

2015

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH TOMLINSON,

Plaintiff/Appellant,

vs.

DOUGLAS KNIGHT CONSTRUCTION,
INC.,

Defendant/Appellee/Cross-Appellant.

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.

Case No. 20150529-CA

APPEAL FROM THE THIRD DISTRICT COURT,
SUMMIT COUNTY, STATE OF UTAH
THE HON. RYAN HARRIS, CIVIL NO. 100500668

**BRIEF OF CROSS-APPELLEE
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LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding are listed in the caption on appeal.

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JURISDICTION

This Court has jurisdiction pursuant to [Utah Code § 78A-4-103\(2\)](#).

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the district court correctly grant summary judgment in favor of Picture Perfect Stone Masonry, LLC pursuant to the statute of repose set forth in [Utah Code § 78B-2-225\(3\)\(a\)](#) applicable to real property improvements, where the statute of repose bars contract and warranty claims that are not “commenced within six years of” “the date of first use or possession of the improvement,” and where it is undisputed that the subject property was used or possessed more than six years before Douglas Knight Construction, Inc. filed its claims against Picture Perfect?

Preservation: Picture Perfect preserved this argument in its memorandum in support of its motion for summary judgment ([R. 4045-4086](#)) and in the hearing held regarding its motion ([R. 5244](#)).

Standard of Review: A district court’s grant of summary judgment is reviewed for correctness and without deference to the district court’s decision. [Olsen v. Fair Co.](#), 2016 UT App 46, ¶ 6, --- P.3d. ---.

ISSUE 2: Did Douglas Knight fail to preserve the argument that its “indemnity and contribution” claim against Picture Perfect is not “based in contract

or warranty” and therefore not subject to the six-year statute of repose set forth in [Utah Code § 78B-2-225\(3\)\(a\)](#)?

Preservation: This issue was not addressed below because Douglas Knight raised it for the first time on appeal.

Standard of Review: “To properly preserve an issue for appellate review, the issue must be raised in the district court. Additionally, the issue must be specifically raised, in a timely manner, and must be supported by evidence and relevant legal authority.” [Donjuan v. McDermott](#), 2011 UT 72, ¶ 20, 266 P.3d 839.

DETERMINATIVE STATUTES AND RULES

78B-2-225. Actions related to improvements in real property.

(1) As used in this section:

- (a) “Abandonment” means that there has been no design or construction activity on the improvement for a continuous period of one year.
- (b) “Action” means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty arising out of or related to the design, construction, or installation of an improvement, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law.
- (c) “Completion of improvement” means the date of substantial completion of an improvement to real property as established by the earliest of:
 - (i) a Certificate of Substantial Completion;
 - (ii) a Certificate of Occupancy issued by a governing agency; or
 - (iii) the date of first use or possession of the improvement.
- (d) “Improvement” means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property.
- (e) “Person” means an individual, corporation, limited liability company,

partnership, joint venture, association, proprietorship, or any other legal or governmental entity.

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

(2) The Legislature finds that:

- (a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;
- (b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;
- (c) these costs and hardships constitute clear social and economic evils;
- (d) the possibility of injury and damage becomes highly remote and unexpected seven years following completion or abandonment; and
- (e) except as provided in Subsection (7), it is in the best interests of the citizens of the state to impose the periods of limitation and repose provided in this chapter upon all causes of action by or against a provider arising out of or related to the design, construction, or installation of an improvement.

(3) (a) An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

- (b) All other actions by or against a provider shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than nine years after completion of the improvement or

abandonment of construction. In the event the cause of action is discovered or discoverable in the eighth or ninth year of the nine-year period, the injured person shall have two additional years from that date to commence an action.

- (5) Subsection (4) does not apply to an action against a provider:
 - (a) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty; or
 - (b) for a willful or intentional act, error, omission, or breach of duty.
- (6) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (3) and (4) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.
- (7) This section shall not apply to an action for the death of or bodily injury to an individual while engaged in the design, installation, or construction of an improvement.
- (8) The time limitation imposed by this section does not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury for which the action is brought.
- (9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.
- (10) This section does not create or modify any claim or cause of action.
- (11) This section applies to all causes of action that accrue after May 3, 2003, notwithstanding that the improvement was completed or abandoned before May 3, 2004.

STATEMENT OF THE CASE

*Nature of the case, course of proceedings,
and disposition in the court below*

This is a construction defect case relating to a single-family residential premises located in Park City, Utah (“Premises”). ([R. 1-31](#)). Pursuant to a construction contract dated July 21, 2004, Appellant Douglas Knight Construction,

Inc. (“Douglas Knight”) acted as the general contractor of the Premises. ([R. 817](#); [894-903](#)). Construction commenced shortly after Summit County issued a building permit for construction of the Premises on August 5, 2004.

In connection with its construction efforts, Douglas Knight hired Picture Perfect Stone Masonry, LLC (“Picture Perfect”) to act as a masonry subcontractor on the project. ([R. 4059-4060](#)). After Picture Perfect and the other subcontractors finished their work, the home passed final inspection and the Summit County Building Inspector issued a final inspection report on February 24, 2006. ([R. 4056](#)).

Outpost Development, Inc. acted as the developer for the construction project. ([R. 817](#) ¶¶ 8-9; [3205-3214](#)). After construction was complete and the final inspection certificate was issued, between February 24, 2006 and March 17, 2006, Outpost “staged” the Premises for sale. ([R. 4056](#); [3011-3013](#); [4062-4064](#)). In so doing, Outpost placed furniture and other household items throughout the house to make it look pleasant to prospective buyers who visited the Premises. *Id.*

The Tomlinsons (not a party to the dispute between Douglas Knight and Picture Perfect) toured the Premises shortly before extending their March 17, 2006 offer. ([R. 3239-41](#); [3369](#); [4062-63](#)). The Tomlinsons had no interaction with Douglas Knight, as it was a “spec house.” *Id.* When they toured the Premises, the local authority had already issued the certificate of final inspection on the

Premises. ([R. 3368](#); [4056](#)). Mrs. Tomlinson testified that when she first saw the home, it was decorated beautifully and the state of construction was “totally finished.” ([R. 3011-3013](#); [4062-4064](#)).

Shortly after they first visited the Premises, on March 17, 2006 the Tomlinsons offered to purchase the Premises. ([R. 3205-3214](#); [4066-4075](#)). Outpost accepted the Tomlinsons’ offer and the sale was finalized.

The Tomlinsons subsequently filed their lawsuit against Douglas Knight on July 30, 2010, alleging that Douglas Knight was liable for claimed defects in workmanship and construction of the Premises. ([R. 1-31](#)). After a period of discovery, on April 30, 2012 Douglas Knight filed a third-party complaint against Picture Perfect and other subcontractors alleging contract, warranty, and “indemnity and contribution” claims. [R. 879-890](#).

After discovery was completed, Picture Perfect filed a motion for summary judgment. ([R. 4042-4044](#); [4045-4089](#)). Picture Perfect’s motion argued that it was undisputed that the Premises had been “used” or “possessed” when Outpost, the Tomlinsons’ predecessor interest, staged the home for sale by decorating it with furniture and other household items. ([R. 4048-4049](#)). Based upon such, Picture Perfect argued that Douglas Knight’s claims against it were barred under the six-year statute of repose in [Section 78B-2-225](#). (*Id.*).

The district court agreed, concluding that because the Premises was used or possessed no later than March 17, 2006, construction was substantially completed when the Tomlinsons extended their sale offer on that date. ([R. 5255-5258](#); [4037-4041](#)). (The district court also noted that it had reached the same conclusion in a prior similar motion filed by another third-party defendant, Superior Insulation Co., Inc. *See id.*; *see also*, [Add. Exh. A](#)). Because Douglas Knight's claims against Picture Perfect were filed more than 6 years after March 17, 2006, the district court found that Douglas Knight's claims were barred by the statute of repose in [Section 78B-2-225](#).¹ *Id.*

Douglas Knight timely appealed the district court's summary judgment ruling. ([R. 6226-6241](#)).

SUMMARY OF ARGUMENT

Where construction defect claims are based on contract or warranty, Utah law requires that the claims "be commenced within six years of the date of completion of the improvement or abandonment of construction." [Utah Code §](#)

¹ Although the district court also denied Picture Perfect's motion for summary judgment in part, that denial is not at issue in the case. The district court permitted Douglas Knight's claims against Picture Perfect to go forward as to a single visit Picture Perfect made to the Premises after March 17, 2006, on May 22, 2006. ([R. 5258](#)). Douglas Knight later stipulated to dismissal without prejudice of its remaining claims against Picture Perfect to the extent those claims were predicated upon Picture Perfect's one visit to the Premises that occurred after March 17, 2006. ([R. 6319-6323](#)).

[78B-2-225](#)(3)(a). “Completion of the improvement” means “the date of substantial completion of an improvement to real property as established by the earliest of: (i) a Certificate of Substantial Completion; (ii) a Certificate of Occupancy issued by a governing agency; or (iii) the date of first use or possession of the improvement.” *Id.* at [78B-2-225](#)(1)(c).

Douglas Knight’s breach of contract, breach of warranty, and “indemnity and contribution” claims against Picture Perfect were untimely because Douglas Knight filed its claims more than six years after construction of the Premises was complete. The undisputed evidence shows that before March 17, 2006, Outpost had taken control of the Premises from the general contractor Douglas Knight; the Premises had passed final inspection by the local authority; Outpost had nicely decorated and staged the house with furniture and household items; Outpost had listed the Premises for sale; and, Outpost was actively marketing the Premises to potential buyers such as the Tomlinsons.

Based upon those undisputed facts, for purposes of applying [Section 78B-2-225](#)(3)(a), construction was complete no later than March 17, 2006 because the Tomlinsons’ predecessor Outpost “first use[d] or possess[ed]” the Premises before that date. *See id.* at [78B-2-225](#)(1)(c). Douglas Knight did not file its claims until April 30, 2012, which was more than 6 years after March 17, 2006, “the date of

first use or possession of the improvement.” Section 78B-2-225(1)(c). Therefore, Douglas Knight’s claims are time barred under Section 78B-2-225(3)(a).

Finally, Douglas Knight did not preserve its argument that its “indemnity and contribution” claim should be treated separately from its contract and warranty claims and that it is not subject to the six-year statute of repose. Based upon the lack of preservation, the Court should refuse to entertain that argument.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE STATUTE OF REPOSE IN SECTION 78B-2-225(3)(a) BARRED DOUGLAS KNIGHT’S CLAIMS AGAINST PICTURE PERFECT.

The district court granted summary judgment to Picture Perfect, concluding that the six-year statute of repose in [Section 78B-2-225\(3\)\(a\)](#) rendered Douglas Knight’s claims untimely. This Court should affirm the district court’s conclusion. Douglas Knight admits that Outpost had possession of the home and extensively decorated and staged the home for sale between February 24, 2006 and March 17, 2006. This fact disposes of Douglas Knight’s claims against Picture Perfect.

- a. Douglas Knight’s claims are untimely under Section 78B-2-225(3)(a) because Outpost first used or possessed the Premises more than 6 years before Douglas Knight filed suit against Picture Perfect.**

[Section 78B-2-225\(3\)\(a\)](#) provides, “An action by or against a provider based in contract or warranty shall be commenced within six years of the date of

completion of the improvement or abandonment of construction.”² The statute in turn defines “completion of the improvement” as “the date of substantial completion of an improvement to real property as established by the earliest of: (i) a Certificate of Substantial Completion; (ii) a Certificate of Occupancy issued by a governing agency; or (iii) the date of first use or possession of the improvement.” [Section 78B-2-225\(1\)\(c\)](#).

This Court has interpreted Section 78B-2-225(3)(a) to set forth a statute of repose, not a statute of limitation. [Willis v. DeWitt](#), 2015 UT App 123, ¶¶ 8-11, 350 P.3d 250. As a statute of repose, Section 78B-2-225(3)(a) is not subject to tolling based upon any of the “usual reasons for tolling” that might apply to a statute of limitation. *Id.* at ¶ 8.

At issue here is the meaning of the third basis for a finding of “completion” of a real property improvement, i.e., “first use or possession of the improvement.”³ [Section 78B-2-225\(3\)\(a\)\(iii\); \(1\)\(c\)](#). The undisputed evidence shows “the date of first use or possession of the improvement” was no later than March 17, 2006, because before that date, general contractor Douglas Knight had transferred possession of the Premises to the owner-developer Outpost, Outpost

² Because it is undisputed that Picture Perfect is a “provider” under Section 78B-2-225(3)(a) and that the Premises is an “improvement,” the meanings of those terms are not discussed herein.

³ The other two elements of subsection (1)(c) are not at issue.

had staged, decorated and furnished the home for sale, Outpost was actively marketing the home and showing the home to prospective buyers, and Outpost had received an offer to purchase the home. Accordingly, by that date, the Premises was “complete” for purposes of triggering the countdown of the statute of repose. *See* [78B-2-225](#)(1)(C)(iii);(3)(a).

The analysis is straightforward. Douglas Knight filed its third-party complaint against Picture Perfect on April 30, 2012, which is more than six years after March 17, 2006, when it is undisputed that Outpost was using or possessing the Premises. The district court’s ruling was correct and should be affirmed.

b. Because the relevant facts are undisputed, the district court appropriately entered summary judgment.

Douglas Knight argues that the district court’s summary judgment ruling should be reversed because, says Douglas Knight, the facts pertinent to the question of when the Premises “was complete enough to be used for its intended purpose as a residence” are disputed.” Brief of Douglas Knight at p. 32.

Initially, the question of “intended” use is not relevant because that is not a factor identified in the statute in question. *See generally* [Section 78B-2-225](#).

More importantly, Douglas Knight’s argument boils down to a disagreement with the district court’s conclusion regarding the legal import of the undisputed facts that Outpost staged and decorated the house and marketed it for sale; that Outpost actually did those things with the Premises is nonetheless undisputed.

In its opposition to summary judgment, Douglas Knight admitted that Outpost had decorated and staged the home between February 24, 2006 and March 17, 2006. ([R. 4276-4436](#)). Likewise, Douglas Knight admitted that the Tomlinsons offered to purchase the Premises on March 17, 2006. (*Id.*)

Accordingly, Douglas Knight is mistaken in arguing that material facts remain in dispute. All of the facts entitling Picture Perfect to judgment as a matter of law are undisputed and the district court's ruling should not be disturbed.

c. Whether a hypothetical owner would violate the applicable building code by using or occupying a real property improvement without a certificate of occupancy is a red herring issue.

On appeal, Douglas Knight argues that this Court should find as a matter of law that the “date of first use or possession” of a single-family dwelling can never precede the date upon which the local agency issues a certificate of occupancy. *See* Brief of Douglas Knight at pp. 27-32. According to Douglas Knight, because the statewide building code (adopted by administrative regulation pursuant to statutory authority) prohibits “use” or “occupancy” of an improvement at any time before a certificate of occupancy is issued, as a matter of law an improvement cannot be first “used” or “possessed” for purposes of applying the statute of repose in [Section 78B-2-225](#)(3)(a) until a certificate of occupancy is issued. *Id.* at p. 28.

Douglas Knight's argument is untenable and should be rejected. The main problem with Douglas Knight's argument is that the express language of

Section [78B-2-225](#) contemplates that use or possession may occur before the issuance of a certificate of occupancy. The statute says that substantial completion occurs at “the *earliest* of” three potential occurrences: a certificate of substantial completion, a certificate of occupancy, *or* actual use or possession. Section 78B-2-225(1)(c) (emphasis added). By including the language “earliest of,” the Legislature expressly recognized that a property can be used or possessed before the issuance of a certificate of occupancy.

Further, whether or not a hypothetical owner who occupies a hypothetical property without a certificate of occupancy is in violation of the building code is immaterial in this case, rendering this issue a red herring. Here, there is no contention or evidence that the building code required Outpost to obtain a certificate of occupancy as a prerequisite to taking possession of the Premises and putting it to use by staging it for sale, especially where the Premises had already passed final inspection.⁴ Outpost was using or possessing the Premises and construction was complete, but no certificate of occupancy was required inasmuch as no one was actually living in the home, no one stored their own personal belongings there, no one slept there overnight, etc. Thus, Douglas Knight’s

⁴ The fact that the Premises had passed final inspection is significant, as not all real property improvements result in a certificate of occupancy. Typically, certificates of occupancy must be requested from the governing city or county and, if not requested, they are not always issued automatically. Often, final inspection is the operative date for the building department in terms of completion.

argument that a hypothetical owner would violate the building code by using or possessing a premises without a certificate of occupancy is simply misplaced.

Further, Utah contractors (“providers” as used in [78B-2-225](#)) would suffer significant prejudice if the Court were to adopt the statutory interpretation urged by Douglas Knight. Not all construction projects or improvements are finished, and some projects are delayed for extended periods. If the statute of repose were not triggered until the issuance of a certificate of occupancy, contractors that perform work on projects that are never completed or which are delayed for a lengthy period of time could be exposed to never-ending liability. This would be directly contrary to the stated purpose of Section 78B-2-225(3)(a): lessening the “costs and hardships” suffered by contractors as a result of lawsuits filed in relation to long-passed construction projects that are exceedingly remote in time.⁵

⁵ Section 78B-2-225(2) provides:

The Legislature finds that:

- (a) exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;
- (b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;
- (c) these costs and hardships constitute clear social and economic evils;
- (d) the possibility of injury and damage becomes highly remote and

The same practical problems relating to the commencement of the statute of repose would arise from owners of improvements who fail or refuse to abide by building code requirements and continue using and possessing their property anyway. If Douglas Knight’s interpretation were correct, those owners could effectively toll commencement of the statute of repose by wrongfully using and occupying their property without obtaining a certificate of occupancy.

But the statute of repose in [Section 78B-2-225\(3\)\(a\)](#) does not require “lawful” use or possession as a prerequisite to commencement of the six-year period; rather, any use or possession will suffice. For various reasons, people do things that are unlawful, but an owner’s unlawful possession should not be held to cause detriment to a contractor on the project by effectively tolling the application of the statute of repose during the period of the owner’s unlawful possession.

Douglas Knight cites a North Carolina Court of Appeals case, [Nolan v. Paramount Homes, Inc.](#), 135 N.C.App. 73, 76, 518 S.E.2d 789, 791 (1999), for the proposition that the issuance of a certificate of occupancy is the triggering date for the countdown of the statute of repose. That case is distinguishable from the

unexpected seven years following completion or abandonment; and
(e) except as provided in Subsection (7), it is in the best interests of the citizens of the state to impose the periods of limitation and repose provided in this chapter upon all causes of action by or against a provider arising out of or related to the design, construction, or installation of an improvement.

present case because it involved application and construction of a North Carolina statute with different language than Utah's statute.

In [*Nolan*](#), the North Carolina statute of repose was triggered by “the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.” *Nolan* at 791 (quoting [N.C.G.S. § 1-50\(a\)\(5\)\(a\)](#)). “Substantial completion of the improvement” was defined as “that degree of completion of a project, improvement or specified area or portion thereof upon attainment of which the owner can use the same for the purpose for which it was intended.” *Id.* (quoting N.C.G.S. § 1-50(a)(5)(c)).

The claimant argued that even though a certificate of occupancy was issued in June of 1991, the property was not substantially completed until approximately seven months later in “March-April 1992” when the defendant completed certain outstanding work on a punch-list. The court disagreed and found that the certificate of occupancy date was controlling. *Id.* at 791.

Notably, however, in [*Nolan*](#) there was no evidence or argument presented that the plaintiff or its predecessor owner had actually used or possessed the property before the certificate of occupancy was issued. More importantly, North Carolina law as applied in *Nolan* contains elements and requirements not set forth in Utah law, including most significantly a very different definition of “substantial completion” that requires evidence of intended use and the ability of the property

to be put to such intended use. Utah law incorporates no similar requirements regarding a finding of intended use of the property, thus distinguishing [Nolan](#) from this case entirely.

Here, it is undisputed that construction of the Premises was complete no later than March 17, 2006, because Outpost had used or possessed the Premises before that date. The district court's summary judgment ruling should therefore be affirmed.

d. Douglas Knight did not preserve its argument that its “indemnity and contribution” claim is not subject to the six-year statute of repose in Section 78B-2-225(3)(a).

In its “indemnity and contribution” claim against Picture Perfect, Douglas Knight alleged that if it was “found liable to the Tomlinsons for any of the Home Defect claims asserted by them in the Third Amended Complaint, ...then [Douglas] Knight [] is entitled to contribution and/or indemnification from Third-Party Defendants in amounts proportionate to their respective fault and/or responsibility.” [R. 891, ¶ 41](#). Douglas Knight expressly alleged that its “indemnity and contribution claim” was predicated upon Picture Perfect's and the other subcontractors' alleged “breaches of contract and/or breaches of warranty.” [R. 890, ¶ 39](#).

Douglas Knight argues for the first time on appeal that its cause of action styled “indemnity and contribution” is not subject to the six-year statute of repose

in [Section 78B-2-225](#)(3)(a). Tellingly, Douglas Knight admits that it did not make this argument below but it says the Court should nonetheless entertain it pursuant to the plain error doctrine. Douglas Knight is mistaken.

The plain error doctrine does not apply here because Douglas Knight cannot demonstrate that any alleged “error” was “obvious” to the district court. See [Pratt v. Nelson](#), 2007 UT 41, ¶ 16, 164 P.3d 366 (To establish plain error, appellant must show that “the error should have been obvious to the trial court.”). There was no “error” to speak of because the district court’s ruling was correct.

Douglas Knight’s “indemnity and contribution” claim must be construed to arise from contract (and thus be subject to the six-year statute of repose), because a) Douglas Knight pleaded its claim under a contract and warranty theory, and b) Utah law has abolished the common law causes of action of indemnity and contribution. See [Nat. Serv. Indus. v. BW Norton Mfg. Co.](#), 937 P.2d 551, 554 (Utah Ct. App. 1997) (recognizing that Utah Liability Reform Act precluded common law actions for indemnity and contribution among joint tortfeasors); [Sanns v. Butterfield Ford](#), 2004 UT App 203, ¶ 20, 94 P.3d 301 (same).

In other words, Utah law does not recognize the common law causes of action of implied indemnity or contribution as a mechanism for shifting responsibility for alleged tortious conduct. See *id.* Therefore, a claimant seeking

to avoid liability by shifting blame to someone else must rely upon the comparative fault statute or some independent statutory or contractual grounds for relief.⁶ *See id.* Because the law precluded Douglas Knight from suing Picture Perfect for common law indemnity and contribution, that claim *ipso facto* must be construed to arise from contract. Thus, the district court properly treated the “indemnity and contribution” claim as a contract-based claim subject to the six-year statute of repose. There was no “error,” and nothing would have been “obvious” to the district court.

Simply put, the plain error doctrine does not apply in this case. Douglas Knight admits that it failed to preserve its argument on this point and based upon that admission, the Court should refuse to entertain the argument.

CONCLUSION

For the reasons set forth above, Appellee Picture Perfect respectfully requests that the Court affirm the district court’s judgment.

⁶ Indeed, Douglas Knight utilized this procedure by filing third-party contract and warranty claims against Picture Perfect ([R. 879-920](#)) and concurrently asserting in its answer to the Tomlinsons’ third-party complaint that its own alleged fault should be reduced by the fault attributable to Picture Perfect, the Tomlinsons, and others. *See* [R. 959](#) (Douglas Knight’s answer to Tomlinsons’ third-party complaint; twelfth affirmative defense).

DATED this 21st day of March, 2016.

CHRISTENSEN & JENSEN, P.C.



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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of March, 2016, two true and correct copies of the foregoing **BRIEF OF APPELLEE PICTURE PERFECT STONE MASONRY, LLC** were mailed, first-class postage prepaid, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Cross-Appellee hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 4,679 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



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