either a manufacturer defect or damage during transit. . . .

- Attached (2023-03-30 CLS (12)) shows the sash stop is not correctly seated. This is likely a manufacturing defect unless it became unseated during transit or installation. . .
- When we applied water to the opposite lower corner of the window assembly (shown in photo IMG_0150) water did not appear in the corresponding location on the interior at the first test and instead appeared on the membrane flashing on the interior sill. The leak occurred almost instantly and quickly overtopped the sill membrane flashing and spilled on the floor. We could see water entering the open miter joint in the aluminum panning (see attached markup titled Leakage Path at Mitered Corner). The question for Marvin is, does the design of these windows include a seal between the wood framing members where the sill meets the jamb? If yes, it is likely this seal is either broken, incomplete or omitted. If incomplete or omitted, this would be a manufacturing defect. Determining the status of the seal may require a destructive probe opening such as removing the aluminum panning in the corner. If the window design does not include a seal between the joining wood members, then a longer discussion with Marvin regarding the window design would be needed.

On May 3, 2023, BES issued "Leakage Investigation Report 1," which identified numerous problems with the framing and installation of the windows. With respect to the large ocean-facing picture window on the first floor, BES stated: "an exterior sash gasket failed to make

contact with the frame and there was a displaced stile. BES attributes this defect to either transportation damages, installation deficiencies, or manufacturing defects.” BES recommended, among other things, that Marvin survey the windows to determine if they are true and can be reused and that reinstallation proceed in accordance with Marvin’s instructions. In January of 2024, representatives from Marvin conducted a field service visit and made certain recommendations.

Archia retained RDH Building Science (“RDH”) to evaluate the water intrusion issues at the main house. On April 10, 2024, RDH observed the water testing at the site. On April 19, 2024, Archia wrote to Greene and Gawrelski stating that it had expended \$339,057.10 to remedy defects in the construction of the house, had exhausted its financial resources, and was not able to continue the project. In this letter, Archia stated: “following water testing performed by RDH On Wednesday, April 10, 2024, it was determined that the water infiltration at the east facing Marvin doors on both the first and second floors, and at the west facing office windows was caused by manufacturers’ defects in those window products.” In an April 26, 2024 letter to Greene and Gawrelski, Archia reiterated its belief that there were manufacturer’s defects in the windows and attached Marvin’s limited warranty for the windows and Marvin’s contact information.

Greene and Gawrelski commenced this action against Archia, Stames, and Cape Cod on May 29, 2024. Their First Amended Complaint alleges breach of contract by Archia in Count I, negligence by Archia in Count II, breach of express warranty by Archia in Count III, and breach of implied warranty of fitness for a particular purpose in Count IV. Count V alleges violation of the Home Improvement Contractor Act by Archia and Stames. Count VI alleges violation of Chapter 93A by Archia. Count VII seeks an accounting from Archia. Count VIII alleges breach

of fiduciary duty by Archia and Count IX alleges fraud by Archia and Stames personally. Count X seeks to pierce the corporate veil. Count XI alleges conversion by Stames. The First Amended Complaint also asserts a negligence claim against Cape Cod in Count XII.⁵

Archia then asserted a third-party complaint against various subcontractors on the project. Count I of Archia's third-party complaint alleges breach of contract by ML Riley, Count II seeks contractual indemnity from ML Riley, Count III seeks contribution from ML Riley, and Count IV alleges negligence by ML Riley.⁶

Archia's third-party complaint alleges the following claims against Marvin: breach of the implied warranty of merchantability in Count IX; breach of the implied warranty of fitness for a particular purpose in Count X; and negligence in Count XI. Count XII seeks contribution from Marvin and Count XIII seeks common law indemnity from Marvin.

Archia's third-party complaint alleges the following claims against Ipswich: breach of contract in Count XIV; contractual indemnity in Count XV; and contribution in Count XVI.

Ipswich then filed a fourth-party complaint against Vilex and Alt. Count I of the fourth-party complaint seeks indemnification from Vilex and Count II seeks contribution from Vilex. Count III of the fourth-party complaint seeks indemnification from Alt and Count IV seeks contribution from Alt.

ML Riley filed a crossclaim against Starbuck and Marvin. Count I of ML Riley's crossclaim seeks indemnification from Starbuck, Count II seeks contribution from Starbuck, Count III alleges negligence by Starbuck, and Count IV alleges breach of contract by Starbuck.

⁵Cape Cod filed a third-party complaint against Marvin but stipulated to the dismissal of that complaint on November 15, 2024.

⁶Counts V through VIII of Archia's third-party complaint alleged claims against Clean Remodel, but Archia stipulated to the dismissal of those claims on June 23, 2026.

Count V of ML Riley's crossclaim seeks indemnification from Marvin, Count VI seeks contribution from Marvin, Count VII alleges negligence by Marvin, Count VIII alleges breach of contract by Marvin, and Count IX alleges breach of warranty by Marvin.

Starbuck filed a crossclaim seeking contribution from Marvin in Count III and common law indemnification in Count IV.⁷

Expert Witnesses

The expert disclosure deadline, as extended by the Court at the request of the parties, was January 15, 2026. On December 29, 2025, the plaintiffs served their expert witness disclosure pursuant to Superior Court Rule 30B. The plaintiffs identified Russell Kenney ("Kenney") from RJ Kenney Associates as an expert who investigated the design and construction of the façade of the house. Kenney assessed the building envelope that was installed, including the roof, cedar siding, MDF panels, PVC trim, adhered stone, flashing, and windows. Kenney prepared marked-up elevation drawings and conducted diagnostic water testing at window locations where leakage was reported, but did not submit a report.

The plaintiffs also retained Thomas Catalano ("Catalano") of Catalano Architects as an expert. Catalano was the architect of record for the project. He wrote a report dated April 10, 2024. Catalano concluded that details in the construction documents were not followed in many instances, including: missing WRB on the exterior sheathing; incorrect WRB on flares and roof sheathing and incorrect application of WRB, resulting in incomplete coverage and water exposure at the flares; missing rain screen on the main house and the incorrect product used on the carriage house; a missing drip edge along the entire roof line; and missing continuous wood blocking back dam and upturned leg of membrane flashing on the window sills. Catalano noted

⁷Clean Remodel also filed a crossclaim against Marvin but stipulated to its dismissal on November 12, 2024.

that in several areas, black felt paper was applied to create the WRB instead of the Harvey Blueskin material required by the construction plans. Catalano also identified many examples of poor workmanship and lack of oversight in the construction process, including: damaged metal flashing pans under the doors; an exposed hole cut through a wall and left exposed to the exterior; reverse laps in the WRB in numerous locations where water intrusions are occurring; a missing drip edge over the front door; and improper overlap of trim material and poor workmanship on the attachment of PVS trim. Catalano noted a missing high temperature uncured rubber membrane under the lead coated copper flashing for the second floor west deck and concluded that the water coming in above the front door and down the wall of room 104 suggests that the lack of a rubber membrane is the problem.

Catalano recommended several remedial steps, including the removal of all windows experiencing water intrusion and reapplication of the WRB system according to certain instructions, including the use of continuous wood blocking to create a back dam. Catalano's report does not identify a design or manufacturing defect in the windows themselves. However, one of the photographs shows improperly fitted window trim, creating a point of potential window intrusion. With respect to the installation of the cedar shingles on the main house, a photograph to Catalano's report notes that shingles were applied to the north exterior without any Slicker Classic 6 mm rainscreen that the plan documents required to be applied under the shingles. Catalano's report does not identify any deficiencies in the installation of the rubber roof on the peaks of the main house.

Finally, the plaintiffs retained Joseph Folkard ("Folkard") of Marshfield Woodworkers as an expert. He was hired to perform extensive remedial work on the house, including removing and replacing the Henry Blueskin membrane, removing and replacing certain flares on certain

gables, removing and replacing decking, removing all door and window trim, removing and replacing PVC panels, and adding missing trim and flashing on the house. The plaintiffs' Rule 30B disclosure does not identify any expert who will provide an opinion about the existence of a design or manufacturing defect in the Marvin windows and doors.

On January 15, 2026, ML Riley served its Rule 30B expert disclosure, identifying David Doddridge ("Doddridge") as its expert. Doddridge has a construction supervisor license, is a certified building envelope inspector, and has experience in the installation of windows and doors, building envelope components, and related weather-resistant systems. Doddridge was retained to offer an opinion about, among other things, the generally accepted practices applicable to high-end residential construction in a coastal Massachusetts environment and the standard of care applicable to the installation of windows and doors in a coastal, waterfront setting where increased exposure to wind driven rain and moisture places heightened demands on the building envelope.

According to the Rule 30B disclosure, Doddridge will opine about the suitability of the materials selected by the architect for use in the coastal setting of the project, including Marvin windows. In addition, he will opine about construction coordination and sequencing of window and door installation, including the relationship between framing, installation timing, and the application of weather-resistive barrier materials. ML Riley's Rule 30B disclosure does not identify any expert who will provide an opinion about the existence of a design or manufacturing defect in the Marvin windows and doors themselves. Based on the timely disclosed Rule 30B expert disclosures, Marvin did not retain a rebuttal expert or seek to depose the plaintiffs' and ML Riley's experts.

Archia, Starbuck, and Clean Remodel did not serve Rule 30B expert disclosures by the deadline of January 15, 2026.

On June 12, 2026, after Marvin gave notice of the intent to file for summary judgment, ML Riley served a revised expert witness disclosure by Doddridge. This revised disclosure states that Doddridge will testify about Marvin's published installation requirements and generally accepted industry standards and best practices. Doddridge will also testify about "the distinction between leakage attributable to a window or door unit itself versus leakage attributable to the installed wall assembly and the integration of the unit into the surrounding construction (including flashing, water-resistive barrier integration, trim interfaces, and related transition details)." Finally:

It is anticipated that Mr. Doddridge will testify that the [RDH] testing observations, as documented, are consistent with potential unit-level leakage pathways and/or product performance issue rather than definitive evidence of improper installation integration by the framing/window installation trade. Mr. Doddridge will further testify that he is not offering opinions as a window manufacturing or fenestration design expert, but that he is familiar with field water testing methods and limitations.

With respect to Ipswich, Doddridge's expanded expert disclosure states:

- (a) It is anticipated that Mr. Doddridge will testify regarding the role of roofing and siding sequencing and roof-to-wall integration in maintaining weather-tightness, including roof edge and rake integration and gable end overhang integration with trim conditions, and water shedding laps at roof-to-wall transitions.
- (b) It is anticipated that Mr. Doddridge will testify that incomplete roof drainage features (including uncompleted scuppers, if confirmed) can reasonably result in localized water entry and damage that is independent of window product performance and independent of window installation workmanship.
- (c) Mr. Doddridge reserves the right to supplement opinions regarding Ipswich Roofing and Siding, Inc. after review of additional production materials, invoices, sequencing records, photographs, and testimony.

Ipswich retained Robert Stone ("Stone") of Peter J. Dupont & Associates, LLC to inspect the siding and roofing on the home. In a report dated June 16, 2026, Stone concluded, to a

reasonable degree of professional certainty, that there was no deficiency with the cedar shingle siding installed by Ipswich, Ipswich was not responsible for installation of the rain screen, the absence of a rain screen did not contribute to the water intrusion issues, Ipswich installed the LCC drip edge in compliance with Catalano's design details, and no water intrusion events resulted from the installation of the roof and cedar shingle siding. Stone did not identify any specific act or omission by Vilex or Alt that was negligent or a breach of contract.

On June 19, 2026, three days before the Final Pre-Trial Conference, Archia served its first Rule 30B expert disclosure, in which it identified RDH as its expert. RDH provided an expert review and analysis of the water intrusion and building envelope conditions at 57 Gurnet Road. RDH issued a report dated June 19, 2026, in which it discussed Marvin's installation instructions for the windows and doors and noted discrepancies in the architectural framing plans for the windows. RDH's report states:

Archia provided a letter to the homeowner summarizing the initial findings from the water testing performed by RDH on April 10, 2024. Archia stated that they, RDH, and the homeowner discussed on April 10, 2024 the possibility that the water intrusion issues were related to a systemic issue with the windows Marvin provided for the project. The letter reports Archia's decision to cease their involvement with the water intrusion issues for this project. Archia recommended that the homeowner schedule further testing of the windows with RDH and that they should pursue Marvin directly about the water intrusion issues.

RDH's report notes that Stames attributed the deficient building envelope conditions to two principal causes: improper window installation by Cape Cod and "issues with the manufacturing of the windows themselves."

RDH did not expressly opine that the Marvin windows are defective. Rather, RDH stated:

BES documented conditions potentially consistent with unit fabrication – shipping/handling -, or installation-related issues, including a racked assembly, displaced stile, gasket engagement concerns, and an unseated sash stop. Marvin's

representative also questioned the integrity of certain units, and Mr. Meharg attributed a limited number of residual leaks to product performance deficiencies rather than installation deficiencies.

RDH cannot allocate those residual leaks solely to manufacturing, shipping, handling, installation, or adjustment on the present record. Additional manufacturer records, field-service documentation, and targeted retested after adjustment or repair would be required to isolate the cause.

RDH stated to a reasonable degree of certainty that in its preliminary opinion:

The probable causes of the reported intrusion are concentrated at four interfaces: the WRB at the flare and roof-to-wall transitions; the window rough-opening, sill drainage, and perimeter-sealing conditions; the second-floor west deck-to-wall interface; and the roof-edge and cladding-drainage provisions.

RDH further concluded:

As measured against the construction documents and the applicable manufacturer recommendations, responsibility for the original conditions is preliminarily allocated as follows:

- A subset of conditions originates in the design documents prepared by Catalano, including the omitted air seal at the window sill, the depiction of the WRB wrapping into the window head in conflict with the Henry Blueskin VP100 guidance, and the absence of soldering, end-dam, and high-temperature-membrane callouts at the door and deck details.
- The rough-opening sizing, the omitted sloped clapboard and back-dam, and the installation, sequencing, and lapping of the WRB fall within the framing-and-barrier scope performed through [Cape Cod] and M.L. Riley.
- The out-of-square units, the sealed sills and incompatible sealant application, and the unfinished field mull fall within the window-and-door installation scope performed by Starbuck.
- The deck-membrane non-adhesion, the copper flashing, and the drip-edge conditions fall within the roofing scope performed by Ipswich.
- A residual portion of the window leakage may implicate the performance of the Marvin units.

With respect to roofing issues, RDH stated: “The drawings depict a lead-coated copper drip edge at the roof edges (Gable Details 2 and 5/A5.6) and the code (780 CMR) additionally

provides drip-edge requirements. RDH recommends verifying presence/absence by elevation.” RDH characterized the deck membrane condition as a combined detailing, sequencing, and flashing integration issue implicating the design documents, the framing scope, and the roofing and flashing scope. In allocating responsibility for the water intrusion at the main house, RDH concluded: “The deck-membrane non-adhesion, the copper flashing, and the drip-edge conditions fall within the roofing scope performed by Ipswich.” RDH did not conclude that any improper substitution of felt underlayment for the specified self-adhered membrane occurred and did not identify the specific roof areas at issue.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. *Carroll v. Select Bd. of Norwell*, 493 Mass. 178, 188 (2024). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party’s case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of her case at trial. *Id.*

MARVIN’S MOTION FOR SUMMARY JUDGMENT AND DAUBERT-LANIGAN MOTION TO EXCLUDE UNTIMELY DISCLOSED EXPERT WITNESSES (Paper # 112)

As a threshold matter, Marvin contends that for purposes of summary judgment, the Court should not consider Doddridge’s supplemental expert opinion and RDH’s expert opinion

due to ML Riley and Archia's failure to comply with Superior Court Rule 30B, which provides in relevant part:

Unless the parties agree or the court in the interests of justice orders otherwise, each party shall set forth the following information in the pre-trial conference memorandum: the name, address, and qualifications of each expert a party intends to call, the subject matter on which the expert is expected to testify, the substance of all facts and opinions expected, and a summary of the grounds of each expert's opinion as detailed as would be expected in an answer to an expert interrogatory. The information as to any expert set forth in the pre-trial memorandum must be signed by that expert in accordance with Superior Court Rule 30B. . . . Any party who has previously made such disclosure in response to an expert interrogatory may satisfy this requirement by appending such response to the pre-trial memorandum. No party may reserve the right to make a later disclosure. A party who fails to comply substantially with the terms of this Rule shall not have the right to call an expert at trial, but the court in its discretion may permit that party to do so upon such additional terms, if any, that the court may require.

Super. Ct. Rule 30B(a). Rule 30B expressly provides for the exclusion of expert testimony at trial. See, e.g., *Krumsiek v. Collins Elec. Co., Inc.*, 2021 WL 9165972 at *1 (Mass. Super. Ct.) (Hodge, J.) (denying motion to file Rule 30B expert designation one month before trial where case had been pending for three years, extensive discovery was closed, dispositive motions had been heard, defendant did not explain why expert designation was so late, and defendant did not explain how proposed expert's testimony was necessary to its defense). However, it is unclear whether that remedy also is appropriate at the summary judgment stage of the proceedings. See *DeRosa v. Lenox Farms Ltd. P'ship*, 104 Mass. App. Ct. 510, 514 (2024) (stating, in context of summary judgment, that sanction for violation of Rule 30B does not include dismissal of action and concluding that judge erred in granting summary judgment for landlord on ground that plaintiff lacked expert testimony linking her symptoms to mold in apartment where although plaintiff failed to serve expert disclosures, landlord was on notice that tenant's treating physician was willing to testify in case). Cf. *Hartunian v. Mercy Med. Cntr.*, 2020 WL 7488628 at *2 (Mass. App. Ct. Rule 23.0) (declining to address whether in granting summary judgment, judge

erred in refusing to consider expert opinion filed late in violation of Rule 30B where judge had denied motion to continue trial because expert could not testify on trial date, after finding motion was filed in bad faith for purpose of delay, and it was therefore indisputably true that plaintiff could not prove his case at trial).

MJ Riley and Archia assert that their late expert disclosures were necessitated by the extended discovery schedule due to the addition of the third-party and fourth-party defendants. Notably, discovery did not close until April 17, 2026. They emphasize that Marvin was on notice, beginning in the spring of 2023, of Archia's claim that the water infiltration was caused by a defect in the windows themselves. Nonetheless, the timing of the belated disclosures strongly suggests that they were created in response to Marvin's notice of intent to file for summary judgment based on the lack of expert testimony as to a product defect. It is also questionable whether the disclosures comply with the substantive requirements of Rule 30B, which include disclosure of the substance of all facts and opinions expected, and a summary of the grounds of each expert's opinion as detailed as would be expected in an answer to an expert interrogatory. With respect to Marvin's alleged role in the water infiltration problems, the disclosures are decidedly vague. In any event, as discussed, *infra*, the substance of the late-disclosed experts is insufficient, as a matter of law, to create a genuine issue of material fact with respect to Marvin's liability. The Court therefore will not exclude them from the summary judgment record.

Archia's Third-Party Claims

Marvin moves for summary judgment on all Archia's third-party claims against it.

Count IX

Marvin contends that Archia has no reasonable expectation of proving that it breached the implied warranty of merchantability with respect to its windows. A manufacturer breaches that warranty when at the point of sale or distribution, a product is defective and not fit for the ordinary purposes for which such goods are used, i.e., their intended and foreseeable use.

Haglund v. Philip Morris Inc., 446 Mass. 741, 746-747 (2006). Liability may be premised on defective design, a manufacturing defect, or a failure to warn. *Id.* A breach of warranty claim focuses on the product's features and not the defendant's conduct. *Id.* at 747. The plaintiff must demonstrate that his injury was proximately caused by a defect in the product that existed at the time of the sale. *Enrich v. Windmere*, 416 Mass. 83, 89 (1993); *Kourovacilis v. General Motors Corp.*, 410 Mass. 706, 708 (1991); *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 37 (1987).

Proof of the existence of a product defect generally requires expert testimony. *Enrich v. Windmere*, 416 Mass. at 87. Archia suggests that it is a matter of common sense that windows should not leak and therefore, the leaky windows must be defective. However, the mere malfunctioning of a product is not adequate proof that the product was defectively designed or manufactured. *Id.* at 87-88; *Kourovacilis v. General Motors Corp.*, 410 Mass. at 717. Further, this is not a case where a jury could find from its own knowledge that Marvin improperly designed or manufactured the windows, because those matters involve technical considerations. See, e.g., *Esturban v. Massachusetts Bay Transp. Auth.*, 68 Mass. App. Ct. 911, 911 (2007) (proper width and design of escalator was beyond common knowledge and experience of

average person). Cf. *Smith v. Ariens Co.*, 375 Mass. 620, 625 (1978) (jury could infer without expert testimony that metal protrusions on handlebars of snowmobile, which cut plaintiff's face when she was propelled forward in collision, amounted to obvious design defect); *doCanto v. Ametek*, 367 Mass. 776, 782 (1975) (no expert testimony was necessary where given evidence of post-accident safety improvements, lay person could conclude that commercial laundry ironer that pulled in worker's hand and continued to do so even after electricity was shut off had unsafe design); *Cocco v. Deluxe Sys., Inc.*, 25 Mass. App. Ct. 151, 156-157 (1987), rev. den., 401 Mass. 1103 (1988) (expert testimony was not required where lay person could make judgment that where workers had to put hands in shredder to unjam it and shredder could accidentally become engaged from someone brushing by it, a warning was required to make it reasonably safe). Here, the need for expert testimony about the existence of a defect in the windows is particularly great, given the extensive record evidence of failure to follow the manufacturer's instructions and improper window installation.

Archia argues that the record contains sufficient testimony by lay witnesses to create a genuine issue of material fact as to a design or manufacturing defect. The Court is not persuaded. Archia's lead carpenter, Meharg, opined that eight windows were "themselves not square," a condition which he believes indicates a manufacturing defect, as opposed to an installation issue. Lay testimony is not a substitute for expert testimony as to a product defect. See *Enrich v. Windmere*, 416 Mass. at 87 (lay testimony that house sitter turned on fan, heard scratching noises, then came downstairs and saw fan engulfed in flames was not substitute for expert testimony that fire was caused by defect existing at time fan was sold); *Goffredo v. Mercedes-Benz Truck Co.*, 402 Mass. 97, 104 (1988) (testimony of truck drivers that they had problems getting truck door to open and that it popped halfway open on prior occasions was not

sufficient to establish design defect). Meharg concedes that he does not have any training or expertise related to identifying manufacturing or design defects in windows. Thus, he is not qualified to give an opinion as to a defect in the windows; further, his opinion is too speculative and conclusory to establish a defect in the windows that existed at the time of delivery by Marvin. The same is true of the conclusory opinion of Archia's principal, Stames, that the leaks were caused by both improper installation and issues with the manufacturing of the windows in the first place.

The Court therefore must examine the adequacy of the late-disclosed expert opinions. Foremost, Doddridge concedes that he is not offering an opinion as a window manufacturing or fenestration design expert. Further, Doddridge does not identify a defect in the windows with any specificity, nor does he opine that any defect existed at the time the windows left Marvin's control. Rather, Doddridge will testify only that the leaks observed during RDH's water testing "are consistent with potential unit-level leakage pathways and/or product performance issue, rather than definitive evidence of improper installation integration by the framing/window installation trade." An expert opinion stated in terms of possibilities does not satisfy the plaintiff's burden of proof to establish the existence of a design or manufacturing defect by a preponderance of the evidence. *Goffredo v. Mercedes-Benz Truck Co.*, 402 Mass. at 102; *Fidalgo v. Columbus McKinnon Corp.*, 56 Mass. App. Ct. 176, 183, rev. den., 438 Mass. 1103 (2002). Doddridge's conclusion that the leaks are consistent with a potential product defect suggests no more than a possibility of a defect and is too speculative to create a genuine issue of material fact.

Similarly, RDH's report merely states that BES documented conditions "potentially consistent with" unit fabrication, shipping and handling, or installation-related issues, including a

racked assembly, displaced stile, gasket engagement concerns, and an unseated sash stop.

Although RDH identified specific problem areas of certain windows, it concluded only that they are “potentially consistent” with a defect. This falls short of an admissible expert opinion concerning a design or manufacturing defect. See *Goffredo v. Mercedes-Benz Truck Co.*, 402 Mass. at 102; *Fidalgo v. Columbus McKinnon Corp.*, 56 Mass. App. Ct. at 183.

Further, to prove breach of the warranty of merchantability, expert testimony is required to show that it is more likely that the injury occurred because of a product defect than from some other cause for which the defendant is not responsible. *Enrich v. Windmere*, 416 Mass. at 87; *Esturban v. Massachusetts Bay Transp. Auth.*, 68 Mass. App. Ct. at 911. An expert opinion stated in terms of possibility does not satisfy the plaintiff’s burden of proof to establish by a preponderance of the evidence that a design or manufacturing defect caused the plaintiff’s injuries. *Fidalgo v. Columbus McKinnon Corp.*, 56 Mass. App. Ct. at 183. Doddridge’s proffered testimony states only that the leaks “are consistent with a potential” defect rather than definitive evidence of an installation issue. RDH’s report is even more speculative because it attributes the leaks to “unit fabrication – shipping/handling -, or installation-related issues.” (emphasis added). The proffered expert testimony expresses no more than a possibility of causation and therefore is inadequate to create a material issue of fact.

Viewing the record in the light most favorable to Archia, it has no reasonable expectation of proving breach of the implied warranty of merchantability. Marvin therefore is entitled to judgment as a matter of law on Count IX of the third-party complaint. See *Kourovacilis v. General Motors Corp.*, 410 Mass. at 716-717; *Morrell v. Precise Eng’g, Inc.*, 36 Mass. App. Ct. 935, 936 (1994) (summary judgment was appropriate where plaintiff lacked necessary expert opinion to prove product defect caused injury).

Count X

Marvin further contends that Archia has no reasonable expectation of proving that it breached the implied warranty of fitness for a particular purpose. Such a warranty arises when the seller has reason to know that the buyer needs the product for a particular purpose and is relying on the seller's skill or judgment to select and furnish suitable goods. *Fernandes v. Union Bookbinding Co.*, 400 Mass. at 34; *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 484 (1971). The summary judgment record is devoid of evidence that Archia was relying on Marvin to select and furnish windows for some specific use peculiar to the project beyond the ordinary purposes for which its windows are used. See *Fernandes v. Union Bookbinding Co.*, 400 Mass. at 35. Accordingly, viewing the record in the light most favorable to Archia, it has no reasonable expectation of proving breach of the implied warranty of fitness for a particular purpose, and Marvin is entitled to judgment as a matter of law on Count X of the third-party complaint.

Count XI

Marvin also contends that Archia has no reasonable expectation of proving its negligence. To establish negligence, the plaintiff must prove that the defendant owed him a duty of reasonable care and breached that duty, damage resulted, and there was a causal relation between the breach of duty and the damage. *Trustees of Boston Univ. v. Clough, Harbour & Assoc. LLP*, 495 Mass. 682, 687 (2025); *Williams v. Steward Health Care Sys., LLC*, 480 Mass. 286, 290 (2018). In a negligence action involving an allegedly defective product which has left the control of the manufacturer, the plaintiff must show that the product was not improperly handled by himself or intermediate handlers. *Corsetti v. Stone Co.*, 396 Mass. 1, 24 (1985). As discussed, *supra*, without admissible expert testimony, Archia has no reasonable expectation of proving a defect in the windows as opposed to improper installation and therefore cannot

demonstrate that Marvin breached a duty of care with respect to the design or manufacture of the windows.

Further, causation is an essential element of a negligence claim, and a defendant is not liable for negligent conduct unless it is causally related to the plaintiff's injury. *Kent v. Commonwealth*, 437 Mass. 312, 320 (2002). See also *Aulson v. Stone*, 97 Mass. App. Ct. 702, 705 (2018) (summary judgment is proper where no reasonable factfinder could find causation on evidence presented). Expert testimony generally is required to show that it is more likely that the injury occurred because of the defendant's negligence than from some other cause for which the defendant is not responsible. *Enrich v. Windmere*, 416 Mass. at 87; *Esturban v. Massachusetts Bay Transp. Auth.*, 68 Mass. App. Ct. at 911.

As discussed, *supra*, the proffered opinions of Doddridge and RDH are inadequate to meet Archia's burden to demonstrate causation. Without admissible expert testimony, Archia has no reasonable expectation of proving proximate cause and thus liability. Accordingly, Marvin is entitled to judgment as a matter of law on Count XI of the third-party complaint.

Count XII

Marvin next contends that Archia has no reasonable expectation of proving its entitlement to contribution. The contribution statute, Chapter 231B, confers upon a tortfeasor the right to contribution from others jointly liable in tort for the same injury. *Berube v. Northampton*, 413 Mass. 635, 638 (1992). Contribution rights are derivative of joint tort liability and there is no claim for contribution without liability in tort. *Id.*

As discussed, *supra*, there is no admissible expert testimony to demonstrate that the windows provided by Marvin were defectively designed or contained a manufacturing defect, nor is there evidence of any other negligence on Marvin's part. Accordingly, there is no basis

for holding Marvin liable in tort for the plaintiffs' damages. Without such a basis, Archia cannot seek contribution from Marvin. See *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. 316, 326 (2012) (there is no right of contribution unless party would be directly liable to injured person); *Berube v. Northampton*, 413 Mass. at 639 (contribution is not recoverable from party against whom plaintiff has no cause of action). Accordingly, Archia has no reasonable expectation of proving a right to contribution and Marvin is entitled to judgment as a matter of law on Count XII of the third-party complaint.

Count XIII

Marvin also contends that Archia has no reasonable expectation of proving its entitlement to common law indemnity. Indemnity allows one who is without fault but is compelled by operation of law to defend himself against the wrongful act of another to recover from the wrongdoer the entire amount of his loss. *Elias v. Unisys Corp.*, 410 Mass. 479, 482 (1991); *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 369 (1985). Here, Archia's exposure to damages is not derivative or vicarious in nature but rather, due to its potential direct liability to the plaintiffs for its own negligence in performing defective work and failing to properly supervise its subcontractors. This is not a case where Archia is blameless. Accordingly, there is no third-party claim for indemnification based on vicarious liability.

The general rule is that a person who negligently causes injury to a third person is not entitled to indemnification from another person who also negligently caused that injury. *Ferreira v. Chrysler Group LLC*, 468 Mass. 336, 344 (2014); *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. at 370. However, in rare cases, common law indemnity may be allowed to a party who is negligent, but whose negligence is insignificant in relation to that of the indemnitor. *Rathburn v. Western Mass. Elec. Co.*, 395 Mass. 361, 364 (1985). As discussed,

supra, the summary judgment record is devoid of evidence that Marvin was negligent.

Accordingly, Archia has no reasonable expectation of proving an entitlement to common law indemnification and Marvin is entitled to judgment as a matter of law on Count XIII of the third-party complaint.

ML Riley's Crossclaim

Marvin further moves for summary judgment on ML Riley's crossclaim.

Count V

Marvin contends that ML Riley has no reasonable expectation of proving its entitlement to indemnification from Marvin. ML Riley's exposure to damages is not derivative or vicarious in nature but rather due to its potential direct liability to the plaintiffs for its own negligence in failing to properly supervise the subcontractors performing rough carpentry and framing. This is not a case where ML Riley is blameless. Accordingly, there is no third-party claim for indemnification based on vicarious liability. See *Elias v. Unisys Corp.*, 410 Mass. at 482; *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. at 369. Further, because the summary judgment record is devoid of evidence that Marvin was negligent, ML Riley cannot obtain common law indemnification on the ground that its negligence is insignificant in relation to that of Marvin. See *Rathburn v. Western Mass. Elec. Co.*, 395 Mass. at 364. Accordingly, ML Riley has no reasonable expectation of proving an entitlement to common law indemnification and Marvin is entitled to judgment as a matter of law on Count V of the crossclaim.

Count VI

Marvin further contends that ML Riley has no reasonable expectation of proving its entitlement to contribution. Because on this record, there is no basis for holding Marvin liable in tort for the plaintiffs' damages, ML Riley cannot seek contribution from Marvin. See *LeBlanc*

v. *Logan Hilton Joint Venture*, 463 Mass. at 326; *Berube v. Northampton*, 413 Mass. at 639.

Marvin therefore is entitled to judgment as a matter of law on Count VI of the crossclaim.

Count VII

Marvin also contends that ML Riley has no reasonable expectation of proving its negligence. As discussed, *supra*, without admissible expert testimony to demonstrate that the windows provided by Marvin were defectively designed or contained a manufacturing defect, ML Riley cannot prove Marvin's negligence. Accordingly, Marvin is entitled to judgment as a matter of law on Count VII of the crossclaim.

Count VIII

Marvin contends that ML Riley has no reasonable expectation of proving breach of contract. To prevail on a breach of contract claim, the plaintiff must show that: an agreement was made between the plaintiffs and the defendant supported by valid consideration; the plaintiff was ready, willing, and able to perform; and the defendant's breach caused the plaintiff to suffer damages. *Tenants' Develop. Corp. v. AMTAX Holdings, 227, LLC*, 495 Mass. 207, 222 (2025). The summary judgment record is devoid of evidence that Marvin entered into a contract with ML Riley. Accordingly, ML Riley has no reasonable expectation of proving breach of contract, and Marvin is entitled to judgment as a matter of law on Count VIII of the crossclaim.

Count IX

Marvin contends that ML Riley has no reasonable expectation of proving breach of warranty. As discussed, *supra*, expert testimony is required in this case to prove breach of the warranty of merchantability, and the record does not contain an adequate expert opinion on the issues of defect and causation. Accordingly, ML Riley cannot prove breach of warranty, and Marvin is entitled to judgment as a matter of law on Count IX of the crossclaim.

Starbuck's Crossclaim

Finally, Marvin moves for summary judgment on Starbuck's crossclaim. Marvin contends that Starbuck has no reasonable expectation of proving its entitlement to contribution in Count III or common law indemnification in Count IV. Given the absence of admissible evidence of a defect in the windows or other negligence by Marvin, Starbuck's claims for contribution and indemnification must fail. Accordingly, Marvin is entitled to judgment as a matter of law on Starbuck's crossclaim.

DEFENDANT IPSWICH'S MOTION FOR SUMMARY JUDGMENT (Paper # 113)

Ipswich moves for summary judgment on Archia's third-party claims against it.

Count XIV

Ipswich contends that Archia has no reasonable expectation of proving that it breached the two purchase orders. A breach of contract claim requires the plaintiff to show that: an agreement was made between the plaintiffs and the defendant supported by valid consideration; the plaintiff was ready, willing, and able to perform; and the defendant's breach caused the plaintiff to suffer damages. *Tenants' Develop. Corp. v. AMTAX Holdings, 227, LLC*, 495 Mass. at 222. Purchase Order 225 required Ipswich to provide all labor, equipment, and permit fees to complete rubber, cedar roofing, and lead coated copper flashing on the main house and carriage house. Purchase Order 221 required Ipswich to provide all labor, equipment, and permit fees to complete the installation of the white cedar shingles as necessary. Both purchase orders required Ipswich to complete its work in a workmanlike manner and in compliance with the plans and specifications for the project as well as applicable building codes.

Archia asserts that Ipswich breached its contract by failing to install rain screens (drainage mat) on the main house, failing to install a drip edge along the roof line, and failing to properly install the rubber membrane under the copper flashing at the second-floor west deck.⁸ Ipswich contends that none of those items were within the scope of work set forth in the purchase orders. The record shows that in general, ML Riley and Cape Cod were responsible for installing the WRB. RDH's report noted that Catalano's plans called for an entangled-filament drainage mat between the back of the shingles and the WRB as part of a water shedding rain screen assembly. There is no evidence that Ipswich was responsible for the rain screen. With respect to the drip edge, RDH's report states: "Flashing scope attribution coordinates with Ipswich" and "the drip edge conditions fall within the roofing scope performed by Ipswich." The summary judgment record therefore raises a genuine issue of material fact with respect to whether the drip edge was within the scope of the work Ipswich was required to perform and did perform under the purchase orders.

Ipswich emphasizes that the RDH report states: "the installation of the high-temperature deck membrane is not included in either Ipswich purchase order. The deck membrane scope is addressed separately." Nonetheless, the purchase orders required Ipswich to perform all work "necessary for the construction and completion of the work described in each individual Work Order, including work incidental thereto and reasonably inferable therefrom . . ." Archia's principal, Stames, testified that Ipswich was hired to put the building exterior skin on the building, which was not sufficiently watertight. Archia's lead carpenter, Meharg, was responsible for supervising Ipswich's work as it related to the building envelope. He testified

⁸With respect to the drip edge, RDH's report states: "RDH recommends verifying presence/absence by elevation." Doddridge's report discusses incomplete roof drainage features, including "uncompleted scuppers, if confirmed." However, Catalano's report notes a missing rain screen on the main house and a missing drip edge along the entire roof line.

that Ipswich installed the rubber membrane around the double door in the primary bedroom. Accordingly, there is a genuine issue of material fact with respect to whether the rubber deck membrane was within the scope of the work Ipswich was required to perform and did perform under the purchase orders.

Ipswich further contends that Archia cannot prove that it breached its obligation to perform in a workmanlike manner and in compliance with the project plans and specifications and applicable building codes. When a party binds himself by contract to do work, he agrees to do a workmanlike job and to use the reasonable care and skill required by members of his profession. *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. at 329; *Klein v. Cataldo*, 386 Mass. 701, 720 (1982). Expert testimony is generally required to establish this professional standard of care. *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. at 329 (standard of care for architect). See also *Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. 221, 227 (1999) (expert testimony is necessary to demonstrate standard of care for engineer); *Murphy v. DiNisco*, 2002 WL 850227 at *1 (Mass. App. Ct. Rule 1:28) (expert testimony is necessary to demonstrate applicable standard of care for general contractors).

Ipswich argues that Archia has no reasonable expectation of proving that it breached the applicable standard of care for its work because none of the experts cite specific professional or industry standards that it violated. Although RDH attributes the water leakage to four interfaces, one of which is “the roof-edge and cladding-drainage provisions,” it does not opine precisely how Ipswich violated the applicable standard of care.

However, Archia’s lead carpenter, Meharg, was responsible for supervising Ipswich’s work as it related to the building envelope. Meharg testified that there was a problem with Ipswich’s installation of the rubber membrane around the double door in the primary bedroom.

The membrane did not adhere properly, and Ipswich attempted to fix it with a copper pan, but the rubber roof still did not adhere underneath the copper pan. This resulted in water leakage around the door. Stames also testified that Ipswich incorrectly installed rubber roofing and copper flashing in the back deck area. An expert need only have sufficient training, experience, and familiarity with the subject of the testimony to assist the jury. See Mass. G. Evid. § 702 (2025). Stames and Meharg are familiar with the project and construction standards generally and appear qualified to testify that Ipswich's work failed to meet the workmanlike standard of care with respect to the deck membrane. Cf. *Davis v. 575 Worcester Rd.*, 2008 WL 4414607 at *2 (Mass. App. Ct. Rule 1:28) (granting summary judgment where plaintiff's expert did not cite any industry standards or practices with respect to when bollards are required in parking lot and did not opine that bollards were warranted to eliminate dangerous condition that caused plaintiff's injuries). Accordingly, viewing the record in the light most favorable to Archia, there is a genuine issue of material fact with respect to whether Ipswich breached the purchase orders. Ipswich has not demonstrated its entitlement to judgment as a matter of law on Count XIV of the third-party complaint.

Count XV

Ipswich contends that Archia has no reasonable expectation of proving an entitlement to contractual indemnity from Ipswich. To prevail on its claim, Archia must show the existence of a valid and enforceable indemnification clause, the occurrence of an event triggering the duty to indemnify, the provision of adequate notice to the indemnitor, and the failure of the indemnitor to fulfill its obligation as specified in the indemnification clause. See *Trustees of Boston Univ. v. Clough, Harbour & Assoc. LLP*, 495 Mass. at 687. An express contract for indemnity is construed to ascertain the parties' intent and effectuate their purpose. *Fall River Hous. Auth. v.*

H.V. Collins Co., 414 Mass. 10, 13 (1992); *Whittle v. Pagani Bros. Constr. Co., Inc.*, 383 Mass. 796, 798 (1981). The primary determinant of the parties' intent is the plain language they used. *Whittle v. Pagani Bros. Constr. Co., Inc.*, 383 Mass. at 798-799. The purchase orders require Ipswich to indemnify Archia with respect to claims "attributable to the negligence of the Subcontractor or any entity for which it is legally responsible or vicariously liable . . ." As discussed, *supra*, there is a genuine issue of material fact with respect to whether Ipswich failed to use reasonable skill and care and failed to complete its tasks in a workmanlike manner. Accordingly, Ipswich has not demonstrated that Archia has no reasonable expectation of proving its right to indemnity under the purchase orders, and Ipswich is not entitled to judgment as a matter of law on Count XV of the third-party complaint.

Count XVI

Finally, Ipswich contends that Archia has no reasonable expectation of proving its entitlement to contribution. Chapter 231B confers upon a tortfeasor the right to contribution from others jointly liable in tort for the same injury. See *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. at 326 (there is no right of contribution unless party would be directly liable to injured person); *Berube v. Northampton*, 413 Mass. at 639 (contribution is not recoverable from party against whom plaintiff has no cause of action). Breach of a contract obligation may be the basis for a tort claim by third parties who are foreseeably injured by the defendant's negligence in carrying out that obligation. *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. at 328. If Ipswich is found to have breached the purchase orders, that breach might enable Greene and Gawrelski to recover from Ipswich in negligence, in which case Ipswich and Archia would be joint tortfeasors under Chapter 231B. Accordingly, viewing the record in the light most favorable to Archia, there is a genuine issue of material fact with respect to whether Archia is entitled to contribution

from Ipswich. Ipswich therefore is not entitled to judgment as a matter of law on Count XVI of the third-party complaint.

DEFENDANT VILEX'S MOTION FOR SUMMARY JUDGMENT (Paper # 114)

Vilex moves for summary judgment on Ipswich's fourth-party complaint.

Count I

Vilex contends that Ipswich has no reasonable expectation of proving an entitlement to indemnification from Vilex. Common law indemnity is available to one who is without fault but is compelled by operation of law to defend himself against the wrongful act of another. *Elias v. Unisys Corp.*, 410 Mass. at 482; *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. at 369. Ipswich entered into an oral agreement with Vilex to perform the cedar shingle installation on the main house and Vilex installed the cedar shingle siding between January 10 and 12, 2023. Vilex did not install the WRB or the black felt roofing paper and did not make any decisions about the order of the work on the project or whether to install a rain screen.

Discovery is closed, and none of the disclosed expert opinions identify the installation of the cedar shingles as unworkmanlike or the source of water infiltration. Nor is there any deposition testimony to support the conclusion that Vilex's work was unworkmanlike or the source of water infiltration. Indeed, Ipswich's own expert, Stone, concluded in his report that there was no deficiency with the installation of the cedar shingle siding and there were no water intrusion events resulting from that work. Thus, the record fails to raise a genuine issue of material fact with respect to negligence by Vilex. Absent some evidence of Vilex's negligence, Ipswich has no reasonable expectation of proving an entitlement to common law indemnification if it is held liable for the plaintiffs' damages.

Ipswich alleges that Vilex orally agreed to indemnify Ipswich for any claims made against Ipswich arising out of Vilex's work on the project. Ipswich argues that there is a genuine issue of material fact with respect to the existence and terms of an express indemnity agreement. In Massachusetts, as a matter of public policy, any agreement "which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents, or subcontractors, shall be void." G.L. c. 149, § 29C. Thus, any oral indemnity agreement between Ipswich and Vilex is enforceable only if some act or failure to act by Vilex, caused, at least in part, the plaintiffs' damages. See *Sheehan v. Modern Continental/Healy*, 62 Mass. App. Ct. 937, 938 (2005) (contractor can be indemnified only if it is established that act or omission of subcontractor caused the injury in question). Viewed in the light most favorable to Ipswich, the record is devoid of evidence that Vilex's cedar shingle installation caused water infiltration into the main house. Without some evidence of Vilex's wrongdoing, Vilex cannot be required to indemnify Ipswich for the plaintiffs' damages. Vilex therefore is entitled to judgment as a matter of law on Count I of the fourth-party complaint.

Count II

Vilex further contends that Ipswich has no reasonable expectation of proving its entitlement to contribution. Chapter 231B confers upon a tortfeasor the right to contribution from others jointly liable in tort for the same injury. See *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. at 326 (there is no right of contribution unless party would be directly liable to injured person); *Berube v. Northampton*, 413 Mass. at 639 (contribution is not recoverable from party against whom plaintiff has no cause of action). Viewed in the light most favorable to Ipswich, the record is devoid of evidence that Vilex's installation of cedar shingles was unworkmanlike or the source of water infiltration. Absent some evidence of Vilex's negligence, Vilex is not a joint

tortfeasor, and Ipswich has no reasonable expectation of proving an entitlement to contribution if it is held liable for the plaintiffs' damages. Accordingly, Vilex is entitled to judgment as a matter of law on Count II of the fourth-party complaint.

FOURTH PARTY DEFENDANT ALT'S MOTION FOR SUMMARY JUDGMENT (Paper # 115)

Alt also moves for summary judgment on Ipswich's fourth-party complaint.

Count III

Alt contends that Ipswich has no reasonable expectation of proving an entitlement to indemnification. Ipswich entered into an oral agreement with Alt to perform a small portion of the rubber roof installation on the peaks above the third floor of the main house, along with a small portion of shingles in front of each peak. Alt performed this work in December of 2022.

Discovery is closed, and none of the disclosed expert opinions identify the rubber roof and shingle installation on the third-floor peaks as unworkmanlike or the source of water infiltration. Nor is there any deposition testimony to support the conclusion that the rubber roof and shingle installation on the third-floor peaks was unworkmanlike or the source of water infiltration. General statements in the expert reports about problems with the roof or roof edges, without more, are insufficient to permit a reasonable inference that Alt's work is implicated. Thus, the record fails to raise a genuine issue of material fact with respect to negligence by Alt. Absent some evidence of Alt's negligence, Ipswich has no reasonable expectation of proving an entitlement to common law indemnification if it is held liable for the plaintiffs' damages. See *Elias v. Unisys Corp.*, 410 Mass. at 482; *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. at 369 (common law indemnity is available to one who is without fault but is compelled by operation of law to defend himself against wrongful act of another).

Ipswich alleges that Alt orally agreed to indemnify Ipswich for any claims made against Ipswich arising out of Alt's work on the project. Ipswich argues that there is a genuine issue of material fact with respect to the existence and terms of an express indemnity agreement. As discussed, *supra*, pursuant to G.L. c. 149, § 29C, any oral indemnity agreement between Ipswich and Alt is enforceable only if some act or omission by Alt, caused, at least in part, the plaintiffs' damages. See *Sheehan v. Modern Continental/Healy*, 62 Mass. App. Ct. at 938. Viewed in the light most favorable to Ipswich, the record is devoid of evidence that Alt's limited rubber roof and shingle installation on the third-floor peaks caused water infiltration into the main house. Absent some evidence of Alt's wrongdoing, Alt cannot be required to indemnify Ipswich for the plaintiffs' damages. Accordingly, Alt is entitled to judgment as a matter of law on Count III of the fourth-party complaint.

Count IV

Finally, Alt contends that Ipswich has no reasonable expectation of proving an entitlement to contribution. Viewed in the light most favorable to Ipswich, the record is devoid of evidence that Alt's limited rubber roof and shingle installation on the third-floor peaks was unworkmanlike or the source of water infiltration. Without evidence of Alt's negligence, Alt is not a joint tortfeasor under Chapter 231B, and Ipswich has no reasonable expectation of proving an entitlement to contribution if it is held liable for the plaintiffs' damages. See *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. at 326 (there is no right of contribution unless party would be directly liable to injured person); *Berube v. Northampton*, 413 Mass. at 639 (contribution is not recoverable from party against whom plaintiff has no cause of action). Accordingly, Alt is entitled to judgment as a matter of law on Count IV of the fourth-party complaint.

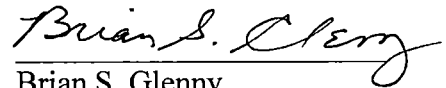
ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant Marvin Lumber and Cedar Company's Motion For Summary Judgment and Daubert-Lanigan Motion to Exclude Untimely Disclosed Expert Witness be **ALLOWED**.

It is further **ORDERED** that Defendant In a 3rd Party Claim Ipswich Roofing Siding Inc.'s Motion For Summary Judgment be **DENIED**.

It is **ORDERED** that Defendant Vilex, Inc.'s Motion For Summary Judgment be **ALLOWED**.

Finally, it is **ORDERED** that Defendant Alt Construction, LLC's Motion For Summary Judgment be **ALLOWED**.



Brian S. Glenny
Justice of the Superior Court

DATED: August ¹⁴, 2026