

SUMMARY  
OF  
**KLINGER V. KIGHTLY V. CALDER**  
791 P.2d 868 (Utah 1990)  
by  
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Note: The principles discussed may not apply to all states. The reader is encouraged to research the law in their own state.

As most surveyors are aware, the protection afforded by the statute of limitations has been eroded over time by the application of the Discovery Rule. Simply put, the Discovery Rule means the statute of limitations does not begin to run in the surveyor's favor until the negligence has or should have been discovered and not necessarily when the negligence was actually committed. The result of this interpretation has been to expose the surveyor or the survey firm to liability for an indeterminate time. Some surveyors in conjunction with other professions have sought enactment of Statutes of Repose which limit actions against professionals for a definite time after the error was committed regardless of the time of discovery. Some courts without legislative direction and mindful that the Discovery Rule may raise as much injustice as it was meant to solve have adopted a balancing test before applying the Discovery Rule.

In *Klinger v. Kightly*, 791 P.2d 868 (Utah 1990) the Utah Supreme Court discussed the Discovery Rule and applied the balancing test. The Court succinctly explained arguments and counter-arguments for applying the Discovery Rule. These same arguments would serve as the justification for adopting or rejecting a Statute of Repose. This case is worth reviewing for the issues and arguments raised concerning a surveyor's liability to third parties, application of the Discovery Rule, and justification for enactment of a Statute of Repose.

In this case, a surveyor surveyed unimproved property, giving a certificate of survey to the client. The client later sold the property to plaintiffs who discovered a discrepancy in the boundaries. Plaintiff's sued the surveyor's client for rescission (rescind the contract) and the client sued the surveyor as a third party defendant. The surveyor raised the statute of limitations as a defense by asserting the time for finding the surveyor liable for past negligence had expired. Summary judgment was granted for the surveyor and

plaintiff appealed seeking recognition of the Discovery Rule, which would overcome the surveyor's defense that the time for asserting the claim had passed.

In seeking to balance the equities between the parties the Appeals Court did recognize the Discovery Rule, which: (1) protects an innocent party who has relied on services from professionals; (2) encourages cautionary techniques among surveyors toward foreseeable parties; and (3) protects the plaintiff from the onerous burden of hiring other surveyor's to check on a prior surveyor's work since the plaintiff ordinarily lacks the means or ability to ascertain that a wrong has been committed. Furthermore, the passage of time does not ordinarily mean defenses are more difficult to assert on the surveyor's behalf. As a result, the strict application of the Statute of Limitations may be unjust in some situations.

The arguments they noted against applying the Discovery Rule included: (1) the burden and anxiety on the surveyor that potential liability may continue throughout a surveyor's professional life; (2) the increasing burden of defending claims where the passage of time has dulled memory and decayed evidence that may be used in defense of the surveyor's conduct; and (3) the client must not be rewarded for their own ignorance.

In balancing the arguments, the Appeals Court chose to adopt the Discovery Rule, reversed the summary judgment, and remanded the case for trial against the surveyor. (As an aside, the Court noted that the surveyor need not have been actually involved in the survey, since his signature and survey certificate alone make him responsible for the survey. The court also gave some weight to the fact that the surveyor is still engaged in the practice of surveying and is available for testimony.)