

2015

**Joseph Tomlinson, an Individual, Plaintiff/Appellant, vs. Doug Knight Construction, Et Al., Defendant/Appellee**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**JOSEPH TOMLINSON**, an individual,

Plaintiff/Appellant,

vs.

**DOUG KNIGHT CONSTRUCTION, et  
al.**,

Defendant/Appellee.

**OPENING BRIEF OF APPELLANT**

Appellate Case No. 20150529

District Court Case No. 100500668

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Appeal from the Third District Court, Summit County,  
from Orders granting a Motion to Dismiss and Motions for Summary Judgment  
before the Honorable Ryan M. Harris

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**I. COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING.**

Plaintiff/Appellant

Joseph Tomlinson

Defendant/Appellee

Doug Knight Construction, Inc.

Defendant Who Obtained Bankruptcy Relief

Outpost Development, LLC

Third Party Defendants

Atika Construction, Inc.  
High Mountain Construction, Inc.  
Jack Johnson Company PCF Inc.  
Picture Perfect Stone Masonry  
Signature Concrete, Inc.  
Superior Insulation Company, Inc.  
US Deck, Inc.  
Bridgewater Consulting Group

## **TABLE OF CONTENTS**

|  |    |
|--|----|
| I. COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING. ....  | ii |
| TABLE OF AUTHORITIES .....   | iv |
| II. JURISDICTION. ....   | 1  |
| III. STATEMENT OF THE ISSUES.....  | 1  |
| A. Issue # 1 .....   | 1  |
| B. Issue # 2 .....   | 2  |
| C. Issue # 3 .....   | 2  |
| D. Issue # 4 .....   | 3  |
| IV. DETERMINATIVE PROVISIONS, STATUTES, ORDINANCES, RULES &<br>REGULATIONS.....  | 4  |
| V. STATEMENT OF THE CASE.....  | 4  |
| A. The Nature of the Case. ....  | 4  |
| B. The Course of Proceedings and Disposition in the Court Below. ....  | 4  |
| C. Statement of the Facts.....   | 5  |
| VI. SUMMARY OF ARGUMENTS.....  | 7  |
| A. The Construction Agreement Did Not Impose a Discovery or Notice Requirement. ....   | 7  |
| B. The Implied Warranty of Habitability Should Apply to All Builders of New Homes. ....  | 7  |
| C. Tomlinson Has the Right to Pursue Any Claims that Outpost Could Have Pursued. ....  | 8  |
| VII. ARGUMENTS.....  | 8  |
| A. TOMLINSON SHOULD BE ALLOWED TO MAINTAIN WARRANTY CLAIMS<br>FOR ANY DEFECTS THAT ACTUALLY EXISTED DURING THE ONE-YEAR<br>WARRANTY PERIOD REGARDLESS OF WHETHER TOMLINSON DISCOVERED<br>THOSE DEFECTS AT A LATER DATE.....                    | 8  |
| B. UTAH LAW SHOULD EXTEND THE AN IMPLIED WARRANTY OF<br>WORKMANLIKE MANNER AND HABITABILITY TO A BUILDER OF A NEW<br>RESIDENCE REGARDLESS OF WHETHER THAT BUILDER IS THE SELLER OF<br>THE RESIDENCE OR IN PRIVITY WITH THE NEW HOME BUYER..... | 12 |
| C. TOMLINSON SHOULD BE ALLOWED TO ASSERT WARRANTY CLAIMS<br>AGAINST DKC FOR ANY WARRANTY ISSUE THAT EXISTED WHEN OUTPOST<br>OWNED THE HOME. ....   | 18 |
| VIII. CONCLUSION.....  | 19 |
| IX. REQUEST FOR ORAL ARGUMENT .....  | 21 |
| X. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE<br>REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.....   | 22 |
| XI. CERTIFICATE OF SERVICE. ....   | 23 |

## **TABLE OF AUTHORITIES**

### **Cases**

|   |         |
|---|---------|
| <i>Alberti v. General Motors Corp.</i> , 600 F. Supp. 1026 (D.D.C. 1985) .....  | 12      |
| <i>Am. Towers Owners Ass’n v. CCI Mech., Inc.</i> , 930 P.2d 1182 (Utah 1996) .....   | 15      |
| <i>Aronsohn v. Mandara</i> , 484 A.2d 675 (N.J. 1984) .....   | 19, 20  |
| <i>Barnes v. MacBrown</i> , 342 N.E.2d 619 (Ind. 1976) .....  | 19      |
| <i>Beckstead v. Deseret Roofing Co., Inc.</i> , 831 P.2d 130 (Utah Ct. App. 1992) .....   | 11      |
| <i>Blagg v. Fred Hunt Co.</i> , 612 S.W.2d 321 (Ark. 1981) .....  | 19      |
| <i>Cabaness v. Thomas</i> , 2010 UT 23, 232 P.3d 486 .....  | 1, 2, 3 |
| <i>Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC</i> , 2009 UT 27, 207 P.3d 1235 .....  | 10, 11  |
| <i>Canal Electric Co. v. Westinghouse Electric Co.</i> , 973 F.2d 988 (1st Cir. 1992) .....                                       | 12      |
| <i>Capra v. Smith</i> , 372 So. 2d 321 (Ala. 1979) .....  | 15      |
| <i>Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing,<br/>LC</i> , 2009 UT 65, 221 P.3d 234 ..... | 13, 15  |
| <i>Elden v. Simmons</i> , 631 P.2d 739 (Okla. 1981) .....   | 19      |
| <i>Gupta v. Ritter Homes, Inc.</i> , 646 S.W.2d 168 (Tex. 1983) .....   | 19      |
| <i>Heiner v. S.J. Groves &amp; Sons Co.</i> , 790 P.2d 107 (Utah Ct. App. 1990) .....   | 3       |
| <i>Hillcrest Inv. Co., LLC v. DOT</i> , 2015 UT App 140, 352 P.3d 128 .....   | 14      |
| <i>In re Repco Products Corp.</i> , 100 B.R. 184 (E.D. Pa. 1989) .....  | 12      |
| <i>Keyes v. Guy Baily Homes, Inc.</i> , 439 So. 2d 670 (Miss. 1983) .....   | 19      |
| <i>Lempke v. Dagenais</i> , 547 A.2d 290 (N.H. 1988) .....  | 19      |

|   |         |
|---|---------|
| <i>Lidstrand v. Silvercrest Indus.</i> , 623 P.2d 710 (Wn. Ct. App. 1999).....                                    | 12      |
| <i>Martin v. Lauder</i> , 2010 UT App 216, 239 P.3d 519 .....   | 1, 2, 3 |
| <i>Moxley v. Laramie Builders</i> , 600 P.2d 733 (Wyo. 1979).....   | 17, 19  |
| <i>Nichols v. R.R. Beaufort &amp; Assocs.</i> , 727 A.2d 174 (R.I. 1999).....                                     | 19      |
| <i>Northeastern Power Co.</i> , 1999 U.S. Dist. LEXIS 13437 (E.D. Pa. Aug. 20, 1999) .....                        | 11      |
| <i>Redarowicz v. Ohlendorf</i> , 441 N.E.2d 324 (Ill. 1982).....  | 19      |
| <i>Richards v. Powercraft Homes, Inc.</i> , 678 P.2d 427 (Ariz. 1984).....  | 19      |
| <i>Sewell v. Gregory</i> , 371 S.E.2d 82 (W. Va. 1988).....   | 19      |
| <i>SME Indus., Inc. v. Thompson, Ventulette, Stainback &amp; Assocs., Inc.</i> , 2001 UT 54,<br>28 P.3d 669 ..... | 22      |
| <i>State v. Horrocks</i> , 2001 UT App 4, 17 P.3d 1145 .....  | 20      |
| <i>Sunridge Dev. Corp. v. RB&amp;G Eng'g, Inc.</i> , 2010 UT 6, 230 P.3d 1000 .....                               | 22      |
| <i>Ted. R. Brown &amp; Assocs. v. Carnes Corp.</i> , 753 P.2d 964 (Utah Ct. App. 1988) .....                      | 14      |
| <i>Terlinde v. Neely</i> , 271 S.E.2d 768 (S.C. 1980).....  | 19      |
| <i>Wilkinson v. Washington City</i> , 2010 UT App 56, 230 P.3d 136 .....  | 1, 2, 3 |

## **Statutes**

|                                     |    |
|-------------------------------------|----|
| Utah Code Ann. § 78A-3-102.....     | 1  |
| Utah Code Ann. § 78A-4-103.....     | 1  |
| Utah Code Ann. § 78B-4-513(6) ..... | 19 |

## **Treatises**

*Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or*

*Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383 (2015) .....20

## **Rules**

Utah R. Civ. P. 12(b)(6).....3

Utah R. Civ. P. 56(c) .....4

The Appellant, Joseph Tomlinson, by and through his counsel of record, submits this Brief in accordance with Rule 24 of the Utah Rules of Appellate Procedure.

## **II. JURISDICTION.**

This Court has jurisdiction under Utah Code Ann. §§ 78A-3-102 and 78A-4-103.

## **III. STATEMENT OF THE ISSUES.**

### **A. Issue # 1**

Did the district court err by granting summary judgment on Tomlinson's warranty claims even though the defects giving rise to the claims were not discovered by Tomlinson during the one-year warranty contained in the Construction Agreement: Cost Plus Contractor's Fee (the "Construction Agreement"), and the Construction Agreement did not expressly include a requirement that defects must be discovered during this one-year period to be actionable? *See* Construction Agreement, R. at 5832, Addendum 1; Order 3-4, Jan. 29, 2015, R. at 5482-83, Addendum 2. Tomlinson preserved this issue for appeal. *See* Opp'n 37-41, Oct. 29, 2014, R. at 4724-28.

**Standard of Review:** This Court reviews the district court's ruling on summary judgment for correctness and views the facts and all reasonable inferences in the light most favorable to Tomlinson. *See Cabaness v. Thomas*, 2010 UT 23, ¶ 18, 232 P.3d 486; *Martin v. Lauder*, 2010 UT App 216, ¶ 4, 239 P.3d 519; *Wilkinson v. Washington City*, 2010 UT App 56, ¶ 5, 230 P.3d 136. To the extent the court's ruling is based on a contract interpretation, this Court reviews the district court's contract interpretation primarily as a question of law under the correctness standard, and accords the court's interpretation no particular weight. *See Meadow Valley Constrs. Inc. v. State Dep't of*



*Transp.*, 2011 UT 35, ¶ 63, 266 P.3d 671 (quoting *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985)).

**B. Issue # 2**

Did the district court err by ruling on summary judgment that the Construction Agreement required Tomlinson to notify Doug Knight Construction, Inc. (“DKC”) of every defect in the home within the one-year warranty period even though the language of the Construction Agreement’s express warranty did not include such a requirement? *See* Construction Agreement, R. at 5832, Addendum 1; Order 3-4, Jan. 29, 2015, R. at 5482-83, Addendum 2. Tomlinson preserved this issue for appeal. *See* Opp’n 41-45, Oct. 29, 2014, R. at 4728-32.

**Standard of Review:** This Court reviews the district court’s ruling on summary judgment for correctness and views the facts and all reasonable inferences in the light most favorable to Tomlinson. *See Cabaness*, 2010 UT 23, ¶ 18; *Martin*, 2010 UT App 216, ¶ 4; *Wilkinson*, 2010 UT App 56, ¶ 5. To the extent the court’s ruling is based on a contract interpretation, this Court reviews the district court’s contract interpretation primarily as a question of law under the correctness standard, and accords the court’s interpretation no particular weight. *See Meadow Valley Constrs. Inc.*, 2011 UT 35, ¶ 63 (quoting *Kimball*, 699 P.2d at 716).

**C. Issue # 3**

Did the district court err by granting the motion to dismiss filed by DKC and dismissing Tomlinson’s claim for breach of the implied warranty of habitability and

workmanlike manner? *See* Order 3, Nov. 25, 2013, R. at 2537, Addendum 3. Tomlinson preserved this issue for appeal. *See* Opp'n 10-14, July 31, 2013, R. at 1888-92.

**Standard of Review:** This Court should affirm the district court's ruling on DKC's motion to dismiss only if it appears to a certainty that Tomlinson would not be entitled to relief under any set of facts that could be proven in support of his claim. *See Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 109 (Utah Ct. App. 1990).

**D. Issue # 4**

Did the district court err when it ruled on summary judgment that Tomlinson had no viable claims against DKC despite admissible evidence in the record showing that after Tomlinson purchased the home he obtained an assignment of all the original lot owner's rights? *See* Assignment of Claims, R. at 5821-22, Addendum 4; Order 4, June 3, 2015, R. at 6064, Addendum 5. Tomlinson preserved this issue for appeal. *See* Opp'n 17-26, Feb. 18, 2015, R. at 5804-13.

**Standard of Review:** This Court reviews the district court's ruling on summary judgment for correctness and views the facts and all reasonable inferences in the light most favorable to Tomlinson. *See Cabaness*, 2010 UT 23, ¶ 18; *Martin*, 2010 UT App 216, ¶ 4; *Wilkinson*, 2010 UT App 56, ¶ 5. To the extent the court's ruling is based on a contract interpretation, this Court reviews the district court's contract interpretation primarily as a question of law under the correctness standard, and accords the court's interpretation no particular weight. *See Meadow Valley Constrs. Inc.*, 2011 UT 35, ¶ 63 (quoting *Kimball*, 699 P.2d at 716).

**IV. DETERMINATIVE PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS.**

None.

**V. STATEMENT OF THE CASE.**

**A. The Nature of the Case.**

This appeal is from a final judgment of the Third Judicial District Court granting summary judgment in case number 100500668. *See* Order, June 3, 2015, R. at 6061-65, Addendum 5. This case involves a dispute over significant construction defects discovered in a multimillion dollar home built by DKC for a single-purpose entity that sold the new home to Tomlinson. R. at 5481, 6062. On July 29, 2010, Tomlinson filed a complaint against DKC and others. R. at 1-16. Through subsequent rulings on motions to dismiss and motions for summary judgment filed, the district court dismissed all of Tomlinson's claims against DKC.

**B. The Course of Proceedings and Disposition in the Court Below.**

Tomlinson's claims against DKC included claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of the implied warranties of the implied warranties of habitability and workmanlike manner. *See* Third Am. Compl., R. at 816-833. On November 23, 2013, the district court dismissed Tomlinson's claim for breach of the implied warranties. R. at 2535-40. On January 29, 2015, the district court limited Tomlinson's damages on his claims for breach of contract and breach of the implied covenant of good faith and fair dealing by granting summary judgment for DKC. R. at 5480-84. Then, on June 3, 2015, the district court granted

summary judgment for DKC on those claims. R. at 6081-85. Thereafter, Tomlinson filed a motion to alter or amend the district court's ruling, which was denied on August 11, 2015. R. at 6283-984.

**C. Statement of the Facts.**

On August 3, 2004, DKC entered into the Construction Agreement with Lot 84 Deer Crossing, LLC ("Lot 84") to build the home on a lot that had been acquired by Lot 84 for development. R. at 5797. In January of 2005, Lot 84 assigned its rights under the Construction Agreement to Outpost Development, Inc. ("Outpost"), a successor entity whose purpose was to sell the newly constructed home to a buyer who would be the home's first occupant. R. at 5793; Royce Richards Aff. ¶ 7, R. at 5817. On March 17, 2006, Tomlinson offered to purchase the Property from Outpost. R. at 5798. DKC completed construction of the home while the Tomlinson purchase was pending. R. at 5793. Outpost deeded the home to Tomlinson on May 15, 2006, R. 5536, and a Certificate of Occupancy was issued on May 17, 2006. R. at 5793.

After signing the real estate purchase contract, but prior to closing, Outpost disclosed a water leak to Tomlinson that DKC had previously disclosed to Outpost. R. at 818-19. Outpost assured Tomlinson the leak had been fixed. R. at 819. In October of 2006, Tomlinson discovered the water leak had not been fixed and notified both Outpost and DKC that the home failed to conform to the Construction Agreement and its one-year express warranty. R. at 4695-96. From October 2006 to May 2007, Outpost and DKC continually promised Tomlinson they would fix the leak, but were unable or unwilling to do so. R. at 4696-97.

After waiting nearly a full year for Outpost and DKC to fix the leak, Tomlinson hired Park City Fine Homes in September of 2007 to fix the leak and perform remediation work on the home. R. at 4698-702. Park City Fine Homes fixed and remediated damages from the leak, but discovered additional defects in the design, workmanship, and construction of the home that appeared to have been present since the completion of construction. R. at 4700.

Tomlinson filed suit in 2010 against DKC, Outpost, and others to recover damages caused by DKC's defective construction. R. at 1-16. In January 2011, Outpost asserted seven cross-claims against DKC. R. at 216-19. Before these claims were resolved, Outpost filed for bankruptcy in Nevada. R. at 1537. After Outpost declared bankruptcy, Tomlinson purchased an assignment of all of Outpost's existing and potential causes of action against DKC from Outpost's bankruptcy trustee. R. at 6062-64. Tomlinson then filed a Third Amended Complaint asserting claims for breach of the Construction Agreement as assignee of Outpost. R. at 816-833.

Two provisions of the Construction Agreement are of central importance to this appeal. Article 9.7 provides the following warranty:

Contractor agrees to extend all manufacturer warranties to Owner. Contractor does not warrant or in any way guarantee the useful life of any product used in the construction of the Project, if the produce is a natural product, including but not limited to logs, timbers, stones, or rocks. . . . Contractor further warrants the Work as per Utah state code for a period of one year.

*See* Construction Agreement, R. at 5832, Addendum 1. Article 9.8 contains the following damage limitation:

In no event shall Contractor be liable for special or consequential damages. Contractor's liability on any claim by Owner arising out of or connected with this contract, or any obligation resulting therefrom, or from the manufacture, sale, delivery, installation or use of any materials covered by this Construction Agreement shall be limited to that which is set forth in the preceding paragraph.

*See id.*

## **VI. SUMMARY OF ARGUMENTS.**

### **A. The Construction Agreement Did Not Impose a Discovery or Notice Requirement.**

The Construction Agreement did not expressly impose a requirement on the owner to discover and issue notice of a defect within one year in order to obtain warranty coverage. Consequently, the general contractor who drafted the Construction Agreement was not entitled to imply a discovery and notice requirement in the Construction Agreement. The courts are not to write a better contract for a party than the party wrote for itself, but the district court did just that and ruled that Tomlinson was only allowed to pursue asserted warranty claims for defects that Tomlinson discovered and specifically identified during that one-year period. This Court should reverse the district court's decision and should allow Tomlinson to pursue warranty claims for any defects that Tomlinson can prove existed during the one-year warranty period.

### **B. The Implied Warranty of Habitability Should Apply to All Builders of New Homes.**

Utah law should extend the implied warranty of workmanlike manner and habitability to builders of new homes regardless of whether those builders are in contractual privity with the new home buyer. The current requirement of contractual

privity with the home buyer has triggered a rise in the use of single-purpose LLCs and corporations to act as residential home developers who contract with a builder to construct a new home and then sell the new home to a buyer in a manner that keeps the builder at arm's length from the buyer. Many other states have already concluded that a buyer of a new home should be entitled to rely upon the implied warranty regardless of whether the builder is in contractual privity with that builder, and the time has come for Utah to join those states.

**C. Tomlinson Has the Right to Pursue Any Claims that Outpost Could Have Pursued.**

Tomlinson should be allowed to assert warranty claims in the shoes of Outpost regardless of whether Outpost sold the home during the warranty period. Tomlinson acquired Outpost's warranty rights by way of assignment after Outpost declared bankruptcy, and Tomlinson is therefore entitled to assert any claim against DKC that Outpost itself could have asserted at any time during the course of Outpost's ownership of the property.

**VII. ARGUMENTS.**

**A. TOMLINSON SHOULD BE ALLOWED TO MAINTAIN WARRANTY CLAIMS FOR ANY DEFECTS THAT ACTUALLY EXISTED DURING THE ONE-YEAR WARRANTY PERIOD REGARDLESS OF WHETHER TOMLINSON DISCOVERED THOSE DEFECTS AT A LATER DATE.**

The district court made two rulings of law in its January 29<sup>th</sup> Order. First, the court ruled that Tomlinson's claims were limited to those for breach of warranty; and second, that Tomlinson's claims were limited to those actually discovered and noticed to

DKC during the warranty period. *See* Order 3-4, Jan. 29, 2015, R. at 5482-83, Addendum 2. The court construed § 9.7 and § 9.8 of the Construction Agreement as barring Tomlinson from asserting any defect claims against DKC that were not brought to DKC's attention during the first year after completion of construction. *See id.* The court ruled that "any claims for contractual defects or construction defects not raised with the contractor DKC within one year of substantial completion are indeed waived." *See id.* at 4, R. at 5483, Addendum 2. This was reversible error because the court improperly inferred a discovery and notice requirement into the Construction Agreement when no such requirement was articulated in the Construction Agreement.

When interpreting a contract, a court reviews its language to determine its meaning and the parties' intentions. *See Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235. If its language is unambiguous, the parties' intentions are determined from the plain meaning of the contract's language and the contract is interpreted as a matter of law. *See id.* When interpreting a particular provision in a contract, that contract provision is considered in relation to all others, "with a view toward giving effect to all and ignoring none." *See id.*

Turning to the interpretation of the warranty provision in the Construction Agreement, Tomlinson acknowledges that Utah law requires the courts to enforce a warranty's discovery and notice requirements when those requirements are actually articulated in the warranty. *See, e.g., Beckstead v. Deseret Roofing Co., Inc.*, 831 P.2d 130, 131 (Utah Ct. App. 1992) (in which warranty included specific notice requirement). However, the warranty in the present case only states "Contractor further warrants the



Work as per Utah state code for a period of one year.” *See* Construction Agreement § 9.8, R. at 5832, Addendum 1. But in this case, the builder who wrote the warranty chose not to impose a notice or discovery requirement upon the property owner. *See id.*

It does not appear that Utah has previously addressed the question of whether discovery and notice is implied when a warranty fails to require discovery and notice. But there is some authority from outside Utah in which a warranty has been found to cover defects that existed during the one-year warranty period, regardless of whether those defects were discovered during that same one-year period. *See, e.g., Northeastern Power Co.*, 1999 U.S. Dist. LEXIS 13437, \*15-17 (E.D. Pa. Aug. 20, 1999) (“BDI’s warranty does not contain any language which explicitly specifies that the defect must be ‘found’ or ‘discovered’ during the one-year period. . . . We find that a reasonable interpretation of BDI’s express warranty’s language would allow for coverage of manifest but undiscovered defects due to the fault of the seller.”). There are also many examples of other jurisdictions construing manufacturing warranties in this manner. *See, e.g., Alberti v. General Motors Corp.*, 600 F. Supp. 1026, 1028 (D.D.C. 1985) (“It was at the time of the sales, therefore, that plaintiffs maintain the loss for which they make claim here—diminished value of the cars they purchased—was incurred, for it was then that GM broke its warranty that the brakes would function safely . . . .”); *Lidstrand v. Silvercrest Indus.*, 623 P.2d 710, 714 (Wn. Ct. App. 1999) (“[I]t may be reasonably inferred that the defects which became apparent after the 1-year period were related to and caused by the same defects which existed at the time the mobile home was manufactured.”); *Canal Electric Co. v. Westinghouse Electric Co.*, 973 F.2d 988, 992 (1st

Cir. 1992) (“[F]or purposes of this warranty, a defect ‘appears’ during the warranty period if *either* 1) it is in fact perceived during that period, or 2) it would have been perceived during the course of an inspection that a reasonable user would *normally* have made during that period.”); *In re Repco Products Corp.*, 100 B.R. 184, 194 (E.D. Pa. 1989) (“The existence of a malfunction alone establishes a ‘defective condition,’ and it is not necessary for the buyer to establish a specific defect or the reason why the good did not properly perform in order to succeed in a breach of warranty claim.”).

In Utah, the law recognizes that the construction of a new home is a complex undertaking, and that the end user of that new home is simply not equipped to assess the quality of the home received. *See Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶¶ 12, 63, 221 P.3d 234. Utah law also recognizes that home builders are in a superior position to comply with the complex governmental codes and regulations, are in the better position to prevent the harm of noncompliance, and should bear the loss of any defects. *See id.*

This recognition of the new home buyer’s lack of expertise in home construction argues in favor of construing builder warranties against the builder and in favor of the home buyer. If a home buyer is required to discover all defects in a home prior to the expiration of the builder’s warranty, that home buyer owner must hire professionals and essentially conduct a forensic audit of the home’s condition prior to the one-year deadline or face the loss of the warranty’s protection. An ordinary home buyer will never think to undertake such a forensic audit unless, at the very least, the home buyer is explicitly warned in the contract or construction agreement of the need to do so. Consequently,

when a builder fails to issue that warning, the home buyer should not be the one who suffers.

In Utah, it is well-settled that the court will not write a better contract for a party than it wrote for itself. *See Hillcrest Inv. Co., LLC v. DOT*, 2015 UT App 140, ¶ 19, 352 P.3d 128 (citing *Ted. R. Brown & Assocs. v. Carnes Corp.*, 753 P.2d 964, 970 (Utah Ct. App. 1988)) (“[A] court may not make a better contract for the parties than they have made for themselves . . .”). But that is actually what the district court did in this case. The district court rewrote the warranty provision of the Construction Agreement to give DKC more protection than DKC gave itself. Tomlinson asks this Court to hold that the warranty expressed in § 9.7 and § 9.8 of the Construction Agreement did not impose an affirmative obligation on Tomlinson to discover and notice a defect within one year of construction completion. So long as Tomlinson can prove that a defect existed during the one-year warranty period, he should be allowed to recover damages for that defect.

**B. UTAH LAW SHOULD EXTEND THE AN IMPLIED WARRANTY OF WORKMANLIKE MANNER AND HABITABILITY TO A BUILDER OF A NEW RESIDENCE REGARDLESS OF WHETHER THAT BUILDER IS THE SELLER OF THE RESIDENCE OR IN PRIVITY WITH THE NEW HOME BUYER.**

Utah has recently decided to begin recognizing and extending the implied warranty of workmanlike manner and habitability to the construction of new homes. Back in 1996, the Utah Supreme Court declined to recognize an implied warranty of workmanlike manner and habitability (the “implied warranty”) in new homes. *See Am. Towers Owners Ass’n v. CCI Mech., Inc.*, 930 P.2d 1182, 1193 (Utah 1996). But then in

2009, the Utah Supreme Court recognized that an implied warranty was needed to prevent “unscrupulous, fly-by-night, [and] unskilled builder[s]” from constructing new homes. *See Davencourt*, 2009 UT 65, ¶ 53 (quoting *Capra v. Smith*, 372 So. 2d 321, 323 (Ala. 1979)).

Davencourt opened the door to applying the implied warranty to new home construction in Utah; however, Davencourt did not open the door wide enough to cover situations where a custom-home “developer”—which is usually a single purpose limited liability company that is formed to purchase a single lot and then contract with a builder to construct a single residence for quick sale—employs a builder at arm’s length to construct the new home. In that situation, the LLC sells the home to the actual first occupant of the home and then distributes the proceeds to its members as quickly as possible. The LLC is then either dissolved or is left as an empty shell. In that increasingly common scenario, Utah’s implied warranty is useless to the actual home buyer because the LLC is inherently judgment proof and the “unscrupulous, fly-by-night, unskilled builder” is at arm’s length from the actual home buyer. *See id.* ¶ 53.

This result does not comport with the policies articulated by the Utah Supreme Court in *Davencourt*. The *Davencourt* Court grounded its recognition of an implied warranty in the following policy considerations:

- (1) modern construction is too complex and intertwined with codes and regulations for the new home buyer to understand;
- (2) building a new home is a daily event for contractors who should know and comply with the codes and regulations;
- (3) buyers need be able to rely on a contractor’s specialized knowledge and skill;

- (4) the contractor is in the better position to prevent, notice, and correct any harm and ought to bear the loss,
- (5) unskilled contractors will not perform work and there will be less defective work; and
- (6) purchasing a new home is a significant financial transaction for a new home buyer and it would be unjust to favor the builder over the buyer by applying caveat emptor to the sale of the new home.

*See Davencourt*, 2009 UT 65, ¶ 53. These policy considerations confirm that the purpose underlying Utah's implied warranty is to prevent the manifest injustice of imposing *caveat emptor* upon a new home buyer who is usually at a distinct disadvantage in grasping the complexities of modern home construction. *See Davencourt*, 2009 UT 65, ¶¶ 53-54.

Unfortunately, *Davencourt* limited the implied warranty to builder-vendors or developer-vendors, *see id.* ¶ 60, and to parties who are in privity of contract. *See id.* ¶ 54. These limitations on the implied warranty of habitability have led entrepreneurial custom-home developers to use single purpose, quick-flip LLCs or S corporations to act as the developer-vendor. The single-purpose entity is booted up to purchase a bare lot and hire a contractor to build a house on that lot. The entity then quickly sells the developed lot for a profit and just as quickly distributes the sale proceeds to its member(s), who then immediately dissolve the LLC or convert it into an empty shell. If a homebuyer then asserts a claim against the entity, the entity is thrown into bankruptcy and the home buyer is left with no other recourse. This arrangement results in rendering the implied warranty of habitability completely useless to the home buyer, i.e., the very consumer that the *Davencourt* Court sought to protect.

By extending the implied warranty to the actual builder, i.e. the party that is really described by *Davencourt* as being the party who should be liable, the policies underlying Utah's implied warranty will be better served. Many states have already recognized that removing the vendor and privity requirements is necessary to allow the implied warranty of habitability to serve its intended purpose. For instance, the Wyoming Supreme Court concluded over 30 years ago:

We can see no difference between a builder or contractor who undertakes construction of a home and a builder-developer [i.e., builder-vendor]. To the buyer of a home the same considerations are present, no matter whether a builder constructs a residence on the land of the owner or whether the builder constructs a habitation on land he is developing and selling the residential structures as part of a package including the land. It is the structure and all its intricate components and related facilities that are the subject matter of the implied warranty. Those who hold themselves out as builders must be just as accountable for the workmanship that goes into a home that a buyer or his successor or successors in interest expect to occupy in the years that thereafter follow, as are builder-developers.

*Moxley v. Laramie Builders*, 600 P.2d 733,735 (Wyo. 1979). Idaho reached the same conclusion 10 years later. *See Tusch Enters. v. Coffin*, 740 P.2d 1022, 1033 (Idaho 1987) (quoting *Moxley*, 600 P.2d at 735).

In 2008, Arizona discarded the distinction between vendor and contractor after recognizing that it is the builder who impliedly warrants the new home rather than the vendor. *See The Lofts at Fillmore v. Reliance Commercial Constr., Inc.*, 190 P.3d 733, 736 (Ariz. 2008); *see also Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 P.3d 664 (Ariz. 2010). The Arizona Supreme Court recognized at that time:

In today's marketplace, as this case illustrates, there has been some shift from the traditional builder-vendor model to arrangements under which a construction entity builds the homes and a sales entity markets them to the

public. In some cases, the builder may be relate to the vendor; in other cases, the vendor and the builder may be unrelated. But whatever the commercial utility of such contractual arrangement, they should not affect the homebuyer's ability to enforce the implied warranty against the builder. Innocent buyer of defectively constructed homes should not be denied redress on the implied warranty simply because of the form of the business deal chosen by the builder and vendor.

*Lofts at Fillmore*, 190 P.3d at 736.

In 2010, Illinois also extinguished the "vendor requirement" when applying the implied warranty doctrine to builders of new homes. *See 1324 W. Pratt Condo. Ass'n v. Platt Constr. Group*, 936 N.E.2d 1093, 1099 (Ill. App. 1st Dist. 2010). After first recognizing that the implied warranty of habitability has been greatly expanded in recent years, the Illinois Appellate Court went on to conclude that

limiting application of the warranty to only those builders who are also vendors would defeat the warranty's policy goals of holding builders themselves accountable for latent defects in new homes and placing the costs of repair on the builders who created the defect.

*Id.*

States have also abandoned the privity requirement when applying the implied warranty to subsequent purchasers. *See Nichols v. R.R. Beaufort & Assocs.*, 727 A.2d 174, 179-81 (R.I. 1999); *Lempke v. Dagenais*, 547 A.2d 290, 293-94 (N.H. 1988); *Sewell v. Gregory*, 371 S.E.2d 82, 85 (W. Va. 1988); *Tusch Enters. v. Coffin*, 740 P.2d 1022, 1033, 1035-36 (Idaho 1987); *Aronsohn v. Mandara*, 484 A.2d 675, 680 (N.J. 1984); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983); *Keyes v. Guy Baily Homes, Inc.*, 439 So. 2d 670, 672-73 (Miss. 1983); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330-31 (Ill.

1982); *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 323-24 (Ark. 1981); *Elden v. Simmons*, 631 P.2d 739, 742 (Okla. 1981); *Terlinde v. Neely*, 271 S.E.2d 768, 769-770 (S.C. 1980); *Moxly v. Laramie Builders, Inc.*, 600 P.2d 733, 736 (Wyo. 1979); *Barnes v. MacBrown*, 342 N.E.2d 619, 620-21 (Ind. 1976); *see generally* Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383, *passim* (2015). The rationale policy underlying the decision by these states to lift the privity requirement was summed up by the Supreme Court of New Jersey as follows: “To require privity between the contractor and the home owner in such a situation would defeat the purpose of the implied warranty of good workmanship and could leave innocent homeowners without remedy . . . .” *Aronsohn*, 484 A.2d at 680.

In the present case, the district court dismissed Tomlinson’s implied warranty claim because DKC was not the actual seller of the new home. *See* Order 3, Nov. 25, 2013, R. at 2537, Addendum 3. While it is true that the district court’s decision complies with *Davencourt*, Tomlinson is asking Utah to lift the vendor and privity requirements set forth in *Davencourt*. Unless and until the vendor and privity restrictions are removed from Utah’s implied warranty of habitability, contractors like DKC who build defective homes will be able to escape all liability for their defective work, and equally unscrupulous entrepreneurial “developers” will be able to use single-purpose LLCs to render the implied warranty useless to purchasers of new homes.

Tomlinson recognizes that this Court may be constrained in granting the relief requested by Tomlinson because this Court “cannot disregard or overturn decisions of the



Supreme Court.” *State v. Horrocks*, 2001 UT App 4, ¶ 24, 17 P.3d 1145. But Tomlinson must argue to this Court in order to preserve his rights to ultimately put these issues before the Utah Supreme Court.

**C. TOMLINSON SHOULD BE ALLOWED TO ASSERT WARRANTY CLAIMS AGAINST DKC FOR ANY WARRANTY ISSUE THAT EXISTED WHEN OUTPOST OWNED THE HOME.**

The district court ruled on June 3, 2015 that “the only remaining claims Plaintiff has alleged against DKC in this case are breach of contract claims for construction defects, and these claims are ‘pass through’ claims brought by Plaintiff as an assignee of Outpost’s contract claims.” *See* Order 4, June 3, 2015, R. at 6064, Addendum 5. In reality, Tomlinson did assert direct claims against DKC as well as pass-through claims. *See* Third Am. Compl. 7-8, R. at 822-23. But Tomlinson also asserted claims against DKC in the shoes of Outpost. *See* Opp’n 17-23, R. at 5804-10.

With regards to Outpost’s assignment of its warranty rights, DKC did not limit the warranty’s transferability. *See* Order 3, Jan. 29, 2015 (quoting Construction Agreement 6, § 9.8), R. at 5482, Addendum 2. DKC simply provided that it would warranty “the Work . . . for a period of one year.” *See id.* Tomlinson acquired “all of Outpost’s right title and interest in and to any and all rights, claims, causes of action, choses in action, rights to payments, and judgment of any kind that Outpost has asserted in the Litigation, or may otherwise assert, against the Defendants (the ‘Claims’).” *See* Assignment of Claims, Addendum 4; Opp’n 18, R. at 5805. Given the unrestricted terms of the warranty, Tomlinson can properly enforce the warranty, as the assignee of the warranty right.

The district court limited Tomlinson's damages to those actually suffered by Outpost prior to the assignment. *See* Order 4, June 3, 2015 (relying on *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 30, 28 P.3d 669, in making its ruling), R. at 6064, Addendum 5. The district court's rulings were made in error because *SME Industries, Inc.* does "not place a temporal restriction on the damages an assignee may recover." *See Sunridge Dev. Corp. v. RB&G Eng'g, Inc.*, 2010 UT 6, ¶ 25, 230 P.3d 1000. In *Sunridge*, the Utah Supreme Court recognized that:

[T]he rule that an assignee cannot stand in a better position than its assignor simply means an assignee cannot recover more than the assignor could have recovered under the assigned contracts. The correct inquiry looks at the assignor's rights and liability under the contract, not solely whether a claim for damages arose before or after the date of the assignment.

*See id.* ¶ 23 & n.5 (emphasis added). According to *Sunridge*, Tomlinson has the right to assert any claims that Outpost could have pursued, not merely claims that Outpost did pursue.

## **VIII. CONCLUSION.**

Tomlinson purchased a home that was under construction when he signed the purchase contract. After closing on the purchase, Tomlinson discovered significant defects in the construction of the home that were in existence as of the home's completion. Because the general contractor who built the home had issued a one-year builder's warranty to the seller of the home, and because Tomlinson acquired an assignment of the seller's rights under that warranty, Tomlinson should be allowed to pursue breach of warranty claims against the builder for any defects that Tomlinson can prove were in existence during the one-year builder's warranty period. The district court

erred when it injected a discovery and notice requirement into the warranty provision of the Construction Agreement, and the district court erred when it ruled that Tomlinson was not entitled to pursue claims in the shoes of the seller of the home that the seller did not itself pursue prior to the sale of the home to Tomlinson.

The business arrangement employed by the developer of the home in this case is an increasingly common one in the State of Utah. A single-purpose entity is formed to acquire a lot and then that entity arranges for a third-party builder to construct a new home on the lot. The developer entity then sells the new home to buyers like Tomlinson and the seller entity converts itself into an empty shell. Because Utah currently requires a home buyer to be in privity with the builder in order to be covered by the implied warranty of habitability, the buyer is unable to invoke the implied warranty of habitability against the builder when the home turns out to be uninhabitable. In order for this to change, the vendor and privity requirements imposed by *Davencourt* must be lifted so that all builders of new homes are subject to the implied warranty of habitability and workmanlike manner.

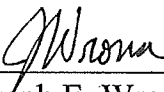
Tomlinson requests this Court to: (1) reverse the court's November 23, 2013 Order that dismissed Tomlinson's claim for breach of the implied warranties, (2) reverse the court's January 29, 2015 Order that limited Tomlinson's damages on his claims for breach of contract and breach of the implied covenant of good faith and fair dealing by granting summary judgment for DKC, and (3) reverse the court's June 3, 2015 Order that granted summary judgment for DKC on those claims.

**IX. REQUEST FOR ORAL ARGUMENT**

Tomlinson respectfully requests oral argument on this appeal.

DATED December 4, 2015.

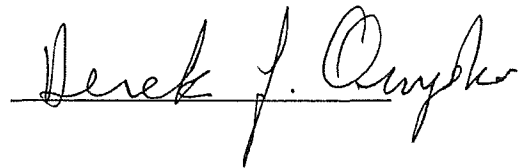
**WRONA, GORDON & DUBOIS, P.C.**

  
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Joseph E. Wrona  
*Attorney for Plaintiff*

X. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 6,963 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 13 point.

DATED December 4, 2015.

A handwritten signature in cursive script, reading "Derek J. Quigley", is written over a horizontal line.

**XI. CERTIFICATE OF SERVICE.**

I certify that on December 4, 2015, I mailed two copies of the foregoing  
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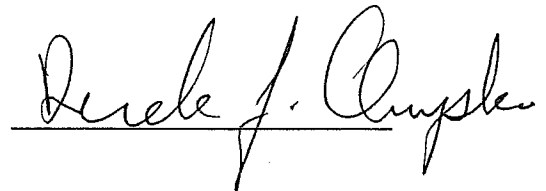
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## ADDENDUM 1: Construction Agreement



## **CONSTRUCTION AGREEMENT COST PLUS CONTRACTOR'S FEE**

This agreement is made and entered into this 21st day of July, 2004, between Douglas Knight Construction, Inc. with offices at 1434 East 4500 South #103 Salt Lake City UT 84117 ("Contractor"), and Lot 84 Deer Crossing, LLC ("Owner"), whose present address is C/O Royce Richards, Manager, 2490 Wall Ave., Ogden UT 84401 ("Owner").

For and in consideration of the agreements and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Contractor and Owner agree as follows:

### **ARTICLE 1 PROJECT AND THE WORK**

- 1.1 The construction project subject to this agreement (the "Work") is located at the address described as Lot 84 Deer Crossing, Promontory Subdivision, Summit County, Utah.
- 1.2 The Contractor shall perform all the Work reasonably required, necessary or appropriate to construct the project for the Owner.
- 1.3 This Work is described more fully in, but not limited to, the construction drawings, identified in Article 3 hereof, and includes any additional work requested or approved by the Owner, agreed to by the Contractor, whether oral or in writing. If oral, the Work shall be described in Change Orders subsequent to the oral agreement.

### **ARTICLE 2 TIME**

- 2.1 The Work to be performed under this contract shall be commenced no earlier than when the Contractor has received the building permit and completed working drawings and specifications, subject to authorized adjustments. The date of commencement is the date on which the Contractor has received the building permit and completed drawings and specifications.
- 2.2 Substantial completion shall be achieved not later than 13 months following the date of commencement. This date shall be extended for delays that are not caused by Contractor, including but not limited to: changes ordered in the Work, failure of Owner to make Selections or to otherwise perform Owner's responsibilities under this contract, labor disputes, fire, delays in transportation, adverse weather conditions not reasonably anticipated, unavoidable casualties, or any cause beyond the Contractor's control, which may justify the delay. In accordance with any of the above, the time for commencement and completion of the Work shall be extended for a reasonable time.
- 2.3 Substantial completion is defined as when construction is sufficiently complete so that the Owner can occupy or utilize the Project for the purpose for which it is intended. Owner may take possession of the Project after Substantial Completion at a time agreed to by the parties.
- 2.4 In the event Contractor does not achieve Substantial Completion within the Contract Time, including approved extensions, the Contractor shall pay the Owner, as liquidated damages and not as a penalty, the sum of \$100.00 per each work day the actual time performance exceeds the authorized Contract Time, if Owner has completed all

selections prior to the beginning of the framing phase of the home. Owner hereby acknowledges that a blank Selection Sheet has been provided Owner by Contractor.

### ARTICLE 3 CONTRACT DOCUMENTS

- 3.1 The contract documents consist of this Agreement and any written, appended, and initialed or signed attachments, exhibits and addenda; the initialed or signed drawings; the written, initialed, or signed specifications; the documents specifically enumerated below; and all oral, written, initialed, or signed modifications and change orders issued by the Owner or Owner's architect, after execution of the Agreement for minor changes in the Work. Contract documents include:

Architectural Plans by Jack Johnson Company

Date: June 9, 2004

#### Pages Included:

|          |   |
|----------|---|
| Aa       | Cover Sheet                               |
| L-1      | Grading Plan                              |
| A100     | Basement Floor Plan                       |
| A101     | Ground Level Floor Plan                   |
| A102     | Second Level Floor Plan                   |
| A103     | Roof Plan                                 |
| A200-201 | Exterior Elevations                       |
| A300     | Building Sections                         |
| A400-402 | Wall Sections                             |
| A500-501 | Enlarged Stair Plans and Sections         |
| A600     | Details                                   |
| A700     | Door and Window Schedule                  |
| A701     | Door and Window Details                   |
| A800-817 | Interior Elevations                       |
| A900     | Lower Level Reflected Ceiling Plan        |
| A901     | Ground Level Reflected Ceiling Plan       |
| A902     | Second Level Reflected Ceiling Plan       |
| S1.1     | General Structural Notes                  |
| S1.2     | Standard Details, Abbreviations & Symbols |
| S2.1     | Basement Foundation Plan                  |
| S2.2     | Foundation Plan                           |
| S3.1     | Foundation Details                        |
| S4.1     | Basement Framing Plan                     |
| S4.2     | Floor and Low Roof Framing Plan           |
| S4.3     | Roof Framing Plan                         |
| S5.1-5.3 | Framing Details                           |

At the time of the Estimate, no Soils Report was available for the Project.

### ARTICLE 4 CONTRACTOR'S FEE

- 4.1 In consideration for the performance of the Work on the Project, the Owner agrees to pay the Contractor in current funds as compensation for the Contractor's services on the Project as follows:
- 4.2 Owner agrees to reimburse Contractor all costs of the Work as set forth in Article 5 hereof.

- 4.3 Owner agrees to pay a Contractor's fee (the "Contractor's Fee"), in addition to reimbursement of all costs of the Work, as set forth in Article 5 hereof. Such Contractor's Fee shall be in the amount of \$149,900, and shall be paid in a pro rata share of 9.92% of the hard costs by Owner with each draw, up to a total amount of \$149,900. At the completion of the Project, any unpaid balance of the \$149,900 shall be paid in full with the last draw to the Contractor.
- 4.4 Contractor includes an Estimate Report for the construction cost with this Contract. The Estimate Report is provided to give the owner an approximation of what the Work would cost as per the plans and specs at the time of the Estimate. Costs may vary from the Estimate Report due to materials, cost changes, or scope of work changes.

#### ARTICLE 5 COSTS TO BE REIMBURSED

- 5.1 Reimbursable costs shall mean costs necessarily incurred by Contractor in the performance of the Work. The Owner shall reimburse the Contractor for all of the costs of the Work, which costs shall include, but are not limited to, the cost items hereinafter identified in this Article 5, that are incurred in the proper performance of the Work, and either paid for or payable by the Contractor. Such costs shall be at rates not higher than those customarily paid, except by consent of the owner.

Contractor will undertake best efforts to see that Work is performed at the costs set forth in the cost breakdown contained in the Standard Estimating Report and use all diligence to hold subcontractors to the bids submitted therein.

- a. Wages paid for labor in the direct employ of the Contractor including Contractor's supervisory and administrative personnel when working on this project.
- b. Cost of all materials, supplies and equipment incorporated in the Work performed pursuant to the agreement or subcontracts pursuant hereto. The bid costs for construction supplies (including but not limited to lumber and sheetrock) is an estimate only. It is not a firm bid. The actual costs for materials and supplies may be more or less at the time of purchase. The Owner shall be responsible for the actual cost of such construction supplies.
- c. Payments made by the Contractor to subcontractors for work performed pursuant to subcontracts or subcontracts.
- d. Cost of all materials, supplies, equipment, temporary facilities (including heat and other utilities) and hand tools not owned by the workers, which are consumed or damaged in the performance of the Work.
- e. Reasonable rental costs of all necessary machinery and equipment, exclusive of hand tools, used at the site of the Work, whether rented from the contractor or others.
- f. Cost of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work even if not listed in any Estimating Standard Report included in the Contract documents.
- g. Losses and expenses not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor.
- h. Cost of removal of all debris.
- i. Costs incurred due to an emergency affecting the safety of persons or property. Other costs incurred in the performance of the Work if and to the extent required or approved orally or in writing by the Owner, or deemed necessary by the Contractor or architect.

- j. Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Contractor is liable.
- k. Fees and assessments for the building permit and for other permits, licenses, tests and inspections for which the Contractor is required by to pay in connection with the performance of this contract.
- l. Necessary costs and expenses as per the cost breakdown in any Estimating Standard Report included in the Contract documents.
- m. All costs and expenses associated with seismic tie down requirements not shown on the plans, unforeseen water tables, unstable ground, rock blasting, contingencies related to adverse weather conditions or delays, or any other extraordinary geographical or geophysical conditions which are not known by the Contractor.

5.2 The following costs are not to be reimbursed: Contractors general overhead, office rent, and general overhead costs not directly attributed to this job.

#### ARTICLE 6 PAYMENTS TO THE CONTRACTOR

- 6.1 Owner shall make bi-monthly progress payments to the Contractor within five days of the Owner's receipt of Contractor's application for payment as follows:
  - a. With each application, Contractor shall submit a copy of each voucher, invoice, receipt and other documents reasonably necessary to authenticate the costs (as provided in Article 5) for which payment is requested.
  - b. With each payment by Owner or Owner's lender for costs, the Contractor shall simultaneously be paid an amount equal to 9.92% of the costs, which amounts shall be in partial payment of and shall be applied against the Contractor's Fee set forth in Article 5 hereof.
- 6.2 Payment due and unpaid under this Agreement shall bear interest from the date payment is due at the rate of 18% per annum.
- 6.3 Final payment, constituting the entire unpaid balance of the cost of the Work and of the Contractor's Fee, unless otherwise agreed in writing, shall be paid by the Owner to the Contractor within ten (10) days after substantial completion of the Work, but in all events not later than the time of Owner's taking possession or occupancy of the building subject to the Work.
- 6.4 The making of final payment and completion of corrected work referenced in Article 13 shall constitute a waiver of all claims by the Owner with the exception of claims in Article 9. The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of final application for payment, with the exception of invoices by subcontractors or suppliers not foreseen by Contractor.

#### ARTICLE 7 CHANGES IN THE WORK

- 7.1 All Owner selections, including colors, specifications, and materials, shall be made no later than two weeks before commencement of framing, or such will be treated as a change.
- 7.2 The Owner, without invalidating this Agreement, may, with consent and agreement of the Contractor, approve or request changes in the Work after Selections are made. It is the

Owner's or Owner's agents' responsibility to supply all necessary documentation, specifications, and drawings so that said changes can be accurately estimated and performed. The cost of any such change to the Work shall be included in the reimbursable costs and fees. The Work and the Time for Contractor's performance and completion of the Work, in Article 2, shall be adjusted for each such requested change. Such changes in the Work must be authorized in writing signed by the Owner and Contractor.

#### ARTICLE 8 OWNER

- 8.1 Owner shall issue all communications concerning the work to be performed under this contract directly to the Contractor or Architect. Owner shall not impede or endeavor to supervise the construction work to be performed under or arising out of this contract. Should Owner impede supervise, or effect changes in the work required by the Contract documents contrary to this paragraph, Owner shall be liable and responsible therefore to such individuals, subcontractors and the Contractor, or each of them, for all costs, damages and injuries of every nature arising directly or indirectly as a result of Owner's activities or changes affected in the work.
- 8.2 Owner shall make all selections and forward all instructions to the Contractor or Architect in a timely manner so as not to delay the project.
- 8.3 Owner shall waive claims against Contractor for consequential damages arising out of or relating to the performance of this agreement which shall include but not be limited to damages incurred by Owner for rental expenses, loss of use of income, lost profits, and financing costs, interest and fees.

#### ARTICLE 9 CONTRACTOR

- 9.1 Except as may be provided in Article 8, the Contractor shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.
- 9.2 The Contractor shall perform the Work in accordance with the Contract Documents, using Contractor's best skill and attention, and the Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Agreement.
- 9.3 Except as provided in Article 5, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent, and whether or not incorporated in the Work, and Owner shall reimburse Contractor for the same.
- 9.4 Contractor is responsible to provide Owner with lien releases for any and all work or supplies utilized on said job.
- 9.5 Except as provided in Article 5, the Contractor shall pay all sales, consumer, use and other similar taxes which are legally in force at the time bids are received, and shall secure and pay for the building permit and for all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work, and Owner shall reimburse the Contractor for the same.

- 9.6 As reasonably practicable under the circumstances, the Contractor shall keep the premises free from unreasonable accumulation of waste materials or rubbish caused by the Contractor's operations. At the completion of the Work, the Contractor shall remove all such waste materials and rubbish from and about the project, as well as the Contractor's tools, construction equipment, machinery and surplus materials.
- 9.7 Limited Warranty: Contractor agrees to extend all manufacturer warranties to Owner. Contractor does not warrant or in any way guarantee the useful life of any product used in the construction of the Project, if the product is a natural product, including but not limited to logs, timbers, stones, or rocks. Contractor will to the best of Contractor's ability use the best products possible subject to the estimate report and budget. Contractor further warrants the Work as per Utah state code for a period of one year.
- 9.8 In no event shall Contractor be liable for special or consequential damages. Contractor's liability on any claim by Owner arising out of or connected with this contract, or any obligation resulting therefrom, or from the manufacture, sale, delivery, installation or use of any materials covered by this agreement shall be limited to that which is set forth in the preceding paragraph.

#### ARTICLE 10 ACCOUNTING RECORDS

- 10.1 Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Contract, and the Contractor shall preserve these for a period of three years after final payment.

#### ARTICLE 11 RESOLUTION OF DISPUTES

- 11.1 INITIAL DISPUTE RESOLUTION. If a dispute arises out of or relates to this Contract, or the breach thereof, the parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties shall endeavor to settle the dispute by mediation before recourse to arbitration. Unless the parties agree otherwise, the mediation shall be conducted in accordance with the Construction Mediation Rules of the American Arbitration Association. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus fourteen (14) calendar days, or as otherwise provided in the Contract Documents. If parties can't resolve the disputes through mediation the parties shall arbitrate.
- 11.2 AGREEMENT TO ARBITRATE. All claims, disputes and other matters in question arising out of, or relating to, this Contract, or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. Notwithstanding other provisions in this Contract, or choice of law provisions to the contrary, this agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., which shall not be superseded or supplemented by any other arbitration act, statute, or regulation. The award of the arbitrator(s) shall be final and may be enforced in any court of competent jurisdiction. The prevailing party in such arbitration

proceedings shall be entitled to an award of its attorney's fees, and its costs incurred including arbitrators fees and costs, administrative fees and expert fees.

- 11.3 WORK CONTINUATION AND PAYMENT. The Contractor shall carry on the Contract Work and maintain the Schedule of Work pending final resolution of a claim including arbitration, unless the Contract has been terminated or the Contract Work suspended as provided for in the Contract, or the parties otherwise agree in writing to a partial or total suspension of the Contract Work. If the Subcontractor is continuing to perform in accordance with the Contract, the Contractor shall continue to make payments as required by the Contract.
- 11.4 NO LIMITATION OF RIGHTS AND REMEDIES. Nothing in this Article shall limit any rights or remedies not expressly waived by the Contractor which the Contractor may have under lien laws or surety bonds.
- 11.5 SAME ARBITRATORS. To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor and others involved with the Project, concerning a common question of fact or law, shall be heard by the same arbitrator(s) in a single proceeding.

#### ARTICLE 12 INSURANCE

- 12.1 Unless otherwise provided, the Owner shall purchase and maintain insurance upon the entire Work at the Project site to the full insurable value thereof and shall add Contractor as an additional insured. This insurance shall include the interests of the Owner, the Contractor, and subcontractors of the Work, and shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss or damage, including, without duplication of coverage, theft, vandalism, and malicious mischief. In the event of a claim, the Owner is responsible for payment of any deductible.
- 12.2 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Work. The insurance procured by the Owner shall be deemed to be primary and shall be looked to first for protection and coverage matters.
- 12.3 Any loss insured under Paragraph 12.1 is to be adjusted with the Owner and made payable to the Owner as trustee for the Contractor and other insureds, subject to the requirements of any mortgagee clause.
- 12.4 The Owner and the Contractor waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to Article 12 or any other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The Contractor shall require similar waivers in favor of the Owner and the Contractor by subcontractors and sub-subcontractors.
- 12.5 Contractor shall maintain general liability insurance, covering claims which may arise out of or result from the Contractor's operations under the Contract, and as specified in the terms of the general liability policy.

#### ARTICLE 13 CORRECTION OF WORK

- 13.1 The Owner or Owner's architect shall furnish to the Contractor, at the time of Substantial Completion, a written list of any work that is incomplete, rejected or claimed to be

defective, or failing to conform to this Agreement. Otherwise, any such rejection or claim is waived.

- 13.2 Within a reasonable period of time, after receipt of the written list provided for in Paragraph 13.1 the Contractor shall correct any of the work reasonably and timely rejected by the Owner or Owner's architect which is defective or fails to conform to this Agreement.

#### ARTICLE 14 TERMINATION OF THE AGREEMENT

- 14.1 If any payment required to be made to the Contractor under this Agreement is not made within 20 days of the date required, or if Owner fails to carry out the terms of this Agreement in accordance with all its Provisions, the Contractor, without limiting or waiving any other legal rights or remedies, may at its sole option, after written notice to the Owner and three days time to cure, either terminate this Agreement and retain all amounts paid under this Agreement, or suspend work until Owner makes sufficient payment. Upon termination, Contractor shall recover from the Owner payment for all work performed and reimbursement for all costs incurred, together with the Contractor's Fee equal to 9.92% of the cost of all Work performed as of the date of termination, as provided in Paragraphs 14.2 hereof.
- 14.2 In case of such termination of this Agreement, the Owner shall further assume and become liable for obligations, commitments and unsettled claims that the Contractor has previously undertaken or incurred in good faith in connection with said Work. The Owner shall also pay to the Contractor fair compensation, either by purchase or rental, at the election of the Owner, for any equipment retained.

#### ARTICLE 15 DIFFERING SITE CONDITIONS & ENVIRONMENTAL CONCERNS

- 15.1 If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then, and in such event, Contractor shall be entitled to receive an extension to the time required to complete the Work and all costs incurred by Contractor in connection with all extra work and time expended.
- 15.2 Owner anticipates that the site upon which the project is to be constructed is free and clear of any and all hazardous or regulated wastes. In the event of such discovery, Contractor at its option may terminate this Agreement. If any such item described above is found, Construction shall stop immediately to determine how to correct the problem. Any costs to correct the problem shall be the Owner.
- 15.3 Contractor shall be entitled to an adjustment in the contract time in which to complete its work and all costs of correction, delay, shut down and start up resulting from or relating to the inspection, testing and removal of hazardous substances or materials which may cause foreseeable bodily injury or death to Contractor's personnel,
- 15.4 Owner agrees to indemnify and hold Contractor harmless from any liability associated with the discovery, testing, inspection or removal of such hazardous substances.



ARTICLE 16  
ADDITIONAL PROVISIONS

- 16.1 The laws of the State of Utah shall govern this Agreement.
- 16.2 Notices, as required or permitted under this Agreement, shall be in writing, and delivered personally or by facsimile or United States mail, postage prepaid, to the parties at the addresses hereinabove given.
- 16.3 In the event either party to this Agreement defaults in the performance of such party's covenants or obligations contained herein, the prevailing party in any action shall be entitled to reimbursement of all reasonable costs and attorney fees incurred in enforcing this Agreement or pursuing its rights hereunder in conjunction with Article 11.
- 16.4 This Agreement sets forth the entire Agreement of the parties with respect to the subject matter hereof. No provision hereof may be amended, nor any right hereunder waived, unless agreed in writing between the parties hereto.

This Agreement entered into as of the day and year first written above.

OWNER/OWNERS  
LOT 84 DEER CROSSING LLC

CONTRACTOR  
DOUGLAS KNIGHT CONSTRUCTION

By: [Signature]  
Date: 8/3/04

By: [Signature]  
Date: 7/21/04

By: \_\_\_\_\_  
Date: \_\_\_\_\_

ADDENDUM 2: Order, Jan. 29, 2015

The Order of Court is stated below:

Dated: January 29, 2015  
03:11:15 PM

/s/ RYAN HARRIS  
District Court Judge



---

**THIRD JUDICIAL DISTRICT COURT  
SUMMIT COUNTY, STATE OF UTAH**

---

JOSEPH TOMLINSON, an individual,

Plaintiff,  
vs.

DOUGLAS KNIGHT CONSTRUCTION, a  
Utah corporation; CLIVE BRIDGEWATER  
an individual; BRIDGEWATER  
CONSULTING GROUP, INC., a Utah  
Corporation; and JOHN DOES 1-10;  
Defendants.

**ORDER RE: DOUGLAS KNIGHT  
CONSTRUCTION, INC.'S MOTION  
FOR SUMMARY JUDGMENT RE:  
WAIVER**

Civil No. 100500668

Judge Ryan Harris

DOUGLAS KNIGHT CONSTRUCTION, a  
Utah Corporation;  
Third-Party Plaintiff,

v.  
AKITA CONSTRUCTION, INC., a Utah  
Corporation; HEARTH & HOME  
DISTRIBUTORS OF UTAH, LLC, a Utah  
Limited Liability Company, HIGH  
MOUNTAIN CONSTRUCTION, INC., a  
Utah Corporation; JACK JOHNSON  
COMPANY, a Utah Corporation; PCF, INC.  
d/b/a PELLA WINDOWS AND DOORS, a  
Utah Corporation; PICTURE PERFECT



and that in any event genuine issues of material fact exist precluding such parsing out of construction defects.

The Court hereby grants DKC's Motion in part and enters a ruling as a matter of law on contract interpretation issues as guidance to the parties.

The Construction Agreement provides in Article 6.4 that "[t]he making of final payment and completion of corrected work referenced in Article 13 shall constitute a waiver of all claims by the Owner with the exception of claims in Article 9."

Article 9.8 of the Construction Agreement states:

In no event shall Contractor be liable for special or consequential damages. Contractor's liability on any claim by Owner arising out of or connected with this contract, or any obligation resulting therefrom, or from the manufacture, sale, delivery, installation or use of any materials covered by this agreement shall be limited to that which is set forth in the preceding paragraph.

The preceding paragraph, Article 9.7 of the Construction Agreement provides DKC's limited warranty:

Contractor agrees to extend all manufacturer warranties to Owner. Contractor does not warrant or in any way guarantee the useful life of any product used in the construction of the Project, if the produce is a natural product, including but not limited to logs, timbers, stones, or rocks. Contractor will to the best of Contractor's ability use the best products possible subject to the estimate report and budget. Contractor further warrants the Work as per Utah state code for a period of one year.

The Court concludes that Article 13 of the Construction Agreement pertains to punch list work and

does not preclude any of Plaintiff's claims herein. However, the Court also concludes that Article 9.8, and Article 9.7 are unambiguous and that pursuant to Article 9.7 and 9.8, any claims for contractual defects or construction defects not raised with the contractor DKC within one year of substantial completion are indeed waived.

Notwithstanding, the Court is unable to completely determine as a matter of law which defects or damages claimed by Tomlinson are precluded as a result of its legal ruling as to the interpretation of Articles 9.7 and 9.8. At oral argument, counsel for DKC used "three categories" as a construct for dividing claims that would be barred from claims that would not be, and the Court finds these categories helpful. However, the Court cannot completely determine as a matter of law, based on the record presented to date, which line-items from Plaintiff's claims fall into which categories.

The categories are roughly described as follows:

**Category 1:** items that were raised with the contractor within one year of substantial completion. Tomlinson's claims with regard to these items are, as a matter of law, not barred by Section 9.7 or 9.8 of the agreement;

**Category 2:** other items related to the issues raised within one year. If issues are related to the matters that were raised within the first year, summary judgment on these items would appear to be inappropriate; and

**Category 3:** additional items not related to the Category 1 issues raised within the first year.

Summary judgment on these items would appear to be appropriate.

As noted, the Court cannot completely determine which items fall into which category at this time.

However, certain items were conceded by DKC at oral argument to have been raised within the first year and therefore to fall within Category 1 (including water intrusion at the exterior fireplace, great room sliding doors, and the northwest bedroom, adjacent hallway, and north side of the game room below). Likewise, certain items were conceded by Plaintiffs at oral argument to be completely unrelated to any Category 1 issues, and therefore to fall within Category 3 (including the kitchen crawl space and the radiant heating system). As to these two conceded issues only (the kitchen crawl space and the radiant heating system), summary judgment is granted in favor of DKC.

The Court orders the parties to submit supplemental briefs, supported by expert affidavits, addressing each defect/damage item (other than the ones already conceded) and indicate if each such item should be classified as category 1, 2 or 3. As noted, summary judgment will be appropriate on Category 3 items. If experts differ on whether items fall within Category 3, summary judgment would seem to be inappropriate on those items due to the presence of disputed factual issues.

DKC's supplemental memorandum will be due on January 23, 2015, and the remainder of the briefing should be filed and served pursuant to rule 7 of the Utah Rules of Civil Procedure. The Court will address the supplemental memoranda at a future summary judgment hearing.

The Court has reviewed both parties' proposed orders, and has created this one by combining portions of both. All objections raised by both parties to the form of this order are, to the extent not incorporated herein, OVERRULED.

-----END OF ORDER-----

ADDENDUM 3: Order, Nov. 25, 2013



The Order of Court is stated below:

Dated: November 25, 2013  
11:44:17 AM

/s/ Ryan Harris  
District Court Judge



**Prepared and Submitted by:**

Jesse C. Trentadue (#4961)  
Noah M. Hoagland (#11400)  
Britton R. Butterfield (#13158)  
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*Attorneys for Defendant and Third-Party Plaintiff  
Douglas Knight Construction, Inc.*

---

**THIRD JUDICIAL DISTRICT COURT  
SUMMIT COUNTY, STATE OF UTAH**

---

JOSEPH TOMLINSON, an individual,  
and

AMY TOMLINSON, an individual,

Plaintiffs,

vs.

DOUG KNIGHT CONSTRUCTION, a  
Utah corporation; CLIVE  
BRIDGEWATER an individual;  
BRIDGEWATER CONSULTING  
GROUP, INC., a Utah Corporation; and  
JOHN DOES 1-10;

Defendants.

**[Proposed] ORDER ON KNIGHT  
CONSTRUCTION, INC.'S THIRD  
MOTION TO DISMISS AND/OR  
MOTION FOR JUDGMENT ON  
THE PLEADINGS**

Civil No. 100500668

Judge Ryan Harris

---

DOUG KNIGHT CONSTRUCTION, a  
Utah Corporation;  
Third-Party Plaintiff,

v.  
AKITA CONSTRUCTION, INC., a Utah  
Corporation; HEARTH & HOME  
DISTRIBUTORS OF UTAH, LLC, a  
Utah Limited Liability Company, HIGH  
MOUNTAIN CONSTRUCTION, INC., a  
Utah Corporation; JACK JOHNSON  
COMPANY, a Utah Corporation;  
PCF, INC. d/b/a PELLA WINDOWS  
AND DOORS, a Utah Corporation;  
PICTURE PERFECT STONE  
MASONRY, LLC, a Utah Limited  
Liability Company; ROCKY  
MOUNTAIN WATER PROOFING,  
INC., a Utah Corporation; SCHULTZ  
PLUMBING & HEATING, INC., a Utah  
Corporation; SIGNATURE CONCRETE,  
INC., a Utah Corporation; SUPERIOR  
INSULATION CO., INC., a Utah  
Corporation; THORNTON PLUMBING  
& HEATING, INC., a Utah Corporation;  
and U.S. DECK, INC., a California  
Corporation;

Third-Party Defendants.

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On October 31, 2013, the Court held a hearing on Defendant Doug Knight Construction, Inc.'s ("Knight") *Third Motion to Dismiss and/or Motion for Judgment on the Pleadings*. Plaintiff was represented by Joseph E. Wrona of Wrona Gordon & Dubois, P.C., and Defendant

was represented by Noah M. Hoagland of Suitter Axland, PLLC. Various Third-Party Defendants also appeared at the hearing through their counsel of record.

Based on the *Motion* and related filings, the arguments of counsel at hearing, and for good cause, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

DKC's *Third Motion to Dismiss* seeks dismissal of Plaintiffs' sixth cause of action for breach of the implied warranties of habitability and workmanlike manner.<sup>1</sup> This claim arises out of the Utah Supreme Court's decision in *Davencourt at Pilgrims Landing Homeowners Assoc. v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, 221 P.3d 234, which enumerates the following five elements: "1) the purchase of a new residence from a defendant builder-vendor/developer-vender; 2) the residence contained a latent defect; 3) the defect manifested itself after purchase; 4) the defect was caused by improper design, material, or workmanship; and 5) the defect created a question of safety or made the house unfit for human habitation." *Id.* p. 60.

DKC argues that Plaintiffs' sixth cause of action should be dismissed because Plaintiffs cannot meet the first element of the implied warranty claim because DKC was neither a builder-vender, nor a developer-vender. The Court agrees. The undisputed facts alleged in Plaintiffs' *Third Amended Complaint* make clear that DKC is not a vendor. Indeed, Plaintiffs purchased their home from Defendant Outpost Development, Inc.

Based on the foregoing, DKC's *Third Motion to Dismiss and/or Motion for Judgment on the Pleadings* is hereby granted and Plaintiffs' cause of action for breach of the implied

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<sup>1</sup> DKC's *Motion* was joined by Third-Party Defendants Schultz Plumbing & Heating, Inc; Thornton Plumbing & Heating, Inc.; and Modern Damp Proofing Inc. dba Rocky Mountain Waterproofing.

warranties of habitability and workmanlike manner is hereby DISMISSED WITH PREJUDICE.

DATED this \_\_\_\_\_ day of November, 2013.

BY THE COURT:

\_\_\_\_\_  
Honorable Ryan Harris  
Third District Court Judge

**Approved as to Form:**

\_\_\_\_\_  
Joseph E. Wrona, Esq.  
Wrona Gordon & Dubois, P.C.  
*Attorneys for Plaintiff*

### CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2013, I caused a true and correct copy of the foregoing **Proposed ORDER ON KNIGHT CONSTRUCTION, INC.'S THIRD MOTION TO DISMISS AND/OR MOTION FOR JUDGMENT ON THE PLEADINGS** to be served via United States mail, postage prepaid, and e-mail, upon the following:

Joseph E. Wrona, Esq.  
Bastiaan K. Coebergh, Esq.  
Jarom B. Bangerter, Esq.  
WRONA GORDON & DUBOIS, P.C.  
1745 Sidewinder Drive  
Park City, Utah 84060  
*Attorneys for Plaintiff*

Kumen L. Taylor, Esq.  
Richard L. Wade, Esq.  
HUTCHISON & STEFFEN, LLC  
Peccole Professional Park  
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Las Vegas, NV 89145  
*Attorneys for Akita Construction, Inc.*

Barbara K. Berrett, Esq.  
Michael A. Stahler, Esq.  
BERRETT & ASSOCIATES, L.C.  
405 South Main Street, Suite 1050  
Salt Lake City, UT 84111  
*Attorneys for Rocky Mountain Water Proofing, Inc.*

Brett N. Anderson, Esq.  
BLACKBURN & STOLL, LC  
257 East 200 South, Suite 800  
Salt Lake City, Utah 84111  
*Attorneys for Superior Insulation Co., Inc.*

Scott T. Evans, Esq.  
Gabriel K. White, Esq.  
CHRISTENSEN & JENSEN  
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Salt Lake City, Utah 84101  
*Attorneys for Picture Perfect Stone Masonry, LLC*

Joseph E. Minnock, Esq.  
Anna Nelson, Esq.  
MORGAN, MINNOCK, RICE & JAMES, LC  
Kearns Building, Eighth Floor  
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Salt Lake City, Utah 84101  
*Attorneys for Schulz Plumbing & Heating, Inc.*

Robert L. Janicki, Esq.  
STRONG & HANNI  
9350 South 150 East, Suite 820  
Sandy, Utah 84070  
*Attorneys for Pella Windows & Doors*

Julianne P. Blanch, Esq.  
Scott C. Powers, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11<sup>th</sup> Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145  
*Co-Counsel for Thornton Plumbing & Heating, Inc.*

U.S. Deck, Inc.  
c/o Thomas Paul Zick, President  
561 Wild Willow Drive  
Kamas, Utah 84036

Kevin E. Helm, Esq.  
HELM & ASSOCIATES  
2810 West Charleston Blvd., Suite G-67  
Las Vegas, NV 89102  
*Attorneys for Thornton Plumbing & Heating, Inc.*

Signature Concrete, Inc.  
c/o James C. Conway, President  
5637 South 700 West  
Salt Lake City, Utah 84123

Jack Johnson Company  
c/o Jack J. Johnson, Registered Agent  
6400 Pace Frontage Road, Suite B  
Park City, Utah 84098-6205

/s/ Noah M. Hoagland

T:\7000\7647\5\KNIGHT PROPOSED ORDER RE DKC THIRD MTD Ver 2.wpd

## ADDENDUM 4: Assignment of Claims

### ASSIGNMENT OF CLAIMS

23rd THIS ASSIGNMENT OF CLAIMS ("Assignment") is made and entered into as of the day of January, 2012 (the "Assignment Date"), by and between David A. Rosenberg, as the duly appointed Chapter 7 Trustee for the bankruptcy estate of debtor Outpost Development, Inc., ("Assignor") and Joseph and Amy Tomlinson ("Assignees").

### RECITALS

- A. WHEREAS, on July 30, 2010, Assignees filed that certain legal action in the Third Judicial District Court, Summit County, State of Utah, as Case No. 100500668 (the "Litigation"), wherein Assignees have causes of action against Outpost Development Inc., a Nevada corporation ("Outpost"), Douglas Knight Construction, Inc., a Utah corporation ("DKC"), Bridgewater Consulting Group, Inc., a Utah corporation ("BCG"), and Clive Bridgewater, an individual ("Bridgewater");
- B. WHEREAS, Outpost has certain causes of action and claims against DKC, BCG, and Bridgewater (collectively the "Defendants") related to the Litigation and have asserted some or all of those claims in the Litigation;
- C. WHEREAS, on September 13, 2011, Outpost filed its voluntary petition for relief under Chapter 7 of the Bankruptcy Code, Case No. BK-S-11-24507-btb, whereby all of Outpost's claims and causes of action became property of the bankruptcy estate;
- D. WHEREAS, the Assignees desire to acquire from Assignor, and Assignor desires to assign, any and all of Outpost's causes of action and claims Outpost may have against the Defendants;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

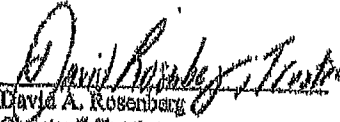
- 1. Assignment. Assignor hereby assigns, transfers, and conveys to Assignees all of Outpost's right title and interest in and to any and all rights, claims, causes of action, choses in action, rights to payment, and judgments of any kind that Outpost has asserted in the Litigation, or may otherwise assert, against the Defendants (the "Claims").
- 2. Purchase Price. Assignees hereby agree to pay the sum of Five Thousand and No/100 Dollars (\$5,000.00) to Assignor no later than February 3, 2012, and in doing so Assignees accept such Claims.



IN WITNESS THEREOF, the parties hereto have caused this Assignment to be executed  
and effective as of the Assignment Date.

ASSIGNOR:

BANKRUPTCY ESTATE OF OUTPOST  
DEVELOPMENT INC.

  
David A. Rosenberg  
Chapter 7 Trustee

ASSIGNEES:

  
JOSEPH TOMLINSON

  
AMY TOMLINSON

## ADDENDUM 5: Order, June 3, 2015

The Order of Court is stated below:

Dated: June 03, 2015  
05:15:03 PM

/s/ Ryan Harris  
District Court Judge



**DISTRICT COURT OF THE STATE OF UTAH  
THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY**

JOSEPH TOMLINSON, an individual,  
Plaintiff,

vs.

DOUG KNIGHT CONSTRUCTION, a  
Utah corporation; CLIVE BRIDGEWATER an  
individual; BRIDGEWATER CONSULTING  
GROUP, INC., a Utah Corporation; and JOHN  
DOES 1-10;

Defendants.

DOUG KNIGHT CONSTRUCTION, a Utah  
Corporation;

Third-Party Plaintiff,

v.

AKITA CONSTRUCTION, INC., a Utah  
Corporation, et al.

Third-Party Defendants.

**ORDER GRANTING DOUGLAS KNIGHT  
CONSTRUCTION, INC.'S MOTION FOR  
SUMMARY JUDGMENT ON  
PLAINTIFF'S FIRST and FIFTH CAUSES  
OF ACTION**

Civil No. 100500668  
Judge Ryan Harris

On May 15, 2015, the Court held a regularly scheduled hearing on Douglas Knight Construction, Inc.'s *Motion for Summary Judgment on Plaintiff's First and Fifth Causes of Action* and its *Supplemental Motion for Summary Judgment re: Waiver*. DKC's *Motion for Summary Judgment on Plaintiff's First and Fifth Causes of Action* is fully dispositive of this case as this Court previously dismissed Plaintiff's remaining causes of action against DKC. (See August 18, 2014

*Order Granting Stipulated Motion to Dismiss Plaintiff's Third Cause of Action*; November 25, 2013 *Order on Knight Construction, Inc. 's Third Motion to Dismiss* (dismissing *Sixth Cause of Action*); and December 2, 2013 *Order on Knight Construction, Inc. 's Second Motion to Dismiss* (dismissing *Seventh and Eighth Causes of Action*)). Plaintiff was represented by Joseph Wrona, Bastiaan Coebergh, and Kendra Bowers of Wrona Gordon & Dubois; and Douglas Knight Construction, Inc. ("DKC") was represented by Noah M. Hoagland of Suitter Axland, PLLC.

The Court heard oral arguments on DKC's *Motion for Summary Judgment on Plaintiff's First and Fifth Causes of Action* first. Based on the *Motion* and related filings, the record in this case, the arguments of counsel at hearing, and for good cause shown, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

This is a construction defect case in which Plaintiff Joe Tomlinson alleges problems at his home in Park City, Utah (the "Home"). DKC was the general contractor that built the Home pursuant to a Construction Agreement between Lot 84, LLC and DKC. (See Exhibit 6 to Plaintiff's *Opposition to [DKC's] Memorandum in Support of Motion for Summary Judgment on Plaintiff's First and Fifth Causes of Action* ("Plaintiff's *Opposition Memorandum*"). Plaintiff alleges that Lot 84, LLC assigned its rights and obligations under the Construction Agreement to developer Outpost Development, Inc. ("Outpost"). Outpost then sold the Home to Plaintiff. Plaintiff sued both Outpost and DKC, and Outpost brought a *Cross-Claim* against DKC, which essentially sought indemnity for any liability that Outpost owed to Plaintiff. (See Exhibit 8 to Plaintiff's *Opposition Memorandum*). Outpost then filed for Chapter 7 bankruptcy and listed its "contingent" claim against DKC as a form of personal property on its bankruptcy filings. (See Exhibit D to DKC's *Memorandum*). During that Bankruptcy proceeding, Plaintiff obtained a broad assignment of all of Outpost's rights to assert

both existing and potential causes of action against DKC that arise out of DKC's construction of the Home. (See Exhibit 3 to Plaintiff's *Opposition Memorandum*). Outpost was later discharged from bankruptcy on January 23, 2013. (See Exhibit H to DKC's supporting *Memorandum*). Plaintiff's operative *Third Amended Complaint* does not bring any causes of action against Outpost.

Plaintiff's *First Cause of Action*, alleges breach of the Construction Agreement by DKC because of the alleged construction defects at the Home. Plaintiff's *Fifth Cause of Action* alleges breach of the covenant of good faith and fair dealing as a result of the alleged construction defects. (See Plaintiff's *Third Amended Complaint*.) Plaintiff brings these claims as the assignee of Outpost's contract claims against DKC.

DKC argues that Plaintiff's *First* and *Fifth Causes of Action* fail because Outpost suffered no damages and therefore Plaintiff, as assignee of Outpost's claims, cannot meet the required elements of its contract claims. *Bair v. Axiom Design, L.L.C.*, 2001 UT 20. ¶ 14, 20 P.3d 388 ("The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages."); *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 218 (Utah 1984) (noting that "a cause of action for indemnity does not arise until the liability of the party seeking indemnity results in damage, either through payment of a sum clearly owed or through the injured party's obtaining an enforceable judgment.").

DKC reasons that Outpost filed for Chapter 7 bankruptcy prior to ever becoming liable to Plaintiff for the alleged construction defect claims, and Outpost has suffered no other form of damages. DKC cites *SME v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, 28 P.3d 669, which held that an "assignee cannot recover more than the assignor could recover; and the assignee never stands in a better position than the assignor." *Id.*, ¶ 16. *SME* further stated that an

assignee may not recover the damages *it* suffered as a result of a breach of the assigned contract. Rather the assignee's recovery, if any, is limited to those damages *the assignor suffered* as a result of the breach. *Id.*, ¶ 30; *see also Meadow Valley Contrs., Inc. v. State DOT*, 2011 UT 35, ¶ 81, 266 P.3d 671 (Durham, J., concurring) (“[A]n assignee not otherwise in privity of contract with an obligor is constrained to pursuing damages *its assignor suffered* for claims *its assignor could have asserted* against the obligor.”).

Although the Court agrees that Plaintiff obtained a broad assignment of claims from Outpost in the Nevada bankruptcy proceeding, an assignment that included all potential claims related to the Home that Outpost may have had against DKC, Plaintiff's claims in this case--for construction defects against DKC--are entirely dependent upon Outpost first being found liable to Plaintiff for damages before Outpost would have an actionable “pass through” claim against DKC. The undisputed facts and procedural history of this case establish that Outpost suffered no liability or damages because it filed for bankruptcy in 2011, and Plaintiff's claims against Outpost were discharged in bankruptcy. 11 USC § 727(b).

The Court determines that the only remaining claims Plaintiff has alleged against DKC in this case are breach of contract claims for construction defects, and these claims are “pass through” claims brought by Plaintiff as an assignee of Outpost's contract claims. As such, Plaintiff is in the shoes of Outpost, and because Outpost has not, and cannot, suffer damages, Plaintiff's claims fail as a matter of law and the Court hereby grants DKC's *Motion for Summary Judgment* and dismisses Plaintiff's *First and Fifth Causes of Action*.

**SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT RE: WAIVER**

Based on the Court's ruling on the *First and Fifth Causes of Action*, the Court declined to

hear oral argument on DKC's *Supplemental Motion for Summary Judgment re: Waiver* as that *Motion* is now moot.

#### **FINAL JUDGMENT FOR DKC**

Because this *Order* disposes of all claims against DKC in this matter, the Court hereby enters final judgment in favor of DKC and certifies this Order as the entry of final judgment under Utah Rule of Civil Procedure 54(b) as the Court determines that there is no just reason for delaying the entry of judgment. The entry of this final judgment certainly does not prevent Plaintiff from filing any motion to reconsider, but Plaintiff should be aware that post judgment motions to reconsider do not toll the time for filing any appeal. See Gillett v. Price, 2006 UT 24, P7, 135 P.3d 861.

DATED this 3rd day of June, 2015.

**Approved as to form:**

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Joseph E. Wrona, Esq.  
Bastiaan K. Coebergh, Esq.  
*Attorneys for Plaintiff*