

2015

**Joseph Tomlinson, Plaintiff/Appellant, vs. Douglas Knight  
Construction, Inc. Defendant/Appelle/Cross-Appellant**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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JOSEPH TOMLINSON,	:	
	:	
Plaintiff/Appellant	:	
	:	
vs.	:	<b>Appellate Case No. 20150529-CA</b>
	:	
DOUGLAS KNIGHT CONSTRUCTION,	:	<b>District Ct. No. 100500668</b>
INC.	:	
	:	
Defendant/Appellee/Cross-Appellant.	:	

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DOUGLAS KNIGHT CONSTRUCTION,	:
INC.	:
	:
Third-Party Plaintiff/Cross-Appellant.	:
	:
vs.	:
	:
SUPERIOR INSULATION, CO.;	:
PICTURE PERFECT STONE	:
MASONRY; and AKITA	:
CONSTRUCTION, INC.	:
	:
Third-Party Defendants/Cross-Appellees.	:

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**REPLY BRIEF OF CROSS-APPELLANT**

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**Appeal from the Third Judicial District Court, Summit County, from Orders  
Granting Dispositive Motions before the Honorable Ryan Harris**

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## INTRODUCTION<sup>1</sup>

This is a construction defect case involving Plaintiff/Appellant Joe Tomlinson's home in Park City, Utah (the "Home"). On or about March 17, 2006, Plaintiff purchased the Home from Outpost Development, Inc. ("Outpost"). Defendant Douglas Knight Construction ("DKC") was the general contractor that built the Home for Outpost, and DKC hired numerous subcontractors to complete the work. A Certificate of Occupancy was issued for the Home on May 17, 2006.

DKC's *Third-Party Complaint* alleged that, to the extent Plaintiff proves construction defects at the Home, the liability for those defects lies with DKC's subcontractors.<sup>2</sup> Cross-Appellees Superior Insulation Co.; Akita Construction, Inc.; and Picture Perfect Stone Masonry (collectively, the "Subcontractors") moved for summary judgment based on the Builders Statute of Repose. In *Orders* dated August 26, 2014, and January 2, 2015, the District Court granted the Subcontractors summary judgment.

## SUMMARY OF ARGUMENT

The District Court should be reversed because its interpretation of the Statute of Repose conflicts with Utah law. Under the International Building Code, which has been adopted as Utah's Building Code, the Home could not be occupied or used until Summit County issued a Certificate of Occupancy. As such, the Home was completed, and the Statute of Repose began running, no earlier than May 17, 2006, when Summit County

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<sup>1</sup> This Brief will respond to all three Cross-Appellees' briefs.

<sup>2</sup> R. 879-90.

issued the Certificate of Occupancy. Such an interpretation is consistent with the Construction Agreement, which defined substantial completion as occurring when the Owner was permitted to occupy the residence. DKC's April 30, 2012 *Third-Party Complaint* is therefore timely against the Subcontractors. Public policy also weighs in favor of reversal.

Alternatively, the District Court should be reversed because determining the date of the first use or possession of the Home is a fact-intensive issue that cannot be decided on summary judgment.

Finally, DKC's claims for indemnity and contribution survive summary judgment because those claims are subject to a separate statute of repose, which began running upon the date DKC discovered these claims. Because DKC filed its *Third-Party Complaint* within two years of Plaintiff commencing this action, DKC's indemnity and contribution claims are timely.

## **ARGUMENT**

### **I. DKC'S CLAIMS ARE TIMELY BECAUSE UTAH LAW PROHIBITS THE USE OR OCCUPANCY OF RESIDENTIAL BUILDINGS UNTIL A CERTIFICATE OF OCCUPANCY IS ISSUED.**

At issue is whether the repose period began on May 17, 2006, when Summit County issued the Certificate of Occupancy or whether the repose period began upon "the date of first use or possession" of the Home. DKC submits that the District Court erred when it determined that DKC's *Third-Party Complaint* was untimely because the Home

was used or possessed by March 17, 2006, when Plaintiff made an offer to purchase the Home. As will be discussed below, the only manner in which the Subcontractors' "improvements" to the Home can be considered "complete" is by the issuance of a Certificate of Occupancy from Summit County, Utah.

Utah courts' "primary objective" when interpreting statutes is "to give effect to the intent of the legislature." *Rapela v. Green*, 2012 UT 57, ¶ 19, 289 P.3d 428. Courts look "first to the statute's plain language and presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning." *Id.* Furthermore, courts must construe statutes "such that no part or provision will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." *Id.* Additionally, statutes of limitation and repose should be construed narrowly. *South Milwaukee Saving Bank v. Barczak*, 600 N.W. 2d 205, 211 (Wis. Ct. App. 1999) ("Reviewing courts must interpret statutes of limitations so that no person's cause of action will be barred unless clearly mandated by the legislature.").

**A. "Use" of the Home Must Comply with the Building Code.**

The term "Certificate of Occupancy" is not defined in the Statute of Repose, but it has an accepted meaning and legal significance because that term is defined in the 2003 International Building Code, which the Legislature and the appropriate administrative agencies have adopted and incorporated into Utah law. In fact, Utah Code section 58-56-1 *et seq.* required the Utah Division of Occupational Licensing and the Utah Uniform



Building Commission to adopt construction codes which “shall be followed when new construction is involved.” Utah Code Ann. § 58-56-4(3)(a) (2004) (emphasis added).

Thus, an interpretation of the Statute of Repose must reconcile the meaning of a Certificate of Occupancy with the Building Code.

The 2003 International Building Code (“IBC”)<sup>3</sup> states that “No building or structure shall be used or occupied . . . until the building official has issued a certificate of occupancy therefore as provided herein.” 2003 IBC § 110.1 (emphasis added).

Reconciling this definition of Certificate of Occupancy with the Statute of Repose means that the Home could not be used or possessed until Summit County issued a Certificate of Occupancy. Indeed, both of these statutes address the “use” and “completion” of an “improvement”. The Subcontractors have cited no authority in support of their position that Utah Code section 58-56-1 *et seq.* should be ignored in favor of the Builders Statute of Repose.

**B. The Subcontractors’ Interpretation of the Statute of Repose Violates the Building Code.**

The Subcontractors maintain that DKC’s reading of the Statute of Repose renders the phrase “use or possession” superfluous. The Subcontractors aver that Outpost used the Home, even though it could not be occupied, by marketing and staging the Home for prospective buyers.

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<sup>3</sup> A copy of the relevant provision of the IBC is attached hereto as Addendum 1.

On the contrary, DKC's interpretation demonstrates that different types of improvements are completed at different times, based on the type of construction and the facts of each case. Indeed, there is no dispute that a Certificate of Substantial Completion was not issued in this case, so that subsection of the Statute of Repose clearly does not apply. More importantly, the "use or possession" trigger of the Statute applies more appropriately to improvements that do not require issuance of a Certificate of Occupancy, such as a fence or sidewalk. Once the fence is erected or the sidewalk cured, an owner begins using that improvement. Conversely, a Certificate of Occupancy signifies that a residential property may be occupied and lived in, which is the purpose of building such an improvement.

Additionally, the term "use" in the Statute of Repose is vague and undefined. This Court should construe the Statute of Repose narrowly, and if the IBC states that a building cannot be "used" until the issuance of a Certificate of Occupancy, then the Statute of Repose cannot be interpreted to allow "use" to trigger completion unless a Certificate of Occupancy has been issued.

**C. The Intended Use of the Homes was Residential Occupancy.**

The clear intent of this Project was to build a residence that could be occupied. This is evidenced by the Construction Agreement, which defines "substantial completion" as the time when the owner can "**occupy or utilize the Project for the**

**purpose for which it is intended.”**<sup>4</sup> In other words, the express terms of the contract state that the Home is not complete until it could be occupied and utilized as a residence. Again, this could not happen until a Certificate of Occupancy was issued.

Applying the proper statutory interpretation to the facts of this case renders DKC’s third-party claims timely. Summit County signed the Certificate of Occupancy on May 17, 2006. Pursuant to the IBC, no one could use or occupy the Home until that time. Because DKC filed its *Third-Party Complaint* on April 20, 2012, DKC brought its third-party claims prior to the expiration of the six year Statute of Repose.

**D. “Possession” of the Home Did Not Trigger the Statute of Repose.**

Subcontractor Picture Perfect Stone Masonry argues that on or about March 17, 2006, DKC transferred possession of the Home to Outpost Development. First, Picture Perfect failed to preserve this argument so it should be disregarded. *Holladay v. Storey*, 2013 UT App 158, ¶ 9, 307 P.3d 584 (declining to address issue not raised in the trial court). Second, the Construction Agreement governs the period when Outpost could take possession of the Home:

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.<sup>5</sup>

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<sup>4</sup> Construction Agreement, ¶ 2.3, which is attached to DKC’s January 19, 2016 Brief as Addendum 2.

<sup>5</sup> *Id.*

The clear intent of this Project was to build a residence that could be occupied. Thus, a Certificate of Occupancy was needed prior to possession of the Home.

## **II. PUBLIC POLICY DOES NOT FAVOR THE SUBCONTRACTORS' INTERPRETATION OF THE STATUTE OF REPOSE.**

The Subcontractors argue that commencing the Statute of Repose on March 17, 2006, comports with the Utah Legislature's intention to protect contractors from the "social and economic evils" of remote and unexpected construction defect litigation. *See* Utah Code Ann. § 78B-2-225(2). Specifically, the Subcontractors aver that if the Statute were not triggered until a Certificate of Occupancy, contractors may face additional liability if there is a delay in the issuance of a Certificate of Occupancy.

However, the Statute of Repose expressly protects contractors from remote litigation where the general contractor or developer have been dilatory in completing construction by making "abandonment of construction" an event that triggers the repose period after there has been "no design or construction activity . . . for a continuous period of one year." Utah Code Ann. § 78B-2-225(2). There is no allegation that construction was abandoned on this Project. As such, the social evils cited by the Subcontractors are already addressed in the Statute of Repose and not at issue here.

On the other hand, public policy weighs in favor of applying the Certificate of Occupancy as the event that triggers the Statute of Repose. A Certificate of Occupancy provides homeowners and contractors alike with a line in the sand from which the repose period commences. Conversely, the "use and possession" subsection of the statute is

better suited for improvements that do not require a Certificate of Occupancy, such as a fence or swimming pool.

Additionally, commencing the Statute of Repose upon the date of the Certificate of Occupancy does not prejudice the Subcontractors. They have not, and cannot, show hardship, unexpected costs, or difficulty in defending this matter, so the Subcontractors have not suffered the social and economic evils contemplated in the Statute of Repose.

**III. SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THERE ARE GENUINE ISSUES OF FACT CONCERNING THE DATE WHEN THE OWNER BEGAN TO USE OR POSSESS THE PROPERTY.**

Alternatively, DKC respectfully submits that the District Court should be reversed because there are factual disputes about the date on which Outpost or Plaintiff began to use or possess the Home. This would necessarily include the factual inquiry into the date on which the Home was complete enough to be used for its intended purpose as a residence. At the summary judgment stage, “all facts and the reasonable inferences to be made therefrom should be construed in a light favorable to [DKC as] the non-moving party.” *USA Power, LLC v. PacifiCorp.*, 2010 UT 31, ¶ 33, 235 P.3d 749. Furthermore, “[e]ven absent a complete conflict as to certain facts, a dispute of the understanding, intention, and consequences of those facts may defeat summary judgment.” *Id.*, ¶ 32.

Applying these standards, it is entirely plausible that the Home was not used or possessed until the issuance of the Certificate of Occupancy, or even when Plaintiff

moved into the home in June of 2006.<sup>6</sup> Additionally, the Real Estate Purchase Contract between Outpost and Plaintiff was not executed until April 7, 2006.<sup>7</sup> Consequently, the jury should be permitted to hear the evidence about the status of construction and whether Outpost was reasonably able to use or possess the Home prior to the issuance of the Certificate of Occupancy. Because this is a highly fact-intensive issue, summary judgment was inappropriate and the District Court's ruling should be reversed.

#### **IV. DKC'S INDEMNITY AND CONTRIBUTION CLAIMS WERE TIMELY ASSERTED.**

DKC's *Third-Party Complaint* brings a Fourth Cause of Action for contribution and indemnity against the Subcontractors.<sup>8</sup> DKC should be permitted to pursue its indemnity and contribution claims against the Subcontractors because the Builders Statute of Repose applies a different repose period for these claims.

An "action" is defined in the Builders Statute of Repose as including all causes of action, whether based in tort, contract, warranty, strict liability, **indemnity, contribution,** or other source of law. *See* Utah Code Ann. § 78B-2-225(1)(b) (emphasis added). The repose period prescribed in Utah Code section 78B-2-225(3)(a) is expressly limited to actions based in contract or warranty, whereas section 78B-2-225(3)(b) applies to "all other actions." Thus, the structure of the statute intentionally distinguishes causes of action based in contract and warranty from claims based in indemnity. Any interpretation

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<sup>6</sup> R. 3216-3217, Joe Tomlinson Depo. p. 41: 17-20.

<sup>7</sup> R. 3205-3214, Real Estate Purchase Contract, ¶ 24(f).

<sup>8</sup> R. 879-90.

treating indemnity claims as being subsumed within the category of warranty or contract nullifies the statutory provisions treating those claims separately. By limiting the causes of action falling within the purview of Utah Code section 78B-2-225(3)(a) to contract and warranty claims, the Legislature clearly intended that indemnity claims (among others) be subject to section 78B-2-225(3)(b). Consequently, instead of the six year repose period commencing upon completion of the Home being applicable, DKC's indemnity and contribution claims are subject to the two year period commencing upon "the date of discovery of a cause of action or the date upon which a cause of action should have been discovered." Utah Code Ann. § 78B-2-225(3)(b).

The Subcontractors respond that DKC failed to preserve this argument, and that DKC's indemnity claim is based in contract and is therefore barred by the six year Statute of Repose. First, DKC has asked this Court to review the issue under plain error, so preservation is not at issue. In order to apply plain error review, DKC must establish that "(1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome." *Meadow Valley Contractors., Inc. v. UDOT*, 2011 UT 35, ¶ 80, 266 P.3d 671 (Durham, J., concurring). Here, an obvious error exists because dismissal of DKC's indemnity claims contravenes the plain language of the Statute of Repose. *See State v. Alzaga*, 2015 UT App 133, ¶ 23, 352 P.3d 107 ("[A]n obvious error is one that contravenes . . . the plain language of the relevant statute."). This error was harmful

because absent the error, DKC would still have claims and remedies against the Subcontractors.

Next, it is true that indemnity claims are typically based in contract, but the Legislature nevertheless included that term in the definition of “action”, which indicates that indemnity claims should be treated differently than typical contract claims. This makes sense, because a cause of action for indemnity “does not arise when the underlying damage occurs; rather, it runs from the time of the payment of the underlying claim or the payment of a judgment or a settlement.” *Davidson Lumber Sales, Inc. v. Bonneville Inv. Inc.*, 794 P.2d 11, 19 (Utah 1990). This is because:

**An action on an implied contract of indemnity is wholly independent as a cause of action from the transaction or situation which gave rise to the right of indemnity.**

Although the right to indemnity may arise out of a tort, the action to enforce the right usually is not governed by the statute relating to the tort. Similarly, a right of indemnity which arises out of an express contract to pay money or perform some other act **generally is not governed by the statute of limitations applicable to an action upon an express contract, where such statute is distinct from the statute governing actions upon implied contracts.**

*Id.* (citations omitted) (emphasis added). In short, an indemnity claim does not accrue when the breach of contract occurs, it accrues when the party that breached the contract fails to indemnify the non-breaching party. Thus, the typical statute of limitations governing contracts does not apply.



DKC brought its claims for indemnity and contribution within two years of being served with Plaintiff's suit seeking monetary damages from DKC. Plaintiff filed his *Complaint* on July 30, 2010,<sup>9</sup> and DKC filed its *Third-Party Complaint* on April 20, 2012. As such, DKC's claims against the Subcontractors were timely asserted and the District Court's ruling should be reversed in this regard.<sup>10</sup>

### **ORAL ARGUMENT IS NOT REQUESTED**

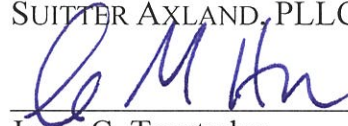
DKC does not request oral argument on this appeal.

### **CONCLUSION**

Based on the foregoing, DKC respectfully requests that this Court REVERSE the District Court's grant of summary judgment to Third-Party Defendants and Cross-Appellees Superior Insulation, Akita Construction, and Picture Perfect Stone Masonry.

DATED this 14th day of April, 2016.

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<sup>9</sup> R. 1.

<sup>10</sup> Subcontractor Akita Construction argues that DKC's indemnity claims are untimely because DKC became aware of leaks at the Home in 2006. However, DKC attempted to repair those leaks, and was not sued for construction defects until July of 2010. (R. 4185-90, Doug Knight Depo., p. 122:16-126:21).

## **CERTIFICATE OF COMPLIANCE**

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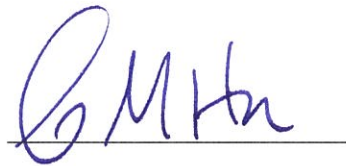
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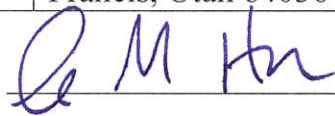
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I certify that on the 14<sup>th</sup> day of April, 2016, a true and correct copy of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT** was e-mailed and sent U.S. Mail, postage prepaid, to the following parties:

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# **ADDENDUM**

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## **SECTION 110 CERTIFICATE OF OCCUPANCY**

### **110.1 Use and occupancy.**

No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefor as provided herein. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction.

### **110.2 Certificate issued.**

After the building official inspects the building or structure and finds no violations of the provisions of this code or other laws that are enforced by the department of building safety, the building official

shall issue a certificate of occupancy that contains the following:

1. The building permit number.
2. The address of the structure.
3. The name and address of the owner.
4. A description of that portion of the structure for which the certificate is issued.
5. A statement that the described portion of the structure has been inspected for compliance with the requirements of this code for the occupancy and division of occupancy and the use for which the proposed occupancy is classified.
6. The name of the building official.
7. The edition of the code under which the permit was issued.
8. The use and occupancy, in accordance with the provisions of Chapter 3.
9. The type of construction as defined in Chapter 6.
10. The design occupant load.
11. If an automatic sprinkler system is provided, whether the sprinkler system is required.
12. Any special stipulations and conditions of the building permit.

### **110.3 Temporary occupancy.**

The building official is authorized to issue a temporary certificate of occupancy before the completion of the entire work covered by the permit, provided that such portion or portions shall be occupied safely. The building official shall set a time period during which the temporary certificate of occupancy is valid.

### **110.4 Revocation.**

The building official is authorized to, in writing, suspend or revoke a certificate of occupancy or completion issued under the provisions of this code wherever the certificate is issued in error, or on the basis of incorrect information supplied, or where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.

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