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

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLEE AND CROSS-APPELLANT

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

Joseph E. Wrona, Esq.
Bastiaan K. Coebergh, Esq.
Jarom B. Bangerter, Esq.
WRONA, GORDON & DUBOIS, P.C.
1745 Sidewinder Drive
Park City, Utah 84060
Telephone: (435) 649-2525
Attorneys for Plaintiff/Appellant Joseph Tomlinson

Jesse C. Trentadue, Esq. (#4961)
Noah M. Hoagland, Esq. (#11400)
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 532-7300
Attorneys for Defendant, Third-Party Plaintiff, and Appellee/Cross-Appellant Douglas Knight Construction, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Rules:

Statutes:

Other Authorities:

JURISDICTION

This Court has jurisdiction pursuant to Utah Code section 78A-4-103.

ISSUES PRESENTED AND STANDARDS OF REVIEW

I. Issues Raised in Plaintiff's Appeal

Douglas Knight Construction, Inc. ("DKC) agrees that Plaintiff has accurately framed Issues 1 through 3 and correctly stated the standards of review for these issues. However, Issue Number 4 should be framed as follows:

Whether the District Court erred when it ruled on summary judgment that Plaintiff had no viable contract claims against DKC because the claims Plaintiff obtained on assignment from Outpost were defective as Plaintiff failed to prove that Outpost suffered damages prior to filing for bankruptcy. This is a question of law reviewed for correctness with no deference to the trial court. *Cabaness v. Thomas*, 2010 UT 23, ¶ 18, 232 P.3d 486; *Meadow Valley Contractors., Inc. v. Utah Department of Transportation*, 2011 UT 35, ¶ 63, 266 P.3d 671.[1]

[1] Plaintiff's *Second Amended Notice of Appeal* (R. 6331-32) notes that Plaintiff is also appealing (1) the District Court's December 2, 2013 *Order on [DKC's] Third Motion to Dismiss and/or Motion for Judgment on the Pleadings*, which dismissed Plaintiff's causes of action for fraud and fraudulent nondisclosure; and (2) the District Court's August 11, 2015 *Order Denying Plaintiff's Rule 59 Motion to Alter or Amend Judgment*. Neither of these rulings are addressed in Plaintiff's brief and the District Court should therefore be summarily affirmed on these rulings. *See Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (noting that issues not raised in appellant's opening brief are waived).

II. Issues Raised in DKC's Cross-Appeal

Whether the District Court correctly applied Utah's Builders Statute of Repose, Utah Code section 78B-2-225, and determined that Plaintiff's home was completed on March 17, 2006, despite the fact that Summit County did not issue a Certificate of Occupancy for Plaintiff's home until May 17, 2006. This is a question of law reviewed for correctness. *Menzies v. State*, 2014 UT 40, ¶[344 .3d 581.

Whether there are genuine issues of material fact regarding the date that Plaintiff's home was completed for purposes of applying the Builders Statute of Repose. "In determining whether the trial court correctly found that there was no genuine issue of material fact, [Utah courts] accept the facts and inferences in the light most favorable to the nonmoving party." *SME Industries, Inc. v. Thompson, Ventulett, Stainback and Assocs., Inc.*, 2001 UT 54, ¶ 9, 28 P.3d 669.

Both of these issues are preserved in DKC's *Memoranda* filed in opposition to Third-Party Defendants' *Motions for Summary Judgment.*[2]

DETERMINATIVE LAW

Utah Code Ann. § 78B-2-225 (2009)

Utah Code Ann. § 58-56-4 (2004)

Utah Admin. Code R. 156-56-701 (2004)

2003 International Building Code § 110.1

These authorities are set forth verbatim in **Addendum 1** hereto.

[2] R. 3172-200 and 4276-303.

STATEMENT OF THE CASE

Nature of the Case

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 a developer, Outpost Development, Inc. ("Outpost"). Defendant/Appellee Douglas Knight Construction ("DKC") was the general contractor that built the Home for Outpost,[3] and DKC hired numerous subcontractors to complete the work. A Certificate of Occupancy was issued for the Home on May 17, 2006.

Disposition at Trial Court

I. Plaintiff's Claims Against DKC

Plaintiff's *Third Amended Complaint* alleged numerous claims against DKC. On November 25, 2013, the District Court dismissed Plaintiff's Sixth Cause of Action for breach of implied warranties.[4] On December 2, 2013, the District Court dismissed Plaintiff's Seventh Cause of Action for fraud and Eighth Cause of Action for fraudulent non-disclosure because those claims were barred by Utah's Builders Statute of Repose, Utah Code section 78B-2-225.[5]

Plaintiff's First and Fifth Causes of Action brought contract claims against DKC based on a purported assignment of claims from Outpost to Plaintiff. On June 3, 2015,

---

[3] The Construction Agreement between DKC and Outpost is attached hereto as **Addendum 2**.
[4] R. 2535-40.
[5] R. 2547-52.

the District Court granted DKC summary judgment on these claims.[6] Pursuant to Utah Rule of Civil Procedure 59, Plaintiff moved for amendment of the District Court's June 3, 2015 *Order*. On August 11, 2015, the District Court denied Plaintiff's Rule 59 *Motion*.[7]

DKC also moved for summary judgment on Plaintiff's contract claims based on the waiver provisions in the Construction Agreement between DKC and Outpost. On January 29, 2015,[8] the District Court granted DKC partial summary judgment, but later declared this *Motion* moot when the Court dismissed Plaintiff's contract claims.[9]

II. DKC's Third-Party Claims Against the Subcontractors

DKC's *Third-Amended Complaint* alleged that, to the extent Plaintiff proves construction defects at the Home, the liability for those defects lies with DKC's subcontractors.[10] 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 and determined that the Home was completed on March 17, 2006, when Plaintiff offered to purchase the Home from Outpost. The Court determined that Outpost was able to "use or possess" the Home on March 17, 2006, based on testimony that the Home was staged and furnished at the time Plaintiff offered to purchase the Home. Because DKC did not file

---

[6] R. 6081-85, June 3, 2015 *Order*, which is attached hereto as **Addendum 3**.
[7] R. 6283-84.
[8] R. 5480-84, January 29, 2015 *Order*, which is attached hereto as **Addendum 4**.
[9] Addendum 3, June 3, 2015 *Order*.
[10] R. 879-90.

its *Third-Party Complaint* until April 30, 2012, the Court determined that DKC's claims were time barred.[11]

STATEMENT OF RELEVANT FACTS

The Construction Agreement

1. On July 21, 2004, DKC entered into a contract ("Construction Agreement") with Lot 84 Deer Crossing, LLC to construct the Home.[12]

2. Lot 84 Deer Crossing then purportedly assigned its rights in the Home and the Construction Agreement to Outpost.[13]

3. The Construction Agreement defines the term "substantial completion" as the time "when construction is sufficiently complete so that [Outpost] can occupy or utilize the Project for the purpose for which it intended. [Outpost] may take possession of the Project after Substantial Completion at a time agreed to by the parties."[14]

4. The Construction Agreement provides that "[t]he making of final payment and completion of corrected work referenced in Article 13 shall constitute a waiver of all claims by [Outpost] with the exception of claims in Article 9."[15]

5. Article 9.7 of the Construction Agreement provides DKC's limited warranty:

---

[11] The August 26, 2014, and January 2, 2015 *Orders* are attached hereto as **Addendum 5**.
[12] R. 817, *Third Amended Complaint*, ¶ 7; Addendum 2, Construction Agreement.
[13] R. 817, *Third Amended Complaint*, ¶ 8.
[14] Addendum 2, ¶ 2.3.
[15] Addendum 2, ¶ 6.4.

> 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 further warrants the Work as per Utah state code for a period of one year.**[16]

6. The Construction Agreement's limitation on liability clause states:

> In no event shall Contractor be liable for special or consequential damages. **Contractor's liability on any claim by [Outpost] 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 [Article 9.7].**[17]

7. Article 13.1 of the Construction Contract sets forth the Correction of Work provisions, which state: "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 the Agreement. Otherwise, any such rejection or claim is waived."[18]

8. In other words, Outpost's acceptance of the work and final payment resulted in a waiver of all claims under the Construction Agreement except: (1) claims for breach of warranty under Article 9, and (2) claims for incorrect work under Article 13.[19]

---

[16] Addendum 2, ¶ 9.7.
[17] Addendum 2, ¶ 9.8.
[18] Addendum 2, ¶ 13.1.
[19] Addendum 2, ¶ 6.4, 9.7, 9.8.

The Sale of the Home and Issuance of a Certificate of Occupancy

9. On March 17, 2006, Plaintiff offered to purchase the Home.[20]

10. The Real Estate Purchase Contract was executed on April 7, 2006, and the settlement deadline for Plaintiff's purchase was May 15, 2006.[21]

11. On May 17, 2006, Summit County issued a Certificate of Occupancy for the Property.[22]

12. As such, pursuant to the Construction Agreement, substantial completion was achieved no later than May 17, 2006.[23]

13. Plaintiff did not move into the Home until June of 2006.[24]

The Initial Leak and DKC's Efforts to Repair the Home

14. Prior to Plaintiff's purchase of the Home, a water leak developed, which Outpost disclosed to Plaintiff (the "Initial Leak"). Pursuant to Article 13 of the Construction Agreement, DKC attempted to repair this leak.[25]

15. Despite DKC's efforts to repair the Initial Leak, in October of 2006 Plaintiff discovered water damage in the Home.[26]

16. DKC again attempted to repair the Initial Leak. This work included repair work on the exterior fireplace near the great room, the northwest sliding glass doors to

[20] R. 818, *Third Amended Complaint*, ¶ 19.
[21] R. 3205-3214, Real Estate Purchase Contract, ¶ 24(f).
[22] R. 3238, Certificate of Occupancy.
[23] Addendum 2, ¶ 2.3.
[24] R. 3216-3217, Joe Tomlinson Depo., p. 41:17-20.
[25] R. 818-19, *Third Amended Complaint*, ¶ 18, 20, 22.
[26] R. 819, *Third Amended Complaint*, ¶ 24.

the great room, and interior repairs in the northwest bedroom and its closet, which are directly below the great room and exterior fireplace.[27]

17. DKC continued to repair the home, and sent an email to Plaintiff outlining the proposed scope of repair work.[28]

18. On or about May 7, 2007, Plaintiff advised Outpost that he no longer wanted DKC to work on the Home, and that he would be hiring his own repair contractor.[29] Plaintiff confirmed in his deposition that as of this date he had decided to hire his own repair contractor.[30]

The Alleged Construction Defects

19. Plaintiff hired Dan Kopsack of Park City Fine Homes to perform repair work on the Home.[31]

20. On July 2, 2007, Mr. Kopsack commenced his work on the Home.[32]

21. Mr. Kopsack testified that he never spoke with anyone from DKC or any of DKC's subcontractors.[33] In other words, DKC received no notice of any construction defects at the Project discovered by Park City Fine Homes.

22. Park City Fine Homes allegedly discovered additional construction defects at the Property.[34]

---

[27] R. 4185-90, Doug Knight Depo., p. 122:16-126:21.
[28] R. 4195.
[29] R. 4197.
[30] R. 4199-4201, Joe Tomlinson Depo., p. 71:17-72:10.
[31] R. 820, *Third Amended Complaint*, ¶ 32.
[32] R. 4221-4222 Dan Kopsack Depo., p. 146:14-147:2.
[33] R. 4220, Dan Kopsack Depo., p. 59:18-25.

DKC's Motion for Partial Summary Judgment re: Waiver

23. DKC moved for partial summary judgment on the grounds that all alleged defects not related to the Initial Leak were waived by the Construction Agreement because those defects were not disclosed to DKC during the one year warranty period.[35]

24. On January 29, 2015, the trial court entered an *Order re: [DKC's]Motion for Summary Judgment re: Waiver*, which granted DKC's *Motion*, in part.[36]

25. The Court concluded that under the unambiguous terms of the Construction Agreement "any claims for contractual defects or construction defects not raised with the contractor DKC within one year of substantial completion are indeed waived."[37]

26. The parties then submitted supplemental briefing concerning which defects had been waived, but the District Court subsequently declared the *Motion* moot.[38]

Outpost Development's Bankruptcy

27. Outpost filed for Chapter 7 Bankruptcy on September 13, 2011.[39]

28. In its bankruptcy, Outpost listed Plaintiff on its *Schedule F* of unsecured creditors to be discharged.[40]

29. Outpost listed on its *Schedule B* of assets, its "contingent claim"

---

[34] R. 820, *Third Amended Complaint*, ¶ 33.
[35] R. 4131, DKC's *Memorandum in Support of Motion for Partial Summary Judgment re: Waiver.*
[36] Addendum 4, January 29, 2015 *Order.*
[37] Addendum 4, p. 4.
[38] Addendum 3, June 3, 2015 *Order.*
[39] R. 5293, Plaintiff's Response to Request for Admission No. 5.
[40] R. 5306-07.

against DKC for Outpost's potential liability to Plaintiff with respect to construction of the Home.[41]

30. On December 2, 2011, the Bankruptcy Trustee filed a *Motion* with the Bankruptcy Court for the sale and assignment of Outpost's "*Causes of Action*" against DKC to Plaintiff.[42]

31. In that *Motion*, the Trustee represented to the Bankruptcy Court that Outpost's *Causes of Action* consisted of "indemnity or contribution" from DKC in the event Outpost was found liable to Plaintiff.[43]

32. Outpost's cross claims against DKC are contingent upon Outpost being found liable to Plaintiff. Outpost's breach of contract claim against DKC states: "*To the extent the allegations made in Plaintiffs' Amended Complaint or any other pleading against Outpost are true*, which Outpost denies, then DKC has failed to provide services, good, materials and/or performance promised in accordance with its contractual obligations and has breached the Construction Agreement."[44]

33. On February 21, 2012, the Bankruptcy Court granted the Trustee's *Motion*.[45]

---

[41] R. 5309-12.
[42] R. 5314.
[43] R. 5314, p. 2.
[44] R. 213, Outpost *Cross-Claim*, ¶ 19 (emphasis added).
[45] R. 5316.

34. The Assignment of Claims executed between the Bankruptcy Estate of Outpost and Plaintiff, dated January 23, 2012, shows that Plaintiff paid Five Thousand Dollars ($5,000.00) for this Assignment.[46]

35. Based on this Assignment, Plaintiff's *Third Amended Complaint* asserts claims for breach of contract and breach of the covenant of good faith and fair dealing against DKC.[47]

36. On January 23, 2013, the Bankruptcy Trustee filed his *Final Report*, effectively terminating the bankruptcy proceedings and discharging Outpost's creditors, including Plaintiff.[48]

DKC'S Motion for Summary Judgment on Plaintiff's Assigned Claims

37. DKC moved for summary judgment on Plaintiff's First Cause of Action for breach of the Construction Agreement and Fifth Cause of Action for of the covenant of good faith and fair dealing.[49]

38. On June 3, 2015, the District Court granted DKC's *Motion*.[50]

SUMMARY OF ARGUMENT

I. Plaintiff's Appeal

First, the District Court's dismissal of Plaintiff's assigned contract claims should be affirmed because the District Court correctly determined that Plaintiff failed to show

[46] R. 5318-19.
[47] R. 816, *Third Amended Complaint*, ¶ 48-54 and 74-80.
[48] R. 5321-28.
[49] R. 5259.
[50] Addendum 3, June 3, 2015 *Order*, p. 4.

that assignor Outpost suffered damages. Indeed, an assignee not otherwise in privity of contract with an obligor can only recover damages its *assignor suffered* for claims its *assignor could have asserted* against the obligor. The undisputed facts show that Outpost filed for bankruptcy before being found liable for any damages, so Plaintiff's contract claims fail.

Second, even if Plaintiff's contract claims survive, the District Court correctly granted partial summary judgment on construction defects that Plaintiff waived by failing to raise them during the one year warranty period. The Construction Agreement between DKC and Outpost states that Outpost's acceptance of the work and final payment resulted in a waiver of all claims under the Construction Agreement except: (1) claims for breach of warranty, which had to be raised within one year of substantial completion, and (2) claims for incorrect work, which had to be reported at the time of Substantial Completion.

Third, this Court should affirm dismissal of Plaintiff's claim for breach of implied warranty because DKC is not in privity of contract with Plaintiff and therefore owed no such warranties to Plaintiff. Moreover, this Court cannot extend *Davencourt's* implied warranties to DKC because Utah Code section 78B-4-513 requires privity of contract for construction defect claims.

II. DKC's Cross Appeal

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 Property was completed, and the Statute of Repose began running, no earlier than May 17, 2006, when Summit County issued the Certificate of Occupancy. Such an interpretation is further 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. 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. PLAINTIFF'S APPEAL

A. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S ASSIGNED CONTRACT CLAIMS BECAUSE PLAINTIFF FAILED TO SHOW THAT THAT THE ASSIGNOR SUFFERED DAMAGES.[51]

On June 3, 2015, the District Court granted DKC summary judgment on Plaintiff's assigned contract claims. That Court stated that "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."[52] The District Court explained that "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."[53] Plaintiff asserts that the District Court improperly dismissed his claim for breach of warranty by erroneously limiting Plaintiff's damages to those actually suffered by Outpost prior to its assignment of claims. Plaintiff argues that under *Sunridge Development Corp. v. RB&G, Engineering, Inc.*, 2010 UT 6, 230 P.3d 1000, he has the right to assert any claim that Outpost could have pursued, not merely the claims that Outpost did pursue. But either way Plaintiff's claims fail as a matter of law.

---

[51] DKC has addressed the District Court's June 3, 2015 Ruling first because if this Court affirms the dismissal of Plaintiff's contract claims Plaintiff's appeal of the District Court's January 29, 2015 Ruling on waiver of claims becomes moot.
[52] Addendum 3, June 3, 2015 *Order*, p. 4.
[53] Addendum 3, June 3, 2015 *Order*, p. 4.

1. PLAINTIFF'S CLAIMS AGAINST OUTPOST WERE DISCHARGED IN BANKRUPTCY.

Because Plaintiff's claims against Outpost were discharged in Outpost's bankruptcy, Outpost suffered no damages and its pass-through claims against DKC fail. The general rule is that a discharge from bankruptcy results in the debtor being discharged from "all debts that arose before the date of the order for relief." *See* 11 USC § 727(b). Pursuant to Section 524(a)(2) of the Bankruptcy Code, a discharge operates as

> an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

11 U.S.C. § 524(a)(2).

Consequently, Plaintiff is enjoined from continuing any action or process seeking to hold Outpost liable on the discharged claim. *See Landsing Diversified Properties-II v. First Nat'L Bank & Trust Co. (In re Western Real Estate Fund, Inc.,)*, 922 F.2d 592, 598 (10th Cir. 1990). The bankruptcy discharge and the concomitant injunction against subsequent actions are designed to give the debtor a "financial fresh start." *In re Jet Florida Systems, Inc.*, 883 F.2d 970, 972 (11th Cir. 1989).

Where claims against an indemnitee have been foreclosed as a result of a bankruptcy discharge, the indemnitee's claims against would be indemnitors have similarly been discharged by implication. Indeed, "a cause of action for indemnity does not arise until the liability of the party seeking indemnity results in his damage, either

through payment of a sum clearly owed or through the injured party's obtaining an enforceable judgment." *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 218 (Utah 1984); *see also Perno v. For-Med Medical Group, PC*, 673 N.Y.S. 2d 849 851-52 (N.Y. 1998) (noting that an indemnification claim does not arise until the party seeking indemnity suffer an out-of-pocket loss and that "a party that has not and will not sustain any actual out of pocket loss as the result of a claim raised against it has no indemnification claim against a third party").

2. PLAINTIFF OBTAINED ONLY PASS THROUGH CLAIMS FROM OUTPOST, WHICH ARE UNVIABLE.

The claims that the bankruptcy court allowed the trustee to assign were merely "pass through" claims. The Bankruptcy Trustee's *Motion to Sell Property of the Estate* specifically characterized Outpost's claims against DKC as seeking "indemnity or contribution from [DKC] in the event [Outpost] is found liable to [Plaintiff]. The Trustee's *Motion* stated that Plaintiff "wish[ed] to purchase any and all of [Outpost's] Causes of Action in the Utah Litigation against [DKC]." The phrase "Causes of Action" is expressly defined in the Trustee's *Motion* to include Outpost's cross claims against DKC.[54] In short, the Trustee sought authority to transfer Outpost's cross claims, and that is all the Bankruptcy Court authorized in its *Order*.

Outpost's cross claims against DKC are based entirely upon Outpost being found liable to Plaintiff. For example, Outpost's breach of contract claim against DKC states:

[54] R. 5314, Bankruptcy Trustee's *Motion to Sell Property of the Estate*.

"To the extent the allegations made in Plaintiffs' Amended Complaint or any other pleading against Outpost are true, which Outpost denies, then DKC has failed to provide services, good, materials and/or performance promised in accordance with its contractual obligations and has breached the Construction Agreement."[55] All of Outpost's cross-claims contain similar language, which is why the Bankruptcy Trustee categorized the claims as indemnity and contribution claims. Outpost's cross-claims are now defective against DKC because Outpost has not been found liable to Plaintiff. Thus, summary judgment for DKC was proper.

3. THE TERMS OF THE ASSIGNMENT REQUIRE PLAINTIFF TO STEP INTO THE SHOES OF OUTPOST.

The District Court's ruling relied on *SME v. Thompson, Ventulett, Stainback & Associates, 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 than 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.[56]

Plaintiff correctly notes that *Sunridge* clarified that the rulings in *SME* did not place a "temporal restriction" on the damages an assignee may recover and directed

---

[55] R. 213, Outpost *Cross-Claim*, ¶ 19.
[56] Plaintiff's counsel conceded to the District Court that this is a correct statement of the law. R. 6279 p:26:19-27:1.

courts to evaluate an assignee's rights under the contract at issue. 2010 UT 6, ¶ 23 & 25. However, *Sunridge* is factually distinguishable from the present case and *SME* should control this matter. First and foremost, *Sunridge* involved the assignment of all rights and obligations under a contract, whereas *SME* and the present case involve only an assignment of claims. *Id.*, ¶ 22. In *Sunridge*, plaintiff Sunridge Development Corporation ("SDC") contracted with defendant RB&G Engineering for geotechnical engineering services for a real estate development. SDC's owner then formed a new entity, plaintiff Sunridge Enterprises, and transferred all of SDC's rights and claims under its contract with RB&G to Sunridge Enterprises. *Id.*, ¶¶ 2-3.

In *SME*, on the other hand, only a claim for damages was assigned. Plaintiff SME was a subcontractor for a renovation project on the Salt Palace Convention Center. SME made a claim for cost overruns against the general contractor, who then forwarded the claim to Salt Lake County, the owner of the project. Salt Lake County settled with the general contractor, which settlement included an assignment of the County's claims against the project designers. The general contractor then settled with SME and assigned the County's claims against the designers to SME. 2001 UT 54, ¶¶ 2-6.

The distinction between an assignment of claims versus an assignment of all rights and privileges under a contract was highlighted by the Supreme Court in *Sunridge*. 2010 UT 6, ¶ 22. Indeed, assignment of a claim is a much more limited right than a full assignment of a contract, and an assignee's rights should be limited accordingly. DKC's

interpretation of *SME* is consistent with Justice Durham's concurring opinion in *Meadow Valley Contractors., Inc. v. Utah Department of Transportation*, 2011 UT 35, 266 P.3d 671 (Durham, J., concurring). *Meadow Valley* also involved an assignment of claims—not an assignment of contract—and Justice Durham opined that it would be plain error to allow an assignee to recover its own damages while standing in the shoes of an assignor. Justice Durham relied on *SME*, and reiterated that "an 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." *Meadow Valley*, 2011 UT 35, ¶ 81. The majority opinion in *Meadow Valley* confirmed that Justice Durham correctly applied *SME*. *Id.*, ¶ 19, n.12.

These authorities warrant affirmation of the District Court. The undisputed facts demonstrate that Outpost filed for bankruptcy and Plaintiff has not proven that Outpost suffered any damages.[57] Rather than standing in Outpost's shoes, Plaintiff is seeking his own damages, which is specifically precluded by the Utah Supreme Court.[58]

B. THE DISTRICT COURT CORRECTLY INTERPRETED THE CONSTRUCTION AGREEMENT AND DETERMINED THAT PLAINTIFF HAD WAIVED UNTIMELY CLAIMS.

In the event this Court reverses the District Court and allows Plaintiff to proceed with his assigned contract claims, this Court should affirm the District Court's ruling that

[57] *See* Statement of Relevant Facts 27-37, *supra*.

[58] Alternatively, Plaintiff has provided no evidence detailing the terms of the assignment from Lot 84 to Outpost. This lack of evidence provides additional grounds for this Court to affirm dismissal of Plaintiff's assigned claims because Plaintiff has not shown that Lot 84 suffered any damages.

Plaintiff waived claims that were not raised during the one year warranty period. In its January 29, 2015 *Order*, the District Court ruled that the Construction Agreement is unambiguous and that "any claims for contractual defects or construction defects not raised with the contractor DKC within one year of substantial completion are indeed waived."[59] Plaintiff alleges that the District Court erred by inferring a discovery and notice requirement into the Construction Agreement. As noted by the District Court, however, a discovery and notice requirement is implicit in the Construction Agreement because a general contractor cannot make repairs unless advised of the problem.[60]

The Construction Agreement between DKC and Outpost states that Outpost's acceptance of the work and final payment resulted in a waiver of all claims under the Construction Agreement except: (1) claims for breach of warranty, and (2) claims for incorrect work under the Contract's Correction of Work provision.

"The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract. In interpreting a contract, the intentions of the parties are controlling." *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139. "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Id.*, ¶ 19. Additionally, "[t]he legal standard necessary to find waiver is clear: Waiver is the intentional relinquishment

[59] Addendum 4, January 29, 2015 *Order*.
[60] R. 6281 p.56:23-57:5.

of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." *U.S. Realty 86 Assocs. v. Sec. Inv., Ltd.*, 2002 UT 14, ¶ 16, 40 P.3d 586.

Here, the Construction Agreement provides 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**."[61] Article 13 of the Construction Agreement unambiguously required Outpost to "furnish to [DKC], 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 the Agreement. Otherwise, any such rejection or claim is waived."[62] Article 9 provides:

> 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 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.**[63]

---

[61] Addendum 2, ¶ 6.4 (emphasis added).
[62] Addendum 2, ¶ 13.1.
[63] Addendum 2, ¶ 9.7 & 9.8 (emphasis added).

The Construction Agreement unambiguously requires the owner or architect to provide DKC with notice of any incomplete or defective work and further states that claims for incorrect work that are not disclosed to DKC are expressly waived. Additionally, under the Construction Agreement, DKC warranted the work for one year from substantial completion, which means that the warranty period expired no later than May 17, 2007, or one year after the Certificate of Occupancy was issued. In sum, the Construction Agreement contains a broad limitation of liability in paragraph 9.8, which bars all claims under the contract except the limited warranty set forth in paragraph 9.7 and claims for incorrect work under paragraph 13. As such, the District Court property determined that all defects raised outside of the warranty period and therefore waived under Articles 9 and 13.

This Court applied similar reasoning in *Beckstead v. Deseret Roofing Company, Inc.,* 831 P.2d 130, (Utah Ct. App. 1992). In that case, a homeowner sued a roofing contractor for breach of a warranty in which the contractor warranted that the roof would be watertight for a period of two years. Leaks first manifested within the warranty period, but because suit was not brought until after the warranty period had expired, it was argued that no further work was required under the contract. *Id.* Citing to an analogous decision, the Utah Court of Appeals recognized that the warranty does not set a limitation on repairs, but rather a maximum period for the "discovery and proper notification regarding defect." *Id.* The Court concluded that the contractor breached the

warranty because the defect manifested itself during the warranty period and the contractor never fixed the leak. *Id.* at 132. In other words, Utah courts also recognize that claims for breach of warranty must be based upon construction defects that manifest themselves and are properly reported during the warranty period.

Another analogous case is *Mountain View v. Casper Concrete Company*, 912 P.2d 529 (Wyo. 1996). There, the construction contract contained a one year warranty, as well as a provision stating that all claims would be waived once the final payment was made. *Id.* at 531. The Wyoming Supreme Court affirmed the dismissal of the case because the plaintiff waived its claims by making the final payment and because the claims were brought after the one year warranty period had lapsed. *Id.* at 533. *See also Cree Coaches, Inc. v. Panel Suppliers, Inc.*, 186 N.W. 2d 335 (Mich. 1971) (dismissing claims as waived because parties specifically limited the liability of defendant for faulty work appearing within one year from the date of completion of the contract). Thus, *Beckstead's* requirement that discovery and notification occur within the warranty period, but permitting a lawsuit to be filed thereafter is facially reasonable and in line with other jurisdictions.

The authority cited by Plaintiff is not inconsistent with DKC's proffered interpretation of the Construction Agreement. In *Northeastern Power Co. v. Balcke-Durr, Inc.*, 1999 U.S. Dist. LEXIS 13437, *17-18 (E.D. Pa, August 20, 1999), the Court determined that a reasonable interpretation of the warranty would allow for coverage of

manifest, but undiscovered, defects due to the fault of the seller. Similar to the warranty at issue in this case, the lack of language expressly requiring a defect to be "found or discovered" during the warranty period did not obviate a requirement that the purported defect manifest itself in some manner. *Id.* In the product liability context, many courts evaluating one year warranty periods require the defect to be "perceived" or capable of perception by a reasonable user performing a normal inspection. *See Canal Electric Co. v. Westinghouse Electric Co.*, 973 F.2d 988, 992 (1st Cir. 1992) (determining that alleged product defect was not actionable because it was not discovered during the warranty period). Plaintiff's attempt to expand DKC's warranty to cover defects that do not manifest during the one year warranty period renders the warranty term entirely superfluous by replacing a warranty of determinate duration with an indefinite warranty term.

Plaintiff also argues that the policies discussed in *Davencourt* support the notion that the warranty should be construed against DKC and in his favor. Plaintiff failed to preserve this argument below,[64] so it should not be addressed here. *Holladay v. Storey*, 2013 UT App 158, ¶ 9, 307 P.3d 584 (declining to address issue not raised in the trial court). Moreover, the language cited by Plaintiff actually relates to a claim for breach of implied warranty. As shown in the next section, it is undisputed that DKC owed no such warranty to Plaintiff and Plaintiff's remedy for latent defects was against Outpost as the

[64] *See* R. 4720-34, *Plaintiff's Opposition to DKC's Motion for Summary Judgement re: Waiver*; R. 6281, Hearing Transcript.

seller of the Property. *See Davencourt at Pilgrims Landing Homeowners Assn. v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 60, 221 P.3d 234.

The foregoing demonstrate that defects not raised by Plaintiff during the one year warranty period are waived under Articles 9 and 13 of the Construction Agreement because these alleged defects were discovered after expiration of the warranty period. The District Court's January 29, 2015 *Order* should therefore be affirmed.

C. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S IMPLIED WARRANTY CLAIM.

The District Court properly dismissed Plaintiff's Sixth Cause of Action for implied warranties because DKC is not in privity of contract with Plaintiff. In *Davencourt*, 2009 UT 65, ¶ 60, the Utah Supreme Court held that a plaintiff homeowner may bring a claim for breach of the implied warranty of construction in a workmanlike manner and breach of the implied warranty of habitability. However, such a claim for breach of implied warranties must be based on privity of contract in the form of an agreement between a vendor and vendee. Indeed, *Davencourt* enumerates the elements for a breach of implied warranty claim to require "the purchase of any new residence from a defendant builder-vendor/developer-vendor." *Id.*

The District Court correctly concluded that DKC is neither a builder-vender nor a developer-vender. As such, this Court should follow the principal of vertical stare decisis and affirm the District Court's November 25, 2013 *Order*. *Mitchell v. Labor Com'n,*

2015 UT App 94, ¶ 10, 348 P.3d 356 (noting that Utah Court of Appeals "must follow strictly the decisions rendered by the Utah Supreme Court").

Perhaps most importantly, Plaintiff's argument that the implied warranty should be extended to builders contradicts the Utah legislature's unambiguous directive that a cause of action for defective construction must be based on privity of contract. Utah Code section 78B-4-513 states that "an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer." As aptly stated by the Utah Supreme Court:

> We are relegated to the function of agent of the legislature – of interpreting the policy judgment that it reached, and not of imposing our own will through the exercise of our limited judicial power…
>
> Because we conclude that our legislature has spoken on this issue, we defer to its judgment and enforce its decision as we understand it. And we do so not based on any abstract notion of purpose or intent but based on the legislature's actual product – the statutory text.

Graves v. North Eastern Services, Inc., 2015 UT 28, ¶¶ 70 & 76, 345 P.3d 619.

In creating the claim for breach of implied warranty, the Utah Supreme Court specifically recognized that the claim must be based on privity of contract in accordance with Utah Code section 78B-4-513. *Davencourt*, 2009 UT 65, ¶ 57, n. 13. As such, this Court

should decline Plaintiff's invitation to ignore the plain language of Utah's legislative scheme by expanding the implied warranty to include those not in privity of contract.[65]

Finally, Plaintiff raises numerous policy arguments in favor of extending *Davencourt's* implied warranties to builders. Plaintiff's brief, however, relies on broad generalizations as opposed to factual evidence supporting his policy arguments. These policy arguments are unpersuasive and the District Court should be affirmed.

II. DKC'S CROSS-APPEAL

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

The District Court determined that DKC's *Third-Party Complaint* was untimely under the Builders Statute of Repose because the Home was used or possessed by March 17, 2006, when Plaintiff made an offer to purchase the Home.[66] DKC respectfully submits that the District Court misapplied the Statute of Repose.

The primary 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. Utah Code section 78B-2-225(1)(c) defines "completion of improvement" to mean the earliest of

---

[65] Additionally, to the extent Plaintiff now argues that the "vendor" requirement of *Davencourt* should be abandoned, Plaintiff failed to preserve that argument in the District Court. *See*, R. 1888-92, *Plaintiff's Opposition to DKC's Third Motion to Dismiss*, and R. 6280, Hearing Transcript, p. 29:20-34:2.

[66] Addendum 5, August 26, 2014, and January 2, 2015 *Orders*.

(1) a Certificate of Substantial Completion;[67]
(2) a Certificate of Occupancy issued by a governing agency; or
(3) the date of first use or possession of the improvement.[68]

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.

Because Summit County issued a building permit in August 2004, this Project was governed by Utah Code section 58-56-1 *et seq.*, which required the Utah Division of Occupational Licensing and the Utah Uniform Building Commission to adopt "construction codes which the state and each political subdivision of the state shall follow[.]" Utah Code Ann. § 58-56-4(2)(a) (2004).[69] This statute further states that these building codes "shall be followed when new construction is involved." *Id.* § 58-56-4(3)(a). Pursuant to this enabling statute, Utah Administrative Code R156-56-701(2004) incorporated by reference and adopted the 2003 of the International Building Code. Utah Admin. Code R. 156-56-701(1)(a) (2004).[70] The 2003 International Building Code ("IBC") 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.**"

---

[67] It is undisputed that a Certificate of Substantial Completion was not issued for this Project so this subsection is inapplicable.
[68] A copy of this statute is attached in Addendum 1.
[69] A copy of this statute is attached in Addendum 1.
[70] A copy of this administrative rule is attached in Addendum 1.

2003 IBC § 110.1 (emphasis added).[71] In other words, the Home could not be used or possessed until Summit County issued a Certificate of Occupancy.

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.* Here, 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 IBC, which the Legislature and the appropriate administrative agencies have adopted and incorporated into Utah law. As such, the District Court's interpretation of the Statute of Repose conflicts with the plain language of the statute and renders the phrase "Certificate of Occupancy" inoperative or superfluous.

Indeed, as a matter of law, the owner of a newly constructed home cannot use or possess that home until he or she can legally take occupancy, which requires the issuance of Certificate of Occupancy. Several courts from other jurisdictions have reached this conclusion. In *Nolan v. Paramount Homes*, 518 S.E.2d 789, 791 (N.C. Ct. App. 1999), the court determined that the statute of limitations began to run when the building

[71] A copy of this IBC section is attached in Addendum 1.

department issued a "certificate of compliance" because this was when the home was substantially complete and could be used for its intended purpose as a residence.

Here, 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**."[72] In other words, Outpost was contractually prohibited from taking possession of the Home until it could legally occupy the Home. Just as in *Nolan*, the purpose of this Project was to build a residence, and the Statute of Repose should not begin running until the Home could be inhabited.

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.[73] 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.

B. PUBLIC POLICY DOES NOT FAVOR THE SUBCONTRACTORS' INTERPRETATION OF THE STATUTE OF REPOSE.

The Subcontractors argued below 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

[72] Addendum 2, Construction Agreement, ¶ 2.3.
[73] The same statutory scheme that applied in 2004 also applied in 2006. *See* Utah Code § 58-56-4 (2006) and Utah Admin. R. R156-56-701 (2006), which incorporate and adopt the 2003 International Building Code.

litigation. *See* Utah Code Ann. § 78B-2-225(2). 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.

Moreover, the Subcontractors would suffer no hardship, unexpected costs, or difficulty in defending this matter if the Statute of Repose commenced upon the issuance of a Certificate of Occupancy. Indeed, the Subcontractors timely answered DKC's *Third-Party Complaint* and diligently defended their work throughout the case.[74] Thus, the Subcontractors have not suffered the social and economic evils contemplated in the Statute of Repose.

On the other hand, public policy weighs in favor of applying the Certificate of Occupancy as the event that triggers the Statute of Repose. The issuance of a Certificate of Occupancy provides a clear demarcation of when a residential home is complete for purposes of the statute of repose. This 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, as

[74] *See*, R. 1015, Akita Construction's *Answer*; R. 1070, Superior Insulation's *Answer*; R. 1081, Picture Perfect Stone Masonry's *Answer*.

discussed below, determining the date of use or possession is a factually intensive inquiry that will make it challenging for potential litigants to evaluate the repose period.

C. 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.[75] Additionally, the Real Estate Purchase Contract between Outpost and Plaintiff was not executed until April 7, 2006.[76] 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

[75] R. 3216-3217, Joe Tomlinson Depo. p. 41: 17-20.
[76] R. 3205-3214, Real Estate Purchase Contract, ¶ 24(f).

Certificate of Occupancy. Because this is a highly fact-intensive issue, summary judgment was inappropriate and the District Court's ruling should be reversed.

D. 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.[77] 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.[78]

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 tort, indemnity, strict liability,

---

[77] R. 879-90.

[78] Although DKC did not raise this issue in the District Court, this Court may review this argument under the plain error doctrine. 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). All of these elements are met 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. This error was harmful because absent the error, DKC would still have claims and remedies against the Subcontractors.

and contribution. Any interpretation treating indemnity and contribution claims as being subsumed within the category of warranty or contract would necessarily nullify other statutory provisions treating them separately, and would therefore, be improper. *See Rapela v. Green*, 2012 UT 57, ¶ 19, 289 P.3d 428 (noting that 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").

Utah courts presume that the Legislature used each term advisedly and give effect to each term according to its ordinary and accepted meaning. *Versluis v. Guaranty Nat'l Cos.*, 842 P.2d 865, 867 (Utah 1992). 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 contribution and indemnity claims (among others) be subject to section 78B-2-225(3)(b). Consequently, instead of the six year repose period commencing upon the substantial 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).

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,[79] and DKC filed its *Third-Party Complaint* on April 20,

[79] R. 1.

2012. As such, DKC's claims against the Subcontractors were timely asserted and the District Court's ruling should be reversed in this regard.

CONCLUSION

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

DATED this 19th day of January, 2016.

SUITTER AXLAND, PLLC

Jesse C. Trentadue
Noah M. Hoagland
Attorneys for Defendant, Third-Party Plaintiff, and Appellee/Cross-Appellant Douglas Knight Construction, Inc.

CERTIFICATE OF COMPLIANCE

Word Count

As required by rule 24(f)(1)(C), I certify that this brief contains 9,514 words. I relied on my word processor to obtain the count and it is Microsoft Word version 14.0.

Line Count

My brief was prepared in a monospaced typeface and contains 1,158 lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

CERTIFICATE OF SERVICE

I certify that on the 19th day of January, 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:

Joseph E. Wrona, Esq. Bastiaan K. Coebergh, Esq. Jarom B. Bangerter, Esq. WRONA LAW FIRM, 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 10080 Alta Drive, Suite 200 Las Vegas, NV 89145 *Attorneys for Akita Construction, Inc.*
Scott T. Evans, Esq. Gabriel K. White, Esq. CHRISTENSEN & JENSEN 15 West South Temple, Suite 800 Salt Lake City, Utah 84101 *Attorneys for Picture Perfect Stone Masonry, LLC*	Brett N. Anderson, Esq. Scott R. Taylor, Esq. BLACKBURN & STOLL, LC 257 East 200 South, Suite 800 Salt Lake City, Utah 84111 *Attorneys for Superior Insulation Co., Inc.*
U.S. Mail only to: Signature Concrete, Inc. c/o James C. Conway, President 5637 South 700 West Salt Lake City, Utah 84123	**U.S. Mail only to:** U.S Deck, Inc. c/o Thomas Paul Zick, President 1834 Ash Court Francis, Utah 84036

ADDENDUM

Addendum 1 - Determinative Law

Addendum 2 - Construction Agreement

Addendum 3 - June 3, 2015 Order

Addendum 4 - January 29, 2015 Order

Addendum 5 - August 26, 2014 Order and January 2, 2015 Order