

1996

Valley Colour, Inc. v. Beuchert Builders, Inc. : Brief of Appellant

Utah Court of Appeals

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JURISDICTION

The Utah Supreme Court has jurisdiction over Valley Colour, Inc.'s ("Valley Colour") appeal from the Fourth Judicial District Court's granting of Beuchert Builder, Inc.'s ("Beuchert") Rule 12(b)(6) Motion to Dismiss pursuant to Utah Code Ann. § 78-2b-2(3)(j) (1995).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Did the trial court err in dismissing Valley Colour's claims of breach of contract, repudiation of contract, unjust enrichment, and breach of covenant of good faith and fair dealing as time barred based on the two-year statute of limitations for actions related to improvements in real property pursuant to Utah Code Ann. § 78-12-25.5 (1995).

Standard of Review: Whether a statute of limitations applies to a particular cause of action is a question of law, and reviewed for correctness. Klinger v. Kightly, 791 P.2d 868, 869 (Utah 1990).

2. Did the trial court err in dismissing Valley Colour's claims of slander of title and tortious interference as time barred based on the two-year statute of limitations for actions related to improvements in real property pursuant to Utah Code Ann. § 78-12-25.5 (1995).

Standard of Review: Whether a statute of limitations applies to a particular cause of action is a question of law, and reviewed for correctness. Klinger v. Kightly, 791 P.2d at 869.

3. Did the trial court err in dismissing Valley Colour's challenge to the constitutionality of Utah Code Ann. § 78-12-25.5 as violative of the Uniform Operation of

Laws and Private Laws Forbidden sections of the Utah Constitution. Utah Const. art. I, § 24 and art. VI, § 26.

Standard of Review: The dismissal of Valley Colour's constitutional challenge is a question of law, and reviewed for correctness. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988).

CONSTITUTIONAL AND STATUTORY AUTHORITY

Utah Const. art. I, § 24

All laws of a general nature shall have uniform operation.

Utah Const art. VI, § 26

No private or special law shall be enacted where a general law can be applicable.

Utah Code Ann. § 78-12-25.5 (1995)

. . .

(3) An action against a provider shall be commenced within two years from the date of discovery of the act, error, omission, or breach of duty, or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence. If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Subject to subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the sixth year of the six year period, the injured person has two additional years from date of discovery to commence an action.

. . .

Utah Code Ann. § 78-12-23 (1995)

Within six years:

. . .

(2) An action upon any contract, obligation, or liability founded upon an instrument in writing . . .

Utah Code Ann. § 78-12-25 (1995)

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing . . .

(3) An action for relief not otherwise provided for by law.

Utah Code Ann. § 78-12-26 (1995)

Within three years:

(1) An action for waste, or trespass upon or injury to real property . . .

STATEMENT OF THE CASE

A. Nature of the Case:

This is an appeal from Judge Howard Maetani's February 14, 1996 Memorandum Decision granting Beuchert's Rule 12(b)(6) Motion to Dismiss ("Order"). In that Order, Judge Maetani dismissed all of Valley Colour's claims against Beuchert as time barred by the two-year statute of limitations for actions related to improvements in real property pursuant to Utah Code Ann. § 78-12-25.5 (1995).

B. Course of Proceedings and Disposition Below:

On September 25, 1995, Valley Colour filed a Complaint against Beuchert alleging the following causes of action: breach of contract; repudiation of contract; misrepresentation; unjust enrichment; breach of covenant of good faith and fair dealing; tortious interference; and slander of title. Complaint ¶¶ 21, 18, 34, 40, 45, 50, and 59. Valley Colour sought to recover damages it sustained when Beuchert failed to complete a construction contract for improvements to Valley Colour's real property and to recover for damages Valley Colour sustained when Beuchert improperly placed a mechanics' lien on the title to Valley Colour's real property in order to extort more than it was due under the contract. Valley Colour requested compensatory damages in an amount not less than \$175,000, plus interest and costs.

On December 13, 1995, Beuchert filed a Rule 12(b)(6) Motion to Dismiss alleging that all of Valley Colour's claims against Beuchert were time barred by the two-year statute of limitations for actions related to improvements in real property pursuant to Utah Code Ann. § 78-12-25.5. Valley Colour countered that its claims were not time barred based on the two-year limitations period under section 78-12-25.5, but instead were governed by various other statutes of limitations. Additionally, Valley Colour challenged the constitutionality of section 78-12-25.5 as violative of the Uniform Operation of Laws and Private Laws Forbidden sections of the Utah Constitution. Utah Const. art. I, §24 and art. VI, § 26.

On January 22, 1996, oral argument was held on Beuchert's Rule 12(b)(6) Motion to Dismiss. On February 14, 1996, Judge Maetani entered an Order granting

Beuchert's Rule 12(b)(6) Motion to Dismiss holding that all of Valley Colour's claims were time barred by the two-year statute of limitations for actions relating to improvements in real property pursuant to Utah Code Ann. § 78-12-25.5, and rejecting Valley Colour's challenge to that statute's constitutionality. Order at 17-18.

On February 27, 1996, Valley Colour noticed its appeal of Judge Maetani's Order. Valley Colour respectfully asks this Court to overturn Judge Maetani's Order and allow all of Valley Colour's claims against Beuchert to go forward.

C. Statement of Facts:

On July 20, 1991, Beuchert and Valley Colour entered into an agreement ("Agreement") whereby Beuchert agreed to perform remodeling construction work at a residential property owned by Valley Colour located at 10415 North, Oak Circle, Highland, Utah (the "Property"). Complaint at ¶ 5.

On July 27, 1991, Beuchert commenced the construction work at the Property. From August of 1991 through December of 1991, Valley Colour made periodic payments to Beuchert totaling \$41,127.85 for construction work that Beuchert represented had been completed. Id. at ¶ 11. On December 2, 1991, Beuchert abandoned the construction project although the work was not complete. Subsequent to abandonment, on February 26, 1992 Beuchert placed a mechanics' lien on the Property in the amount of \$19,600. Id. at ¶ 12.

From approximately June of 1992 until around June of 1993, Valley Colour attempted to sell the Property on an "as is" basis, but was unable to do so. Id. at ¶¶ 15 and 17. In June of 1993, Central Bank foreclosed on the Property. Following the foreclosure, in October of 1993 Central Bank sold the Property. Id. at ¶ 18.

On September 25, 1995, Valley filed a Complaint with the Fourth Judicial District Court in and for Utah County, State of Utah, the dismissal of which is the subject of this appeal.

SUMMARY OF ARGUMENTS

First, the trial court erred when it held that the two-year limitations period for actions related to improvements in real property pursuant to subsection (3) of section 78-12-25.5 applied to Valley Colour's contract claims. Instead the correct limitations period is found either in section 78-12-23 which provides a six-year limitations period for actions based on an "instrument in writing," or alternatively in subsection (4) of section 78-12-25.5 which provides "no action for breach of contract or warranty may be commenced against a provider more than six years after the completion of the improvement." The language of section 78-12-25.5 limits its application to actions which result in "injury to persons or property." Utah Code Ann. § 78-12-25.5(1)(b). In fact, section 78-12-25.5 has historically always been limited to actions for financial loss, personal injuries or physical damage to property resulting from defects in design or construction. Section 78-12-25.5 has not been applied to mere contract actions against builders for defective design or construction. Similarly, courts in other jurisdictions interpreting their own parallel statutes of limitations for providers of improvements in real property have limited the "injury to persons or property" language in their statutes to actions which cause actual physical harm to persons or property and have allowed contract claims to go forward. Thus, because Valley Colour did not sustain "injury to persons or property," section 78-12-25.5 does not govern Valley Colour's contract claims.

Second, even if this Court were to decide that Valley Colour sustained “injury to persons or property,” the two-year limitations period of 78-12-25.5(3) is still inapplicable because Valley Colour’s contract claims are not actions based on an “act, error, omission, or breach of duty,” but instead are claims based on “breach of contract.” Subsection (3)’s two-year limitations period applies only to an action based on an “act, error, omission, or breach of duty,” whereas subsection (4)’s six-year limitations period applies to an action based on “breach of contract.” The legislature intentionally excluded “breach of contract” claims from subsection (3)’s two-year limitations period thus indicating that Valley Colour’s “breach of contract” claims are governed by subsection (4)’s six-year limitations period.

Furthermore, the legislative findings contained in the current version of section 78-12-25.5 indicate that the legislature believed that the appropriate limitations period for a claim based on a written instrument was six years. Section 78-12-25.5(2)(d) states that “the possibility of injury and damage become highly remote and unexpected as to claims for breach of contract or warranty six years following completion of the improvement.” Utah Code Ann. § 78-12-25.5(2)(d). Thus, clearly the legislature’s intent was not to eliminate the six-year limitations period for written contracts but instead to limit contract actions related to improvements to real property to six years after completion of the improvement. Therefore, Valley Colour’s claims based on breach of contract are not time barred by the two-year limitations period of subsection (3), but are timely filed under subsection (4) of section 78-12-25.5.

Third, the trial court erred in applying the two-year limitations period for improvements in real property to Valley Colour’s slander of title and tortious interference

claims. The slander of title and tortious interference claims are not actions arising from the Agreement or related to the construction or improvements in real property, but instead are tort actions arising from Beuchert's unwarranted and malicious filing of the mechanic's lien against Valley Colour's Property in an attempt to extort more than Beuchert was due. It was Beuchert's abuse of process by filing the lien against Valley Colour's Property in violation of Utah Code Ann. § 38-1-25 which gave rise to Valley Colour's slander of title and tortious interference claims, not the Agreement or improvement work that Beuchert failed to perform. Thus, Valley Colour's slander of title and tortious interference claims are governed by the four-year statute of limitations for "relief not otherwise provided for by law" or the three-year statute of limitations for "injury to real property." Utah Code Ann. §§ 78-12-25 and 78-12-26.

Fourth, even if the two-year limitations period for actions related to improvements in real property applied to the slander of title and tortious interference claims, the trial court erred in holding that the last event necessary to commence the running of the statute of limitations was Beuchert's placement of the mechanics' lien on the Property. To state a claim for slander of title and tortious interference, a claimant must establish "actual special damages." Valley Colour could not establish such actual or special damages until October of 1993, when Central Bank sold the Property. Thus, Valley Colour filed its slander of title and tortious interference claims well within the two-year limitations period.

Lastly, the trial court erred in dismissing Valley Colour's challenge to the constitutionality of section 78-12-25.5 because the limitations period contained therein violates the Uniform Operation of Laws and Private Laws Forbidden sections of the Utah

Constitution. Utah Const. art. I, § 24 and art. VI, § 26. Section 78-12-25.5 provides a stringent two year limitations period for actions “against” a provider but does not provide a similar limitations period for actions by a provider. Thus, in a contract dispute between a provider and another party, the provider has the complete protection of the six-year limitations period for an action based on an instrument in writing whereas the other party’s action against the provider could expire under the two-year limitations period of section 78-12-25.5. This is not a uniform operation of the law and thus, violates the Utah Constitution.

ARGUMENT

I. Valley Colour’s Contract Claims are Not Based on Conduct That Caused Injury to Persons or Property, and Thus Are Not Time Barred by the Two-Year Limitations Period for Actions Related to Improvements in Real Property But Instead are Governed by the Six-Year Limitations Period For Contract Actions.

Valley Colour’s claims of breach of contract, repudiation of contract, unjust enrichment, and breach of covenant of good faith and fair dealing are not governed by the two-year limitations period pursuant to subsection (3) of section 78-12-25.5 because they are not based on conduct which caused “injury to persons or property.” Instead, Valley Colour’s contract claims are governed by the six-year limitation period pursuant to section 78-12-23, which governs actions based on written contracts.

Section 78-12-25.5 defines an action as “any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty that causes **injury to persons or property.**” Utah Code Ann. § 78-12-25.5(1)(a) (emphasis added). The trial court expressly based its Order on its erroneous conclusion that “[a]ll of [Valley Colour’s] claims arise out of an injury to property. . . .” Order, at 8.

Courts in other jurisdictions interpreting statutes of limitations virtually identical to the current version of section 78-12-25.5 have held that causes of action based on breach of contract are not within the statute's "injury to persons or property language." In Securities-Intermountain Inc. v. Sunset Fuel Co., 611 P.2d 1158, 1162 (Or. 1980), the Supreme Court of Oregon stated that "the phrase 'injury to . . . person[s] or to property' was thought to encompass what is commonly meant by **'personal injuries,' bodily injuries including their psychic consequences, and physical damage to existing tangible property, but not to financial losses.**" Id. (emphasis added). In Securities-Intermountain Inc. a general contractor brought an action against a subcontractor and architect for defective installation of a heating system. The subcontractor and architect alleged that the contractor's claims were time barred by the two-year limitations period for "injuries to person or property arising from another person performing construction." Id. at 1160. The court rejected the subcontractor and architect's argument and instead applied the six-year limitation period for written contracts. The court reasoned that because the contractor sought damages for the financial injuries resulting from the "faulty performance of a business transaction" that no injuries to persons or property occurred, and because the parties had privity of contract, the statute of limitations for written contracts applied. Id. at 1165.

Likewise, the Supreme Court of Minnesota limited the "injury to persons or property" language in their statute of limitations for actions arising from improvements in real property to "actions in tort by third parties against persons performing or furnishing the design, planning, supervision, or observation of construction of an improvement to real estate" and therefore, allowed a county's contract claims against a general contractor,

subcontractor and architect to go forward. Kittson County v. Wells, Dendbrook & Assocs., 241 N.W.2d 799, 801 (Minn. 1976). The court stated that “[w]hile we have in the past construed statutes of limitation liberally as embodying important public policy in barring stale claims, we think a rule of strict construction is more appropriate in the instant case.” Id. at 801.¹ This Court should limit the “injury to persons or property” language in section 78-12-25.5’s definition of “action” to claims resulting in bodily injury or physical damage to property as did the Minnesota and Oregon Supreme Courts, and thus, avoid any constitutional shortcomings the statute may possess.

This Court, when interpreting the “injury to persons or property” language of section 78-12-25.5, should also consider the historical interpretation it has given to this same language which was contained in section 78-12-25.5’s predecessor statute. “When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in light of its background in history.” Mountain States Tele. and Tele. v. Payne, 782 P.2d 464, 466 (Utah 1989) (holding that even though the legislature eliminated the “intent to defraud” language in a statute establishing liability for any person writing a check with insufficient funds, in light of the historical application of the statute it could not apply to a person who wrote the check innocently). In Brigham Young University v. Paulsen Const. Co., 744 P.2d 1370, 1375 (Utah 1987), the Utah Supreme Court, in interpreting the predecessor statute to the current version of section 78-12-25.5, indicated that actions based on contract by owners against contractors were not “injur[ies] to property” and thus, the six-

¹ The court reasoned that the scope of the statute was uncertain and may result in constitutional violations if read too broadly, thus, to avoid constitutionality issues the court applied a narrow construction.

year statute of limitations applicable to written contracts applied to the university's claim against the contractor rather than Utah Code Ann. § 78-12-25.5 (1977), section 78-12-25.5's predecessor statute for actions related to improvements to real property. (Justice Howe concurring).² Thus, this Court should consider the historical application of the statute, as it did in the Brigham Young University and Mountain States cases, and find that the two-year limitations period for actions which cause injury to persons or property does not apply to Valley Colour's claims.

The trial court resorted to a variety of canons of statutory construction before concluding that the two-year limitation period of subsection (3) applied to Valley Colour's claims against Beuchert. First, the trial court noted the title of section 78-12-25.5 is "[a]ctions related to improvements in real property." Order at 7. The title of the statute, however, "is not part of the statute's text" and should be looked to only to determine

² Section 78-12-25.5 has historically been limited to tort injuries "due to **defective design or construction** of improvement to real property." Utah Code Ann. § 78-12-25.5 (1977) (emphasis added). Section 78-12-25.5 (1977) did not, however, "apply to actions founded on contract against builders for defective construction. Such actions are not injury to property." Brigham Young University, 744 P.2d at 1374-75 (concurring opinion) (holding the six-year statute of limitations for written contracts applicable rather than the seven-year statute for actions based on defective design or construction of an improvement in real property).

In 1991, the Utah legislature amended section 78-12-25.5 because the seven-year statute violated the open courts provision of the Utah Constitution. Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989). The legislative intent of the amended section 78-12-25.5 is to provide members of the construction industry relief from potentially infinite liability and to provide the citizens of Utah a constitutional means of recovery for injuries to person or property. It was not the legislative intent to abrogate the rights of an individual who has a cause of action based on a contract. Historically, a claim based on contract was not within section 78-12-25.5. The "injury to persons or property" restriction contained in section 78-12-25.5 should be read in light of the historical application of the statute to allow claims based on a breach of contract.

legislative intent in the face of an ambiguous statute. Funk v. Utah State Tax Comm’n, 839 P.2d 818, 820 (Utah 1992). Thus, reference to the title of the section is of minimal aid in ascertaining the scope of the statute. Second, the trial court indicated that a statute should be construed according to its plain language. Order at 8. (citing Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989).) However, the plain language of section 78-12-25.5 indicates that subsection (3) applies only to actions which cause “injury to persons or property,” which, according to Justice Howe in Brigham Young University, does not include contract actions without any resulting injury to persons or property as here. Finally, the trial court suggested that the statute should be interpreted as a comprehensive whole rather than [an] unrelated collection of provisions. Order at 10 (citing Hales Sand & Gravel, Inc. v. Audit Div. of State Tax Comm’n of Utah, 842 P.2d 887 (Utah 1992)). Looking at the statute as a whole, including the legislative findings, the statute indicates that “the possibility of injury and damages becomes highly remote and unexpected as to claims for breach of contract or warranty six years following the completion of the improvement or abandonment.” Utah Code Ann. § 78-12-25.5(2)(d) (emphasis added). Thus, because the statute itself indicates that claims based on breach of contract do not become remote until six years after completion, it seems clear that the legislature intended a six-year statute of limitations to apply to causes of action based on contract where there is no bodily injury or physical damage to property as here. See Horton v. Goldminer’s Daughter, 785 P.2d 1087, 1091 (Utah 1989).³

³ Another canon of construction this Court should consider is that a statute should be construed “to avoid the constitutional infirmities whenever possible.” Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993). In order to avoid

Thus, applying the statute's plain language, this Courts historical interpretation of the statute's terms, other state court interpretations of the their own similar statutes, and the canons of statutory construction, it is clear that subsection (3)'s two-year limitation period is applicable only to actions resulting in bodily injury or physical damage to property (damage other than mere financial loss), and that section 78-12-23's six-year limitation period for actions based on an instrument in writing is applicable to Valley Colour's contract claims. Therefore, Valley Colour's contract claims are timely filed.

II. Valley Colour's Contract Claims Are Not Time Barred by the Two-Year Limitations Period For a "Breach of Duty" Pursuant to Subsection (3) of Section 78-12-25.5 But Instead are Governed by the Six-Year Limitations Period For "Breach of Contract" Pursuant to Subsection (4) of Section 78-12-25.5.

Even if Valley Colour suffered "injury to persons or property," Valley Colour's contract claims are not governed by the two-year limitations period pursuant to subsection (3), but instead are governed by the six-year limitation period pursuant to subsection (4) of section 78-12-25.5, which governs actions based on "breach of contract."

Subsection (3) provides that "[a]n action against a provider shall be commenced within two years from the date of discovery of the act, error, omission or **breach of duty** that forms the basis of the action." Utah Code Ann. § 78-12-25.5(3) (emphasis added). In contrast, subsection (4) provides, "no action for **breach of contract** or warranty may be commenced against a provider more than six years after completion of the

constitutional violations through a non-uniform operation of the laws, as addressed in section V of this brief, this Court should restrict the two-year limitations period in subsection (3) to bodily injuries or physical damage to property.

improvement or abandonment of construction.” Id. § 78-12-25.5(4). Accordingly, while it is clear that certain tort type actions, actions based on an “act, error, omission or breach of duty,” must be brought within two years, it is equally clear that actions for “breach of contract” may be brought within six years after completion of the improvement or abandonment of construction. Therefore, because the Utah state legislature has made the clear distinction between an action based on an “act, error, omission and breach of duty” and an action based on a “breach of contract,” Valley Colour’s contract claims are not barred by the two-year limitations period of subsection (3) of section 78-12-25.5.

The trial court, applying the statute’s “plain language,” held that subsection (3)’s two year limitations period applied to all of Valley Colour’s claims. Order at 8 (citing Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989)). However, the plain language of section 78-12-25.5 indicates that subsection (3) applies only to actions based on an “act, error, omission, or breach of duty” excluding actions based on a “breach of contract.” Another cannon of statutory construction which the trial court does not include in its discussion is *expressio unis est exclusio alterius*, meaning the inclusion of one, excludes the other. In subsection (3) the legislature references an “act, error, omission, or breach of duty,” but does not reference breach of contract. In contrast, in subsection (4) the legislature expressly references actions for “breach of contract,” indicating its intent to exclude breach of contract claims from the two-year limitation period set forth in subsection (3).

Lastly, the trial court submits that courts should interpret statutes as to “avoid making any of their provisions surplusage and meaningless.” Order at 10 (quoting Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286, 1288 (Utah 1978)). The trial court,

however, goes on and erroneously asserts that if the six-year statute of limitations applicable to causes of action based on written contracts was read into subsection (4) of section 78-12-25.5, that would render subsection (3) a nullity because all injured parties would allege a breach of contract in order to obtain subsection (4)'s longer limitations period. Id. What the trial court neglected to acknowledge is that a breach of contract action is not available just for the asking to all parties injured by a provider of improvements in real property; the breach of contract allegation must have some merit. The contract claims alleged by Valley Colour require privity of contract and are not available to all parties who may have other causes of action against a provider. Thus, for those individuals without privity of contract with the provider, or otherwise without a valid contract claim, subsection (3)'s two year limitation period would still govern their claims. Consequently, limiting subsection (3)'s applicability to breaches of duty and applying subsection (4)'s limitations period to breaches of contract does not create surplusage or meaningless provisions.

Thus, applying the plain meaning of the statute as a whole and the canons of statutory construction, it is clear that this Court should construe subsection (3)'s two-year limitation period as applicable to actions based on an "act, error, omission, or breach of duty," and subsection (4)'s six-year limitation period as applicable to Valley Colour's claims for "breach of contract." Therefore, Valley Colour's contract claims are timely filed.

III. Valley Colour's Slander of Title and Tortious Interference Claims Do Not Arise Out Of or Relate To Improvements in Real Property, and Thus Are Not Timed Barred by the Two-Year Limitations Period for Actions Related to Improvements in Real Property But Instead are Timely Filed Under the Three-Year Limitations Period for Tortious Injury to Real Property or the Four-Year Limitations Period for Actions for Relief Not Otherwise Provided for by Law.

Valley Colour's slander of title and tortious interference claims are not time barred by the two-year limitations period for actions related to improvements in real property, but instead are governed by the three-year limitations period for tortious "injury to real property" pursuant to section 78-12-26 or the four-year limitations period for "relief not otherwise provided for by law" pursuant to section 78-12-25(3).

The trial court expressly based its decision that the two-year limitations period under subsection (3) of section 78-12-25.5 was applicable on its erroneous conclusion that "[a]ll of [Valley Colour's] claims arise from the agreement made between Valley Colour and Beuchert Builders for remodeling work." Order, at 8. Slander of title and tortious interference are not claims arising from the performance of remodeling work, or the remodeling agreement itself; rather, they are torts which arise from Beuchert's unwarranted and abusive placement of the mechanics lien on Valley Colour's title to the Property. Beuchert placed the lien on the title in an attempt to exact from Valley Colour an amount in excess of the value of the materials and labor it had contributed to the Property, with the intent to cloud Valley Colour's title and interfere with Valley Colour's ability to sell the Property. Any person filing a lien against property with the intent to extort more than is due or to gain any unwarranted advantage or benefit is guilty of a misdemeanor. Utah Code

Ann. § 38-1-25 (1995). It was Beuchert's abuse of process that gave rise to the slander of title and tortious interference claims, not the remodeling work or the remodeling Agreement.

Courts distinguish between actions relating to contracts and those relating to subsequent tortious behavior. For example, in Greenwood v. Sherfield the court held that a retailer's tortious interference with the contractual relations of one of its merchants was not "[a]ny controversy or claim arising out of or relating to [the] agreement" between the retailer and the merchant. 895 S.W.2d 169, 174 (Mo. Ct. App. 1995) (emphasis added). The retailer in Greenwood allegedly told potential purchasers of the merchant's business that there would be substantial changes to the contract the retailer had entered into with the merchant, thus causing the potential purchasers to terminate the sale. The Greenwood court found that the retailer's tortious interference did not arise out of or relate to the contract because the alleged tortious conduct did not arise out of a dispute involving interpretation of the contract terms.

The basis for Beuchert's assertion that Valley Colour's claims arose out of or are related to the remodeling Agreement is that absent the Agreement contract between Valley Colour and Beuchert there would be nothing for Beuchert to allegedly interfere with, and thus no claim for slander of title or tortious interference. Rule 12(b)(6) Motion to Dismiss at 4. The courts have flatly rejected this oversimplified reasoning. It is not sufficient that the dispute would not have arisen absent the existence of the contract to qualify as a dispute that arises out of or relates to the contract in question. Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984). In Armada Coal, the Eleventh Circuit refused to find that a charterer's tort claims against a vessel owner based on wrongful

attachment of the charterer's coal and for conversion of the charterer's letter of credit arose out of or were related to the charter contract. The court recognized that "certainly there is a connection between the claims and the charter" and that "but for the two parties having entered into the business arrangement" the claims would not exist. 726 F.2d at 11568. However, the court went on to hold that this connection is "not sufficiently close" to constitute a dispute arising out of the charter agreement. Id. Likewise, the mere fact that Valley Colour's claims, like the charterer's claims in Armada Coal, would not exist absent the Agreement, is inadequate to force Valley Colour's slander of title and tortious interference claims into the limitations period for "[a]ctions related to improvements in real property."

In order to state a claim based on slander of title, Valley Colour must show that Beuchert's lien "caused actual or special damages." First Sec. Bank v. Banberry Crossing, 780 P.2d 1253, 1257 (Utah 1989); Gillmor v. Cummings 904 P.2d 703, 707 (Utah Ct. App. 1995). Since the statute of limitations does not begin to run until "the happening of the last event necessary to . . . the cause of action" the statute of limitations period did not begin to run until Valley Colour ultimately incurred actual damages resulting from the imposition of the lien. Becton v. Reese, 668 P.2d 1254, 1257 (Utah 1993). Thus, the event necessary to begin the running of the statute of limitations was the event that inflicted actual damages upon Valley Colour, which was when Central Bank sold the Property following the foreclosure. That event did not occur until October of 1993, well within the three-year

limitations period for actions arising from tortious injury to property and the four-year limitations period for relief not otherwise provided for by law.⁴

As with slander of title, in order to establish a claim for tortious interference a claimant must show “(1) that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations, (2) for an improper purpose or by improper means, (3) **causing injury** to the plaintiff.” Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) (emphasis added) (recognizing the tort of interference with economic relations). Valley Colour’s tortious interference claim arises from the interference that Beuchert’s lien created with respect to Valley Colour’s inability to sell the Property after Central Bank sold the Property in October of 1993 following the foreclosure.⁵ Thus, one of the essential events that establishes a cause of action for tortious interference clearly occurred well within both the three-year limitations period set forth in section 78-12-26 and the four-year limitations period set forth in section 78-12-25.

⁴ Even if the last event necessary to begin the running of the statute of limitations is deemed to be Valley Colour’s inability to sell the Property “as is,” which occurred in June of 1993, Valley Colour’s slander of title claim is still well within the three-year limitations period for actions arising from tortious injury to property and the four-year limitations period for relief not otherwise provided for by law.

⁵ Even if the last event necessary to begin the running of the statute of limitations is deemed to be Valley Colour’s inability to sell the Property “as is,” which occurred in June of 1993, Valley Colour’s tortious interference claim is still well within the three-year limitations period for actions arising from tortious injury to property and the four-year limitations period for relief not otherwise provided for by law.

IV. Valley Colour's Slander of Title and Tortious Interference Claims Were Timely Filed Even Within the Two-Year Limitations Period for Actions Relating to Improvements in Real Property Because the Last Event Necessary to the Causes of Action, a Specific Realized or Liquidated Monetary Loss, Did Not Occur Until Central Bank Sold the Property.

Even if the two-year limitations period in subsection (3) of section 78-12-25.5 were to apply to Valley Colour's slander of title and tortious interference claims, Valley Colour filed its claims within that two-year period because the two-year period did not start to run until Central Bank sold the Property in October of 1993 after the foreclosure.

To state a claim based on slander of title a claimant must show that the act in question "caused actual or special damages." First Sec. Bank, 780 P.2d at 1257. Since "[t]he general rule is that a cause of action accrues upon 'the happening of the last event necessary to . . . the cause of action'" Valley Colour's slander of title claim did not begin to accrue until Beuchert's wrongfully placed lien inflicted or resulted in actual or special damages. Brigham Young University, 744 P.2d at 1373.

Actual or special damages are proved in a slander of title action by evidence of the loss of some "pecuniary advantage." Bass v. Planned Management Servs., 761 P.2d 566, 568 (Utah 1988). "There are no general or presumed damages in slander of title actions. . . . Absent a specific monetary loss flowing from a slander affecting the saleableness or use of the Property, there is no damage." Id. (emphasis added). "The special damages rule requires the plaintiff to establish pecuniary loss that has been **realized** or **liquidated** as in the case of specific lost sales." First Sec. Bank, 780 P.2d at 1257 (quoting W. Keeton, Prosser and Keeton on the Law of Torts, at 971 (5th ed. 1984)).

Therefore, before Valley Colour's slander of title claim can begin to accrue, a specific realized or liquidated monetary loss had to have first occurred.

Likewise, in an action for tortious interference "proof of some damages is necessary to sustain the action." W. Keeton, Prosser and Keeton on the Law of Torts, § 129 (5th ed. 1984). For example, in Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 339-41 (Iowa 1977) the court held that the statute of limitations for tortious interference did not begin to run until the alleged interference caused an actual injury, *i.e.* until an actual judgment was entered against the party alleging interference. *Id.* at 339-41. The Stoller court concluded that in its view "the mere possibility, or even probability, that an event causing damages will result from the mere breach of . . . duty not to intentionally or improperly interfere with [the plaintiff's] prospective economic advantage . . . does not render the [defendant's] alleged wrongful act actionable." *Id.* at 341.

Consequently, Valley Colour's slander of title and tortious interference claims did not mature until Valley Colour suffered a specific realized or liquidated monetary loss, which occurred as a result of Valley Colour's inability to sell the Property after Central Bank sold it in October of 1993 following foreclosure. Because this event was well within the two-year limitations period of subsection (3) of 78-12-25.5, Valley Colour's slander of title and tortious interference claims were timely filed.

V. **The Two-Year Limitations Period for Actions Relating to Improvements in Real Property is Unconstitutional Because it Violates the Uniform Operation of Laws and Private Laws Forbidden Sections of the Utah Constitution.**

Even if the trial court's interpretation of the various statutes of limitations were correct, the two-year limitations period in section 78-12-25.5 is unconstitutional because it violates the Uniform Operation of Laws and the Private Laws Forbidden sections of the Utah Constitution. Utah Const. art. I, § 24 and art. VI, § 26.

The Uniform Operation of Laws section of the Utah Constitution provides that, "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. Section 78-12-25.5 provides for a two-year statute of limitations for actions "against a provider" but not for actions by a provider. Utah Code Ann. § 78-12-25.5(3) (emphasis added). A provider can bring an action within three, four or six-years under sections 78-12-23, 78-12-25 and 78-12-26, but an injured party must bring his action against a provider within two years. Because this is not a uniform operation of a law, it violates Utah Const. art. I, § 24.⁶

⁶ In addition, the Private Laws Forbidden section of the Utah Constitution states, "[n]o private or special law shall be enacted where a general law can be applicable." Utah Const. art VI, § 26. Section 78-12-25.5 is a law which provides a special and unfair advantage to providers in the construction industry by allowing an extended period in which to bring actions while limiting actions against such providers. As such, section 78-12-25.5 violates the Private Laws Forbidden section of the Utah Constitution.

In essence, the Uniform Operation of Law and Private Laws Forbidden sections of the Utah Constitution are the "flip side" of each other. Thus, "if a law satisfies the requirement of article I, section 24, that 'all laws of a general nature shall have uniform operation,' it will not violate article VI, section 26 (Private Laws Forbidden)." Blue Cross and Blue Shield of Utah v. State, 779 P.2d 634, 645 (Utah 1989) (upholding the constitutionality of a tax on health service corporations). Therefore, analysis need only proceed under the Uniform Operation of Law section.

To determine whether a statute violates the Uniform Operation of Law provision the Court must consider whether the purported discriminatory classification is a reasonable one. Ryan v. Gold Cross Servs., Inc., 903 P.2d 423, 426 (Utah 1995) (upholding the constitutionality of a statute prohibiting the introduction of seat belt use as evidence of contributory negligence). A discriminatory classification such as that in section 78-12-25.5, which provides for different limitations periods for parties to the same contract is unreasonable. The Utah Supreme Court, in Lee v. Gaufin, stated, “[a] law does not operate uniformly if persons similarly situated are not treated similarly.” Lee, 867 P.2d 572, 577 (Utah 1993). In Lee the Court addressed the constitutionality of a combination statute of limitations / statute of repose for malpractice actions brought on behalf of minors. The Court held that the statute contained an unreasonable classification and was thus, unconstitutional for the following two reasons: first, despite the historical exemption of minors from limitations periods and the fundamental differences between adults and minors, the limitations period in the Utah Health Care Malpractice Act treated adults and minors identically by providing the same limitations period within which both minors and adults must bring medical malpractice action; second, the Court indicated that the Utah Health Care Malpractice Act discriminated between minors injured by medical malpractice and minors injured by all other types of negligence by failing to recognize a minor’s incapacity to bring suit in medical malpractice actions and recognizing a minor’s incapacity to bring suit in all other types of actions. Thus, the Court found that the classification was unreasonable.

Section 78-12-25.5 contains a similarly irrational classification between parties to the same contract. In all other areas of the law, both parties to a written contract have the

same six-year statute of limitations period in which to bring their claims in the event of a breach. Utah Code Ann. § 78-12-23. Conversely, if this Court adopts the trial court's interpretation of section 78-12-25.5, where the contract in question relates to an improvement in real property the provider of the improvement still has six years within which to bring its action, but the non-provider party must bring its action within two years. Thus, like the minors in Lee, the non-provider party in a suit against a provider is irrationally treated different than the provider. If a contract claim relating to improvements in real property becomes stale within two years for the non-provider party, that claim is equally stale from the provider's perspective. A law which provides different limitation periods to the two parties of the same contract is an irrational classification that deprives the non-provider party of its constitutional right to access the Utah courts under the Open Courts provision of the Utah Constitution.

The trial court stated that the "legislature has stated its reasons for classifying the group differently and set out its purposes in § 78-12-25.5(2)." Order at 16. Although the legislature did state its reasons for classifying "actions related to improvements in real property" differently than actions unrelated to such improvements, the legislature failed to state any reasons for classifying claims "against" providers in such actions differently than claims "by" providers in such actions.

Therefore, this Court should not adopt the trial court's interpretation of section 78-12-25.5, but instead, should find that section 78-12-25.5 unreasonably treats similarly situated persons (the two parties to the same contract) dissimilarly, and is unconstitutional as violative of the Uniform Operation of Law provision.

CONCLUSION

The trial court erred in applying the two-year limitations period in subsection (3) of 78-12-25.5 to Valley Colour's contract claims because those claims did not cause "injury to persons or property." This Court should find that the claims are instead governed by the six-year limitations period for actions based on an instrument in writing as set forth in section 78-12-23. Alternatively, this Court should find that Valley Colour's contract claims are governed by the six-year limitation period for "breach of contract" in subsection (4) of 78-12-25.5 rather than the two-year limitation period for "breach of duty" in subsection (3) of 78-12-25.5.

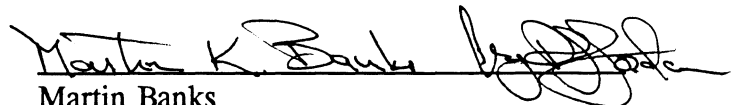
Additionally, the trial court erred in applying the two-year limitations period in subsection (3) of section 78-12-25.5 for actions relating to improvements in real property to Valley Colour's slander of title and tortious interference claims. Those claims do not arise out of the improvement Agreement or relate to improvements in real property, rather they arise out of Beuchert's unwarranted and wrongful placement of a mechanics lien on the title to Valley Colour's Property and are thus governed by the three-year limitations period for tortious injury to real property in section 78-12-26 or the four-year limitations period for relief not otherwise provided for by law in section 78-12-25. Even if the two-year limitations period in subsection (3) of section 78-12-25.5 were to apply to Valley Colour's slander of title and tortious interference claims, those claims did not accrue until Central Bank sold the Property after foreclosure, well within the two-year limitations period.

Lastly, the trial court erred in dismissing Valley Colour's challenge to the constitutionality of section 78-12-25.5. The statute's preferential treatment for providers of

improvements to real property is violative of the Uniform Operation of Law and Private Laws Forbidden sections of the Utah Constitution.

For all of the foregoing reasons this Court should overrule the trial court's dismissal of Valley Colour's complaint and permit all of Valley Colour's claims to go forward.

RESPECTFULLY SUBMITTED this 29 day of July, 1996.

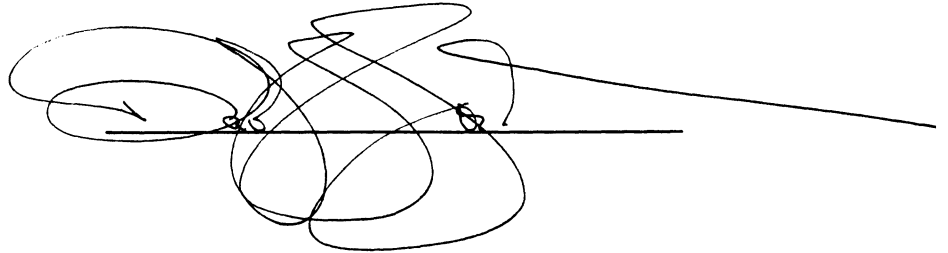

Martin Banks
STOEL RIVES LLP

Attorney for Plaintiff and Appellant
Valley Colour, Inc.

CERTIFICATE OF SERVICE

I hereby certify on this 29th day of July, 1996, that I caused four true and correct copies of the attached **BRIEF OF THE APPELLANT VALLEY COLOUR, INC.** to be delivered by regular mail to:

Benson L. Hathaway, Jr.
STIRBA AND HATHAWAY
215 South State Street, Suite 1150
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Benson L. Hathaway, Jr.", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

ADDENDUM

Utah Code Ann. § 78-12-23. Within six years -- Mesne profits of real property -- Instrument in writing -- Distribution of criminal proceeds to victim.

Within six years:

- (1) An action for the mesne profits of real property.
- (2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.
- (3) An July 26, 1996 action instituted under Section 78-11-12.5 regarding distribution of criminal proceeds to any victim.

1984

Utah Code Ann. § 78-12-25. Within four years.

Within four years:

- (1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.
- (2) A claim for relief or a cause of action under the following sections of Title 25, Chapter 6, the Uniform Fraudulent Transfer Act:
 - (a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;
 - (b) Subsection 25-6-5(1)(b); or
 - (c) Subsection 25-6-6(1).
- (3) An action for relief not otherwise provided for by law.

1988

Utah Code Ann. § 78-12-25.5. Actions related to improvements in real property.

- (1) As used in this section:
 - (a) "action" means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty that causes injury to persons or property, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law;
 - (b) "completion of improvement" means the date of substantial completion of an improvement to real property as established by a Certificate of Substantial Completion, a Certificate of Occupancy issued by a governing agency, or the date of first use or possession of the improvement, whichever is earliest;

(c) “improvement” means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property;

(d) “person” means an individual, corporation, partnership, joint venture, association, proprietorship, or any other legal or governmental entity; and

(e) “provider” means any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, cost or quantity estimates, topographic surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement.

(2) The Legislature finds that:

(a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;

(b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;

(c) these costs and hardships constitute clear social and economic evils;

(d) the possibility of injury and damage becomes highly remote and unexpected as to claims for breach of contract or warranty six years following completion of the improvement or the abandonment of construction and, as to all other claims, ten years following completion or abandonment;

(e) it is in the best interests of the citizens of the state to impose the periods of repose provided in this chapter; and

(f) it is in the best interests of the citizens of this state to impose a period of limitation requiring that an action against a provider be brought within a two-year period following discovery of the act, error, omission, or breach of duty that forms the basis of the action.

(3) An action against a provider shall be commenced within two years from the date of discovery of the act, error, omission, or breach of duty or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence. If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the two year period begins to run upon completion or abandonment.

(4) Subject to Subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the sixth year of the six year period, the injured person has two additional years from the date of discovery to commence an action.

(5) Subject to Subsections (3) and (4), no action may be commenced against a provider more than 12 years after completion of the improvement or abandonment of construction. In the event the act, error, omission, or breach of duty is discovered in the

twelfth year of the 12-year period, the injured person shall have two additional years from the date of discovery to commence an action.

(6) Subsections (4) and (5) do not apply to an action against a provider:

(a) who has fraudulently concealed the act, error, omission, or breach of duty;

(b) for a willful or intentional act, error, omission, or breach of duty; or

(c) for breach of a written express warranty where the warranty period extends beyond six years as provided in Subsection (4).

(7) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (4) and (5) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.

(8) The time limitation imposed by this section shall not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury for which the action is brought.

(9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.

(10) This section applies to all claims and causes of action that accrue after April 29, 1991, notwithstanding that the act, error, omission, or breach of duty occurred, or the improvement was completed or abandoned before April 29, 1991.

1991

Utah Code Ann. § 78-12-26. Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

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