

2008

James Ivers; Katherine G. Havas; and P and F Food Services v. Utah Department of Transportation : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JAMES IVERS; KATHERINE G.
HAVAS; and P and F FOOD SERVICES,

Appellants,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Appellee.

BRIEF OF APPELLANTS

Supreme Court Case No.

~~20060061-SC~~

20080287-SC

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STATEMENT REGARDING RELATED CASES

This matter was originally appealed and heard by the Utah Court of Appeals in 2005. Case No. 20050246-CA (*Utah Dept. of Transp. v. Ivers*, 128 P.3d 74 (Utah App. 2005)). Following the Utah Court of Appeals' decision, this Court granted Arby's Petition for Writ of Certiorari. Case No. 20060061-SC (*Ivers v. Utah Dept. of Transp.*, 154 P.3d 802 (Utah 2007)).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to UTAH CODE ANN. §78-2-2(3)(j).¹ Pursuant to its May 8, 2008 Order, this Court elected to retain this appeal on its docket and vacate its order of transfer to the Utah Court of Appeals.

IDENTIFICATION OF THE PARTIES

Petitioners are James Ivers, Katherine G. Havas, and P and F Food Services, referred to herein collectively as "Arby's." Respondent is Utah Department of Transportation, referred to herein as "UDOT."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review are stated as follows:

ISSUE: Did the trial court violate the mandate of the Utah Supreme Court on remand by foreclosing Arby's right

¹ Utah's Judicial Code was recodified by the Utah Legislature during the 2008 legislative session. This statute is now found at UTAH CODE ANN. §78A-3-102(j).

to seek severance damages for loss of view based upon new arguments raised by UDOT?

ISSUE: Did the trial court err in its interpretation and application of UTAH CODE ANN. §78-34-11(2)² to permit UDOT to amend its condemnation complaint to exclude appurtenant rights from its taking in an effort to avoid paying severance damages for loss of view after the view had already been taken?

ISSUE: Due to the delays in this matter caused by UDOT's approach in raising new arguments, is it appropriate to value Arby's damages currently as opposed to when Arby's was served with process of this condemnation action six years ago?

STANDARD OF REVIEW

Upon remand, a trial court is required to comply with the mandate of an appellate court. *Street v. Fourth Judicial Dist. Court, Utah County*, 191 P.2d, 153, 157 (Utah 1948).

The appellate court reviews the district court's ruling for correctness, granting no deference to its legal conclusions. *Woodbury Amsource, Inc. v. Salt Lake County*, 73 P.3d 362, 364 (Utah 2003). *See also Kouris v. Utah Highway Patrol*, 70 P.3d 72, 75 (Utah 2003); *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990).

² Due to the recodification of the Judicial Code, this statute has been renumbered as UTAH CODE ANN. §78B-6-512(2). For convenience, a copy of this statute is attached hereto as Addendum A.

The interpretation of a statute is a question of law appellate courts review for correctness. *See, e.g., Grappendorf v. Pleasant Grove City*, 173 P.3d 166, 168 (Utah 2007).

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

- Article I, Section 22, Utah Constitution: “Private property shall not be *taken or damaged* for public use without just compensation.” (Emphasis added).

- UTAH CODE ANN. §78-34-10:³

The court, jury or referee *must* hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:⁴

* * * * *

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned *by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff*,

³ Due to the recent recodification of the Utah Judicial Code, this statute was renumbered as UTAH CODE ANN. §78B-6-511.

⁴ This introductory sentence has been amended slightly and now reads as follows: “The courts, jury, or referee shall hear any legal evidence offered by any of the parties to the proceedings, and determine and assess....” UTAH CODE ANN. §78B-6-511.

(2) if the property, though no part is taken, will be damaged by the construction of the proposed improvement, the amount of such damages;

(3) separately, how much the portion not sought to be condemned...will be benefited, if at all, by the construction of the improvement proposed by the plaintiff....

(Emphasis added).

- UTAH CODE ANN. §78-34-11(1):⁵

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have occurred at the date of the service of summons....

- UTAH CODE ANN. §78-34-11(2):

The court or the jury shall consider mitigation or reduction of damages in its assessment of compensation and damages if, after the date of the service of summons, the plaintiff:

- (a) mitigates the damages to the property; or
- (b) reduces the amount of property actually taken.

STATEMENT OF THE CASE

I. Nature of the Case

Prior to UDOT's construction project that is the subject of this case, Arby's had operated a restaurant for many years on the northwest corner of a busy intersection

⁵ Pursuant to the 2008 recodification of the Utah Judicial Code, UTAH CODE ANN. §78-34-11(1) has been renumbered as UTAH CODE ANN. §78B-6-512(1).

located at U.S. 89 and Shepard Lane in a commercial area of Farmington, Utah. This case involves Arby's claims for severance damages suffered in connection with a partial taking of Arby's property for incorporation into UDOT's construction project. UDOT's project involved the elimination of the U.S. 89/Shepard Lane intersection by elevating U.S. 89 over Shepard Lane. The portion of UDOT's expansion and elevation project built adjacent to Arby's remaining property blocks the property's view to the east. Arby's right to seek severance damages for loss of view was recognized by this Court in its prior ruling in this matter. *See Ivers v. Utah Dept. of Transp.*, 154 P.3d 802 (Utah 2007). For convenience, a copy of this Court's prior decision is attached hereto as Addendum B.

II. Course of Proceedings

Following the Utah Court of Appeals' ruling in favor of UDOT,⁶ the issue of whether Arby's could pursue severance damages for loss of view was presented to the Utah Supreme Court on certiorari review. The Supreme Court held that a property owner has a protectable easement in the view from his property that cannot be taken without just compensation. *Ivers*, 154 P.2d at 805, 806-807. With respect to this specific case, the Court held severance damages are appropriate where a portion of property is condemned by the state and the condemnation of that land causes damage to the remnant portion of

⁶ The Utah Court of Appeals' opinion is found at *Utah Dept. of Transp. v. Ivers*, 128 P.3d 74 (Utah App. 2005).

the land. *Id.* at 807. According to this Court, Arby's is entitled to severance damages for loss of view if the "view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is *essential* to completion of the project." *Id.* at 808 (emphasis in original).

The case was remanded to the district court for an initial determination of whether the taking was essential to UDOT's project. Following the remand, UDOT admitted its taking of Arby's property was essential to the project. This left the amount of damages as the only issue for trial. However, before the case could be tried, UDOT filed a motion in limine seeking to preclude Arby's severance damages claim on a basis never before raised in the six year history of this case. UDOT's motion in limine asserted access deeds executed by Arby's predecessors in interest could be interpreted to mean that any and all appurtenant rights, including the right of view, had been relinquished years before Arby's acquired its interest in the property. The trial court denied UDOT's motion in limine as an untimely motion to amend its complaint.

Following the denial of UDOT's motion in limine, UDOT filed another request to alter or amend the trial court's order. UDOT's request to alter or amend included a passing reference to UTAH CODE ANN. §78-34-11(2), which had never been cited previously in this matter. UDOT argued this statute gave it the right to amend its taking at any time during the course of the proceedings. Although not fully explained in its

briefing to the trial court, UDOT's argument appeared to be that it could use UTAH CODE ANN. §78-34-11(2) to unilaterally remove appurtenant rights from the scope of its taking, thereby eliminating Arby's claim for severance damages for loss of view.

III. Disposition in the Lower Court

Upon consideration of UDOT's request to alter or amend, the trial court agreed with UDOT that pursuant to UTAH CODE ANN. §78-34-11(2), UDOT is free at any time to amend its condemnation complaint to modify the scope of the property right it seeks to take. Therefore, the trial court was willing to treat the condemnation complaint in this case as amended to exclude any taking of appurtenant rights, including loss of view. Based upon this ruling, the trial court determined that because UDOT was dropping any claim that it was actually taking any of Arby's appurtenant right, Arby's was precluded from seeking severance damages for loss of view. Because of the trial court's ruling, Arby's filed a motion for leave to amend its pleadings to add a counterclaim against UDOT. In response, the trial court entered a notice stating that due to Arby's appeal, it does not have jurisdiction to decide Arby's motion.

STATEMENT OF FACTS

The underlying facts are set forth in the parties' briefing and the Utah Supreme Court's prior ruling in Case No. 20060061-SC (*Ivers*, 154 P. 3d 802, Addendum E hereto). The facts related to the present appeal are as follows:

1. UDOT filed its Complaint in this action on December 20, 2002, seeking to condemn a portion of Arby's real property. Complaint, R. at pp. 1-12 (the record on appeal is referred to herein as "R").

2. UDOT's Complaint, in identifying the property to be condemned, referred to the Condemnation Resolution attached to the Complaint. Condemnation Resolution, R. at pp. 5-8.

3. The Condemnation Resolution contains the following provision immediately following the metes and bounds description of the parcel UDOT sought to take from Arby's:

To enable [UDOT] to construct and maintain a public highway...the owners of said entire tract of property hereby release and relinquish to said [UDOT] any and all rights appurtenant to the remaining property of said owners by reason of the location thereof with reference to said highway....

Id. at p. 7.

4. Arby's seeks severance damages in this case due to the view-impairing obstruction caused by UDOT's construction project.

5. On February 6, 2007, the Utah Supreme Court entered its decision on severance damages in the prior appeal, and held as follows:

A property owner does... have a protectable easement in the view from his property.

* * * * *

With respect to lost view, severance damages are appropriate under Utah Code Section 78-34-10 where a portion of property is condemned by the state and the condemnation of that land *causes* damage to the noncondemned portion of the land. Damage to the noncondemned portion of the land is ‘caused’ by the severance in two situations: (1) when the view-impairing structure is built on the condemned land, or (2) when the view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is *essential* to completion of the project.

Ivers, 154 P.3d at 807-808 (emphasis in original).

6. The Supreme Court remanded the case to the district court for “proceedings consistent with this opinion.” *Id.* at 808.

7. Upon remand of the case to the trial court, UDOT, in a response to Arby’s request for admissions, admitted its taking was essential to the construction project. Plaintiff’s Response to Request for Admissions, Addendum C hereto.

8. On April 30, 2007, UDOT filed a motion in limine asserting Arby’s had no appurtenant property rights (including view rights), due to language in certain access deeds that had been executed by prior property owners. UDOT’s Motion in Limine and Memorandum in Support, R. at pp. 314-348. This argument was never made previously. February 5, 2008 Ruling (“February Ruling”), R. at p. 463. A copy of the February Ruling

is also attached hereto for convenience as Addendum D.

9. UDOT's briefing in support of its motion in limine made no reference to UTAH CODE ANN. §78-34-11(2). UDOT's Memorandum in Support of Motion in Limine, R. at pp. 317-326.

10. The trial court entered a ruling on October 18, 2007, holding UDOT's motion in limine was an untimely motion to amend pleadings. October 18, 2007 Ruling ("October Ruling"), R. at p. 394. A copy of the October Ruling is also attached hereto as convenience as Addendum E.

11. On October 30, 2007, UDOT filed a request to alter or amend the trial court's October Ruling. The following statement constitutes UDOT's entire argument under UTAH CODE ANN. §78-34-11(2):

As a matter of public policy, a Utah condemning authority has an absolute right to avoid, mitigate or reduce damages by amending or changing the take to either mitigate or reduce damages. The mitigation or change of take can occur any time after service of summons and before the jury assessment of compensation and damages.

Request to Alter or Amend Order, R. at p. 403.

12. On February 5, 2008, the trial court entered its ruling providing that pursuant to UTAH CODE ANN. §78-34-11(2), UDOT is free, without leave of court, to amend its taking at any time and that by removing any claim for taking of appurtenant

rights, Arby's could no longer pursue its claim for damages for loss of view. The trial court held:

Because this statute allows UDOT to amend its taking, it naturally follows that UDOT can amend the complaint at any time, and so the Court's denial of the motion in limine was improper. Because UDOT has that authority, it can now assert that it is not seeking to condemn the rights of view... and Arby's should be precluded from submitting any evidence that it owns a right of view.

February Ruling ("February Ruling"), R. at p. 470. (Addendum D at p. 8).

13. The trial court's February 5, 2008 ruling also contains the following language:

The Court notes that UDOT did not raise that argument in its original motion or its reply memorandum, and so the Court was unaware of [UTAH CODE ANN. §78-34-11(2)]. Throughout this case, and especially since remand, UDOT has proceeded with a strategy of 'shifting theories', in which it first raises what it believes to be winning arguments, but neglects to raise additional arguments that it believes have merit. When the initial arguments fail, UDOT then falls back to a different theory. This is another example of that strategy.

The Court finds UDOT's approach of 'shifting theories' is inappropriate, and has wasted valuable resources....

As noted above, UDOT did not cite to Utah Code Ann. §78-34-11(2) until after the Court had issued its ruling. Normally, the Court would be hesitant to consider the issue, since it should have raised it earlier. However, the fact remains little or nothing would be gained by allowing this matter to proceed to trial only to have any potential judgment in favor of Arby's

reversed on appeal.

Id. at pp. 469-470. (Addendum D at pp. 7-8).

14. On or about March 27, 2008, Arby's filed a motion with the trial court asking for leave to file a counterclaim against UDOT for inverse condemnation as a result of the trial court's ruling precluding Arby's from recovering severance damages. Motion for Leave to File Counterclaim, R. at pp. 477-482.

15. Due to the present appeal, the trial court notified the parties it had no jurisdiction to rule upon Arby's Motion for Leave to File Counterclaim. Notice to Parties, R. at pp. 516-517.

SUMMARY OF ARBY'S ARGUMENT

The Utah Supreme Court remanded this case to the district court for a determination of whether UDOT's taking of Arby's property was essential to its project, and if so, the amount of severance damages for Arby's loss of view. The trial court is required to abide strictly with the appellate court's mandate. However, rather than proceeding as directed by this Court, the district court entertained UDOT's post-remand motions, containing never-before-raised legal arguments, and ultimately interpreted UTAH CODE ANN. §78-34-11(2) to allow UDOT to unilaterally modify its pleadings to exclude loss of view as part of UDOT's taking.

Based upon its own interpretation of the legal impact of UTAH CODE ANN. §78-34-11(2), UDOT has manipulated its taking to exclude any taking of appurtenant rights, such as right of view. This attempt to extinguish any claim Arby's has for severance damages is made long after UDOT's project has been constructed, blocking Arby's view to the east. It is also inconsistent with this Court's prior ruling supported by the Utah Constitution and the severance damages statute. UDOT cannot defeat a severance damages claim based upon the construction of a thirty-foot elevated highway merely by adjusting the language of a pleading. The trial court erred in interpreting and applying UTAH CODE ANN. §78-34-11(2) in a manner that excuses UDOT from paying severance damages to Arby's for its loss of view.

The delays caused by UDOT's tactics in making piece-meal arguments justify a departure from the general rule that damages are to be determined as of the date the condemnation complaint is served. The delays in this case require a current date be used to evaluate damages inasmuch as property values have increased since this case was commenced six years ago.

ARGUMENT

POINT 1

THE TRIAL COURT FAILED TO FOLLOW THE UTAH SUPREME COURT'S MANDATE UPON REMAND

A reading of this Court's February 6, 2007 opinion in this matter makes it clear the issue that was remanded to the trial court for an initial determination whether the taking of Arby's property was "essential" to UDOT's project. *Ivers*, 154 P.3d at 808. According to the opinion, whether the taking was essential "is a factual matter yet to be resolved." *Id.* Following remand, Arby's propounded requests for admissions to UDOT. Responding to those requests for admissions, UDOT admitted the partial taking of Arby's property was essential to the subject construction project. Addendum C hereto.

With UDOT's admission, the only issue left for determination was the amount of severance damages for Arby's loss of view. However, instead of scheduling a proceeding to determine damages, the trial court interpreted a never-before-cited statute (UTAH CODE ANN. §78-34-11(2)) to permit UDOT to unilaterally remove from its condemnation complaint any taking of appurtenant rights. With that, the trial court considered appurtenant rights omitted from this case and determined there is no longer any basis for Arby's to seek severance damages under UTAH CODE ANN. §78-34-10 for loss of view. According to the trial court's order, "there are no other matters to be addressed by this

Court, and the case is resolved.” February Ruling, R. at p. 471. (Addendum D at p. 9).

It is well settled that “when a case has been determined by a reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former.” *Street v. Fourth Judicial Dist. Court, Utah*, 191 P.2d 153, 157 (Utah 1948). This mandate is binding on the trial court “and must be strictly followed and carried into effect....” *Id.* The Utah Supreme Court has already held if UDOT’s taking of Arby’s property was “essential” to the subject construction project, it could be awarded compensation for lost view. Upon remand, the trial court should not “permit amended or supplemental pleadings to be framed to try rights already settled.” *Id.* at 158.

The trial court failed to follow its mandate in this matter. Now that UDOT has admitted the taking was essential, the trial court should be instructed to promptly schedule a trial to determine the amount of damages.

POINT 2

SECTION 78-34-11(2) SHOULD NOT BE CONSTRUED TO ALLOW UDOT TO AVOID ITS LIABILITY FOR SEVERANCE DAMAGES

Arby’s was required to go through a lengthy appeal and certiorari review process to protect its constitutional rights and finally establish its right to pursue severance damages for loss of view. However, upon remand, UDOT proceeded with its practice of raising brand new arguments in an effort to avoid paying Arby’s just compensation.

UDOT was successful in convincing the trial court to incorrectly interpret and apply UTAH CODE ANN. §78-34-11(2) to once again deny Arby's its constitutional rights. Although reluctant to permit UDOT to engage in its strategic use of "shifting theories" and piece-meal arguments in this case, the trial court agreed with UDOT's strained interpretation of UTAH CODE ANN. §78-34-11(2). This statute wasn't presented to the trial court until *after* the trial court had already denied its post-remand motion in limine as an untimely motion to amend pleadings. Even then, UDOT provided the trial court with no analysis of how the statute could be legitimately used to trump UTAH CODE ANN. §78-34-10 to avoid paying a severance damages claim. The statute was cited and discussed, without any analysis, in merely four and a half lines of UDOT's request to amend. UDOT's Request to Alter or Amend Order, R. at p. 403.

In evaluating the trial court's application of UTAH CODE ANN. §78-34-11(2), it is important to focus on the actual statutory language. The statute provides:

The Court or the jury shall consider mitigation or reduction of damages in its assessment of compensation and damages if, after the date of summons, [UDOT]:

- (a) mitigates the damages to the property; or
- (b) reduces the amount of property actually taken.

According to the trial court, pursuant to this statute, the condemning authority can modify its taking any time it wants after service of the summons, *without requiring leave*

of court. February Ruling, R. at p. 469. (Addendum D at p. 7).⁷ The trial court equates the right to modify a taking under UTAH CODE ANN. §78-34-11(2) with the right to amend pleadings. By modifying its complaint to remove any taking of loss of view, the trial court considers Arby's claim for severance damages terminated.

It is well settled that when interpreting a statute, the goal is to ascertain the legislature's intent. *Wasatch County v. Okelberry*, 179 P.3d 768, 774 (Utah 2008). The court does this "by first evaluating 'the best evidence' of legislative intent, namely, 'the plain language of the statute itself.'" *Id.* (footnote omitted). Statutory words are given their "plain, natural, ordinary, and commonly understood meaning, in the absence of any statutory or well-established technical meaning, unless it is plain from the statute that a different meaning is intended." *Id.* (footnote omitted). Moreover, "it is axiomatic that a statute should be given a reasonable and sensible construction." *State of Utah v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) (citation omitted).

⁷ UDOT's desire to amend pleadings is based upon its interpretation of prior access deeds executed by Arby's predecessors in interest and involving projects and property other than what is involved in the present dispute. UDOT's never-before-raised theory is that any and all conceivable appurtenant rights have already been relinquished to UDOT through these prior access deeds that had nothing to do with the construction project at issue in the present matter. However, in the February Ruling, the trial court did not rule upon the legal effect of these prior access deeds. It merely agreed with UDOT that, without leave of court, it was free to amend its taking at any time pursuant to UTAH CODE ANN. §78-34-11(2). Order, Addendum F hereto.

Neither UDOT nor the trial court has provided any analysis to show how, under the plain meaning of UTAH CODE ANN. §78-34-11(2), the statute can be used in such a broad manner so as to defeat a severance damages claim, particularly after the damage has already been inflicted upon a property owner.⁸ It is clear the statute's purpose is to assure awards in condemnation cases reflect any mitigation of damages due to a reduction in the amount of property actually condemned or for other reasons. The element of mitigation is not present here. For example, UDOT has not removed the obstruction or done anything to mitigate the impact of the obstruction on Arby's loss of view from its property. Moreover, UDOT has not given back to Arby's any of the property it took. UDOT has already paid Arby's compensation for the parcel that was condemned. Furthermore, this Court has already ruled a property owner has a claim for damages "when the view impaired structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is essential to completion of the project." *Ivers*, 154 P.3d at 808. What remains is Arby's severance damages claim for lost view under UTAH CODE ANN. §78-34-10.⁹

⁸ This argument is metaphysical in nature. The thirty-foot elevated highway exists, regardless of how UDOT wishes to characterize its pleadings.

⁹ Additionally, there is simply nothing in the statute to indicate the legislature intended to override the Utah Rules of Civil Procedure in connection with the timeliness of seeking amendments to pleadings generally. Prior to UDOT's citation to UTAH CODE ANN. §78-

Even if UDOT wants to make a form over substance argument that removing appurtenant rights from its taking forecloses Arby's severance damages claim, it does not magically undo the damage that has been caused to Arby's by virtue of the view-impairing structure built immediately east of Arby's remnant property. Arby's continues to have its severance damages claim for loss of view under UTAH CODE ANN. §78-34-10, even if the condemnation claim is deemed amended. The view has been taken no matter how UDOT wants to word its condemnation complaint or describe its taking. UTAH CODE ANN. §78-34-11(2) should not be allowed to give a condemning authority the ability to sidestep a property owner's constitutional rights by amending its complaint in reaction to what it considers an unfavorable ruling by the appellate court. That is why Arby's sought to add a counterclaim for inverse condemnation after the trial court rejected the severance damages claim.

In short, it has been established through admissions that the property UDOT took from Arby's was essential to the construction project. There is no dispute the U.S. 89 overpass UDOT built damages Arby's by obstructing Arby's view to the east. Therefore, according to the analysis contained in this Court's prior ruling, the trial court should be

34-11(2), the trial court had appropriately determined UDOT's efforts constituted an untimely motion to amend pleadings. October Ruling, R. at p. 394. (Addendum E at p. 9).

reversed and the issue of severance damages should proceed to trial.

POINT 3

THE DATE OF VALUATION SHOULD BE ADJUSTED DUE TO DELAYS IN ARBY'S ABILITY TO OBTAIN COMPENSATION FOR ITS LOST VIEW

Although the trial court apparently felt compelled to apply UTAH CODE ANN. §78-34-11(2) the way it did, the court's ruling expressed concern about UDOT's tactics during the course of this litigation. For example, the court observed that throughout this case,

UDOT has proceeded with a strategy of 'shifting theories,' in which it first raises what it believes to be winning arguments, but neglects to raise additional arguments that it believes has merit. When the initial arguments fail, UDOT then falls back to a different theory.

February Ruling, R. at p. 469. (Addendum D at p. 7).

The trial court then goes on to say that it finds UDOT's "shifting theories" approach "inappropriate" and that it has wasted valuable resources. *Id.*

This action has gone on for six years now with UDOT successfully delaying Arby's ability to be compensated. Even the trial court has recognized UDOT's tactics have been inappropriate. Arby's shouldn't be required to suffer as a result. Based upon this, in addition to reversing the trial court, the Supreme Court should rule that pursuant to the rationale of the plurality in *Utah State Road Comm'n v. Friberg*, 687 P.2d 821 (Utah 1984), the point in time Arby's damages are calculated should be moved to a

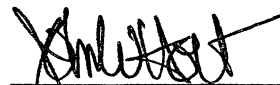
current date, rather than set at the time the complaint was served back in 2002.

CONCLUSION

Based upon the foregoing, the Utah Supreme Court should reverse the trial court's ruling. The case should be remanded for a determination of Arby's damages.

Respectfully submitted this 18th day of July, 2008.

WINDER & COUNSEL, P.C.

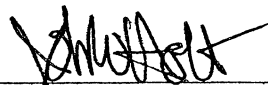


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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 2008, a true and correct copy of the foregoing Appellants' Brief was mailed, postage prepaid, to the following:

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ADDENDUM

“A”

peal complain that the court did not so charge, for under Comp. Laws 1917, § 6803, a party, if desiring more specific instructions than those given, should request them. *Salt Lake & U.R. Co. v. Schramm*, 1920, 56 Utah 53, 189 P. 90. Eminent Domain ⇨ 255

Where there is ample evidence in support of verdict in proceedings to condemn land, Supreme Court cannot review evidence respecting amount allowed by jury. *Ogden, L. & I. Ry. Co. v. Jones*, 1917, 51 Utah 62, 168 P. 548. Eminent Domain ⇨ 262(4)

In proceedings to condemn land, where no demurrer was interposed to complaint, and no objection respecting its sufficiency made either before or during trial, defect that complaint failed to state that attempted condemnation proceedings were authorized as required by statute, being jurisdictional, was not waived. *Town of Tremonton v. Johnston*, 1917, 49 Utah 307, 164 P. 190. Eminent Domain ⇨ 255

In condemnation proceedings, improper elicitation of remote testimony of owner of land on cross-examination held harmless to his substantial rights. *Town of Tremonton v. Johnston*, 1917, 49 Utah 307, 164 P. 190. Eminent Domain ⇨ 262(5)

Refusal to strike out testimony of witness in condemnation proceeding as to elements considered by him in arriving at his estimate of defendant's damages held harmless, where the motion would not have resulted in striking out

the estimate, but merely his reasons, especially in view of the court's instructions. *Telluride Power Co. v. Bruneau*, 1912, 41 Utah 4, 125 P. 399; *Am. Ann. Cas.* 1915A, 1251. Appeal And Error ⇨ 1047(3)

49. New trial

Trial court did not act improperly in ordering new trial in condemnation proceeding unless owner would consent to a remittitur. *Utah State Road Commission v. Johnson*, 1976, 550 P.2d 216. Eminent Domain ⇨ 224

Where landowner was improperly allowed to testify that property was worth \$120,000 to \$125,000 while highest value given by an expert witness was \$92,000, and jury awarded \$95,000, conditioning new trial on owner's consent to remittitur in amount of \$3,000 did not cure the error; rather, new trial was required. *Utah State Road Commission v. Johnson*, 1976, 550 P.2d 216. Eminent Domain ⇨ 224

Where even after reduction the severance damages to grazing land not taken amounted to \$3 per acre more than jury had fixed as value of the better land taken, trial court abused its discretion in not granting the state a new trial since verdict showed that it was given either under influence of passion and prejudice or under a lack of understanding of the law. *U.C.A.* 1953, 78-34-10. *State By and Through Road Commission v. Silliman*, 1968, 22 Utah 2d 33, 448 P.2d 347. Eminent Domain ⇨ 224

§ 78-34-11. Damages—When right deemed to have accrued—Mitigation or reduction—Improvements

(1) For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in Section 78-34-10.

(2) The court or the jury shall consider mitigation or reduction of damages in its assessment of compensation and damages if, after the date of the service of summons, the plaintiff:

- (a) mitigates the damages to the property; or
- (b) reduces the amount of property actually taken.

(3) Improvements put upon the property by the property owner subsequent to the date of service of summons shall not be included in the assessment of compensation or damages.

Laws 1951, c. 58, § 1; Laws 1995, c. 20, § 170, eff. May 1, 1995; Laws 2002, c. 156, § 1, eff. May 6, 2002.

Codifications C. 1943, Supp., § 104-34-11.

ADDENDUM

“B”

Hivers v. Utah Dept. of Transp.
Utah, 2007.

Supreme Court of Utah.
James IVERS; Katherine G. Havas; and P and F
Food Services, Plaintiffs and Petitioners,
v.
UTAH DEPARTMENT OF TRANSPORTATION,
Defendant and Respondent.
No. 20060061.

Feb. 6, 2007.

Background: Department of Transportation (DOT) brought eminent domain action, seeking to acquire portion of restaurant's lot to widen highway. The Second District Court, Farmington Department, Michael G. Allphin, J., denied restaurant's motion for partial summary judgment and granted DOT's motion in limine to preclude admission of evidence concerning severance damages. Restaurant appealed, and the Court of Appeals, 128 P.3d 74, affirmed. Restaurant petitioned for writ of certiorari.

Holdings: The Supreme Court granted the petition, and the Court, Wilkins, Associate C.J., held that, as a matter of first impression:

(1) restaurant did not have a protected property right in visibility of its property from roadway, but
(2) restaurant potentially had claim for severance damages due to loss of view if taken strip was essential to the highway project.

Affirmed in part and remanded.

West Headnotes

[1] Certiorari 73  64(1)

73 Certiorari

73II Proceedings and Determination

73k63 Review

73k64 Scope and Extent in General

73k64(1) k. In General. Most Cited

Cases

On certiorari, the Supreme Court reviews the decision of the court of appeals and not that of the trial court.

[2] Eminent Domain 148



107

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as
Ground for Compensation

148k94 Elements of Compensation for
Injuries to Property Not Taken

148k107 k. Interference with Trade or
Business. Most Cited Cases

Restaurant did not have a protected property right in visibility of its property from roadway, even though part of restaurant's land had been taken by Department of Transportation (DOT), and thus visibility was not compensable for eminent domain purposes; claim was essentially a claim for compensation for lost business profits. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 78-34-10.

[3] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as
Ground for Compensation

148k94 Elements of Compensation for
Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.
Most Cited Cases

Landowners do not have a protected interest in the visibility of their property from an abutting road, even if part of their land has been taken in the process. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 78-34-10.

[4] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.

Most Cited Cases

A property owner has no recognized property right to free and unrestricted visibility of his property by passing traffic, and an impairment of that visibility through a condemnation does not mandate compensation. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 78-34-10.

[5] Easements 141



2

141 Easements

141I Creation, Existence, and Termination

141k2 k. Subject-Matter and Parties in General. Most Cited Cases

An easement of view from one's property is a protectable property right. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 72-6-117(5).

[6] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.

Most Cited Cases

Severance damages are clearly awardable when the state condemns a portion of land and builds a structure directly on that condemned land, impairing the view from, and thereby causing damage to, the non-condemned portion of land. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 72-6-117(5).

[7] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.

Most Cited Cases

When land is condemned as part of a single project—even if the view-impairing structure itself is built on property other than that which was condemned—if the use of the condemned property is essential to the completion of the project as a whole, the property owner is entitled to severance damages for the impaired view; however, if the project could have been completed without taking the severed land, the property owner is not entitled to damage to his view caused by construction that takes place entirely beyond the borders of his land. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 72-6-117(5).

[8] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.

Most Cited Cases

The condemned land is “essential” to the project such that the landowner may recover severance damages for loss of view only if its use is such a critical part of the project that without the taking, the project could not have been completed. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 72-6-117(5).

[9] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.

Most Cited Cases

Restaurant, which had part of its land condemned by Department of Transportation (DOT), potentially had

claim for severance damages due to loss of view if taken strip, which purportedly had a turning lane, curb and gutters, landscaping, and a portion of one lane of the one-way frontage road built on it, was essential to the DOT's highway project. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 72-6-117(5).

[10] Eminent Domain 148



105

148 Eminent Domain

148II Compensation

148II(B) Taking or Injuring Property as Ground for Compensation

148k94 Elements of Compensation for Injuries to Property Not Taken

148k105 k. Obstruction of Light or Air.

Most Cited Cases

Severance damages are appropriate in a condemnation action where a portion of property is condemned by the state and the condemnation of that land "causes" damage to the noncondemned portion of land, which occurs in two situations: (1) when the view-impairing structure is built on the condemned land, or (2) when the view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is essential to completion of the project. West's U.C.A. Const. Art. 1, § 22; West's U.C.A. § 72-6-117(5).

***803** Donald J. Winder, John W. Holt, Salt Lake City, for petitioners.

Mark L. Shurtleff, Att'y Gen., Brent A. Burnett, Randy S. Hunter, Asst. Att'ys Gen., Salt Lake City, for respondent.

On Certiorari to the Utah Court of Appeals

WILKINS, Associate Chief Justice:

¶ 1 The Utah Department of Transportation ("UDOT") condemned a portion of private property for the construction of a frontage road adjacent to U.S. Highway 89 in Farmington, Utah. The construction of the frontage road was part of a larger project to widen and elevate Highway 89. Petitioners James Ivers, Katherine G. Havas, and P & F Food Services (collectively, "Arby's") sought severance damages for loss of view and visibility. The trial

court granted UDOT's motion in limine, precluding Arby's from presenting evidence of severance damages to a jury. Arby's appealed, and the court of appeals affirmed. We granted certiorari to ***804** determine whether article I, section 22 of the Utah Constitution permits claims for compensation and whether Utah Code section 78-34-10 permits presentation of evidence of damages arising from an alleged easement for view or visibility, where the damages to the alleged easement are caused by construction beyond the boundaries of the landowner's property. We conclude that since the raised highway was not built on the condemned land, unless the use of the condemned land was essential to the construction of the raised highway, Arby's is not entitled to damages for loss of view or visibility. We therefore remand for the necessary factual determination.

BACKGROUND

¶ 2 Arby's land is located on the northwest corner of what was the intersection of Shephard Lane and Highway 89 in Farmington, Utah. In order to decrease the number of accidents, UDOT planned to eliminate the intersection by elevating Highway 89 over Shephard Lane. In furtherance of this goal, the State condemned a 0.048-acre portion of Arby's 0.416-acre lot in order to build a one-way frontage road parallel to, and connecting with, the newly widened and elevated highway. UDOT agreed to pay Arby's \$48,250 for the condemned property.^{FN1}

^{FN1} In addition to the \$48,250 compensation originally agreed upon, UDOT later agreed to pay Arby's \$56,250 in additional compensation for damages caused by Arby's inability to comply with local zoning ordinances due to the condemnation and the highway project.

¶ 3 The condemned portion of Arby's property is located on the south and east edges of the property, which abut Shephard Lane and Highway 89 respectively. No portion of the raised highway, its footings, or its foundation was constructed on the condemned land; rather, the condemned land was used for the creation of the frontage road and for improvements to Shephard Lane.

¶ 4 Although Arby's property is adjacent to Highway

89, access to the property has historically been available only by means of Shephard Lane, which had intersected directly with the highway. After the project, Shepard Lane no longer connected directly to Highway 89; rather, the highway is accessed by frontage roads one-half mile north and one-half mile south of Shephard Lane. The elevation of the highway has obstructed both the view to the east from Arby's land and the visibility of Arby's property from the highway.

¶ 5 Arby's sought severance damages, claiming that the condemnation, and the pursuant loss of view and visibility, diminished the market value of their remaining land.^{FN2} UDOT filed a motion in limine. The trial court granted the motion, concluding that Arby's was precluded from introducing evidence of damages because the loss of view and visibility arose from construction on property not actually taken from them.

FN2. Arby's also sought damages for loss of reasonable access to and from its property. However, we did not grant review of that issue.

¶ 6 Arby's appealed the trial court's decision to the court of appeals. The court of appeals affirmed, holding that because the loss of view and visibility was not caused by the severance or by the construction of an improvement on the land severed, Arby's was not entitled to severance damages. We then granted Arby's petition for a writ of certiorari.

ANALYSIS

[1] ¶ 7 On certiorari, we review the decision of the court of appeals and not that of the trial court. *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699. Because the issue before this court is a question of law related to constitutional and statutory interpretation, we review the court of appeals' ruling for correctness. *Longley v. Leucadia Fin. Corp.*, 2000 UT 69, ¶ 13, 9 P.3d 762. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(a).

¶ 8 Article I, section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Utah Code section 78-34-10 gives a landowner the right to present certain evidence of damages,

including severance damages, to a jury for a determination *805 of compensation. Section 78-34-10 provides in part the following:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

....

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff

....

Utah Code Ann. § 78-34-10 (2002).

¶ 9 We have held that loss of view is, in certain situations, an appropriate factor for a jury to consider in awarding severance damages. In *Utah State Road Commission v. Miya*, we held that the "rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street," and that those rights "may not be taken away or impaired without just compensation." 526 P.2d 926, 928-29 (*Utah* 1974). We further concluded that an owner of land abutting a street possesses an "easement of view" that may not be taken without just compensation. *Id.* at 929. On the other hand, we have never decided whether a loss of visibility of property from an abutting road qualifies for severance damages.

¶ 10 The question we are now faced with is when, if ever, an impairment of view or visibility is compensable where the impairment is caused by a structure that is built beyond the borders of the severed land. In answering this question, we will address separately Arby's claims for loss of view from their property and the loss of visibility of their property.

I. LOSS OF VISIBILITY

[2] ¶ 11 We have not previously addressed whether a

landowner has a protectable property interest in the visibility of his land. For a point of reference, we look to other jurisdictions' decisions on the matter. Where government action impairs visibility but there is no physical taking of land, "the virtually unanimous rule provides that there is no freestanding right to be seen, and that the government need not pay compensation for lessened visibility." *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 39 Cal.4th 507, 517-18, 46 Cal.Rptr.3d 742, 139 P.3d 119 (2006). However, when the impairment of visibility is coupled with a partial taking of land, as is the case here, there seems to be little consensus from state to state. While some states recognize an easement of visibility where an obstruction is built on the condemned land,^{FN3} other states have concluded that visibility, by itself, is simply not a compensable property right.^{FN4} On this issue, we can find no generally accepted rule. We next turn to the statutory and case law of our state.

^{FN3.}See *8,960 Square Feet v. Dep't of Transp. & Pub. Facilities*, 806 P.2d 843, 848 (Alaska 1991) (holding that "loss of visibility is compensable in an eminent domain proceeding where the diminished visibility results from changes on the property taken from the landowner, but not where it occurs due to changes on the property of another."). The court of appeals noted that even under this standard, Arby's would not have been entitled to compensation because the obstruction was not built on the condemned land.

^{FN4.}Tracy A. Batemen, Annotation, *Eminent Domain: Compensability of Loss of Visibility of Owner's Property*, 7 A.L.R.5th 113, § 2[a] (1992) ("Where part of an owner's land is taken for the purpose of a public improvement pursuant to the power of eminent domain, and the improvement of or on the land taken results in a loss of visibility to the owner's remaining property, some courts have found this loss of visibility compensable, ... while others have found such loss of visibility not compensable."(citations omitted)).

[3] ¶ 12 Neither the legislature nor this court has recognized a protected property right in visibility of

one's property from the roadway. As a result, the court of appeals concluded that Arby's was not entitled to present evidence of claimed damage to their property caused by a loss of visibility of the property. We agree. In Utah, landowners do not have a protected interest in the visibility of their property from an abutting road, even if part of their land has been taken in the process.

*806[4] ¶ 13 In *Utah State Road Commission v. Miya*, we concluded that the "rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street." 526 P.2d 926, 928 (Utah 1974). We also concluded in *Miya* that "[a] property owner has no property right to a free and unrestricted flow of traffic past his premises, and any impairment or interference with this flow does not entitle the owner to compensation." *Id.* Similarly, a property owner has no recognized property right to free and unrestricted visibility of his property by passing traffic, and an impairment of that visibility does not mandate compensation.

¶ 14 The speculative nature of the damages sought in a claim for loss of visibility further supports this conclusion. As the court of appeals correctly noted, a claim for loss of visibility is essentially a claim for compensation for lost business profits. Article I, section 22 of the Utah Constitution simply does not create a protectable property interest in the mere hope of future sales from passing traffic.^{FN5}

^{FN5.}See *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 878 (Utah 1996) ("[T]o create a protectable property interest, [one] must establish rights more substantial than a unilateral expectation of continued privileges.").

¶ 15 Because property owners have no protectable property interest in visibility, the trial court was correct in granting the motion in limine on this issue, and the court of appeals was correct in affirming.

II. LOSS OF VIEW

[5][6] ¶ 16 Unlike visibility, existing Utah law does recognize an easement of view from one's property as a protectable property right. *Utah Code Ann.* § 72-6-117(5) (2001); *Utah State Rd. Comm'n v. Miya*, 526 P.2d 926, 928-29 (Utah 1974). Severance damages

are clearly awardable when the state condemns a portion of land and builds a structure directly on that condemned land, impairing the view from, and thereby causing damage to, the non-condemned portion of land. In *Utah Department of Transportation v. D'Ambrosio*, we held that severance damages include “those [damages] caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement on that part causes injury to that portion of the parcel not taken.” 743 P.2d 1220, 1222 (Utah 1987) (emphasis in original). Similarly, in *Utah Department of Transportation v. Harvey Real Estate*, we stated, “Section 78-34-10 gives a landowner the right to present evidence of damages caused by the construction of the improvement made on the severed property.” 2002 UT 107, ¶ 10, 57 P.3d 1088.

¶ 17 We have not previously addressed a case, like this, in which the land was condemned as part of a single project to build a structure that would impair the view from the remaining property, but in which that structure was not built on the severed land. In this case, the raised highway, which Arby's claims damages its view, was not built in any part on the condemned portion of Arby's land. Rather, the condemned land was used for the construction of a small portion of the frontage road. The frontage road itself causes no damage to the view from Arby's remaining land. However, according to the trial court's findings, the land was condemned as part of UDOT's plan to raise the highway and was therefore condemned as part of a single project.

¶ 18 Whether severance damages are awardable hinges on whether the severance of the condemned property, and the use of that property, caused damage to the remaining property. Utah Code section 78-34-10(2) describes severance damages as those damages “which will accrue to the portion [of property] not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff” (emphasis added). This section has no express requirement that the view-impairing structure be built directly on the condemned land. Rather, it only requires that the severance damages be caused by the condemnation of, and use of, the property.

¶ 19 The court of appeals recognized this important distinction when it concluded that Arby's was not entitled to severance damages*807 because their “loss of view and visibility was not caused by the severance of its property or the construction of an improvement thereon.” *Utah Dep't of Transp. v. Ivers*, 2005 UT App 519, ¶ 24, 128 P.3d 74 (emphasis added).

¶ 20 In *Miya*, *Harvey Real Estate*, and *D'Ambrosio*, we concluded that when the state condemns a portion of land and builds a view-impairing structure directly on that land, the damage to the remaining property is recoverable. This is because when the condemned land is used for the construction of the view-impairing structure, the damage to the remaining property is clearly caused by the severance. However, these cases should not be read, as the State does, to hold that the only situation in which a partial condemnation can cause awardable severance damages is when the view-impairing structure is built directly on the severed land.

[7][8] ¶ 21 When land is condemned as part of a single project—even if the view-impairing structure itself is built on property other than that which was condemned—if the use of the condemned property is essential to the completion of the project as a whole, the property owner is entitled to severance damages. Logically, if the project could not be built without taking the condemned land, the impairment of view caused by the completion of the project could and would not have arisen “but for” the condemnation. This is the very essence of cause. However, if the project could have been completed without taking the severed land, the property owner is not entitled to damage to his view caused by construction that takes place entirely beyond the borders of his land. Stated another way, the condemned land is “essential” to the project only if its use is such a critical part of the project that without the taking, the project could not have been completed.

¶ 22 Arby's asks us to adopt the standard applied by some other jurisdictions that “where the use of the land taken constitutes an *integral and inseparable* part of a single use ... the effect of the whole improvement is properly to be considered” in awarding severance damages. *Andrews v. Cox*, 129 Conn. 475, 29 A.2d 587, 590 (1942) (emphasis added). We decline to adopt the “integral and

inseparable” language as our standard, choosing instead to expressly limit severance damages to situations where the condemnation and use of the condemned land was essential to the project. We believe this strikes the correct balance between the property owner's rights under constitutional and statutory law and the state's interest in its ability to improve the highway system without being exposed to limitless liability. This approach also best complies with the express language of section 78-34-10.

[9] ¶ 23 In this case, a very narrow piece of land was taken to create a portion of a frontage road. That condemned land appears to have had a turning lane, curb and gutters, landscaping, and perhaps a portion of the second of two lanes of the one-way frontage road built on it. Under our but-for standard, we cannot say that Arby's land was, or was not, essential to the project. This is a factual question as yet left unanswered by the record before us. Consequently, remand to the trial court for that factual determination is necessary.

¶ 24 If the use of Arby's condemned land was not “essential” to the project, they are not entitled to severance damages for loss of view from the property under article I, section 22 of the Utah Constitution or Utah Code section 78-34-10. If it was, appropriate damages may be awarded.

CONCLUSION

¶ 25 The court of appeals correctly concluded that Arby's is not entitled to severance damages for loss of visibility. A property owner does not have a protectable interest in the visibility of his property from an abutting highway. A property owner does, however, have a protectable easement in the view from his property.

[10] ¶ 26 With respect to lost view, severance damages are appropriate under Utah Code section 78-34-10 where a portion of property is condemned by the state and the condemnation of that land *causes* damage to the noncondemned portion of land. Damage to the noncondemned portion of land is “caused” by the severance in two situations: *808 (1) when the view-impairing structure is built on the condemned land, or (2) when the view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a

single project and that use is *essential* to completion of the project. The raised highway, which blocks the view from Arby's land, was not built on Arby's land. However, whether the land taken from Arby's was essential to the highway project is a factual matter not yet resolved. Affirmed in part and remanded for proceedings consistent with this opinion.

¶ 27 Chief Justice DURHAM, Justice DURRANT, Justice PARRISH, and Justice NEHRING concur in Associate Chief Justice WILKINS' opinion.
Utah, 2007.

Ivers v. Utah Dept. of Transp.

154 P.3d 802, 571 Utah Adv. Rep. 3, 2007 UT 19

END OF DOCUMENT

ADDENDUM

“C”

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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

JAMES IVERS; KATHERINE G. HAVAS;
P and F FOOD SERVICES (Tenant); and
ZIONS CREDIT CORPORATION,

Defendants

**PLAINTIFF'S RESPONSE TO
REQUEST FOR ADMISSIONS**

Civil No. 020700665

Judge Michael Allphin

Pursuant to Rule 36, Utah Rules of Civil Procedure, the Plaintiff, Utah Department of Transportation ("UDOT"), by and through counsel of record, hereby responds to Defendants' First Requests for Admissions dated April 16, 2007 as follows:

REQUEST FOR ADMISSIONS

REQUEST NO. 1: Admit that the partial taking of the Arby's property in this action was essential to the completion of subject construction project.

ANSWER TO REQUEST NO. 1: Admits.

REQUEST NO. 2: Admit that the Condemnation Resolution for the condemnation of the Arby's property states that the taking was "for the widening of an expressway State Route 89 . . ."

ANSWER TO REQUEST NO. 2: Admits.

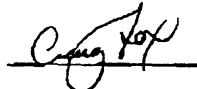
STATE OF UTAH)

COUNTY OF SALT LAKE)

ss

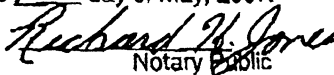
CRAIG FOX after being first duly sworn under oath hereby answers the Plaintiff's Responses to Defendants' First Set of Requests for Production of Documents to Plaintiff.

DATED this 10th day of May, 2007.

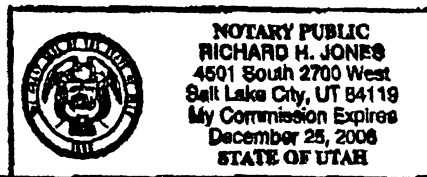


CRAIG FOX
Utah Department of Transportation

Subscribed and sworn to before me this 10th day of May, 2007.


Notary Public

Dated this 10th day of May, 2007.



STEPHEN C. WARD
Assistant Attorney General
As To Objections

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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

JAMES IVERS; KATHERINE G. HAVAS; P
and F FOOD SERVICES (Tenant); and ZIONS
CREDIT CORPORATION,

Defendants.

CERTIFICATE OF SERVICE

Civil No. 020700665

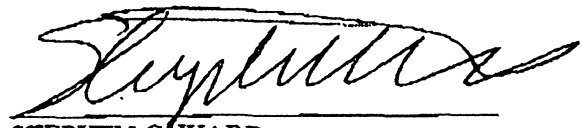
Judge Michael Allphin

I hereby certify that I caused a true a correct copy of PLAINTIFF'S RESPONSES TO
FIRST REQUESTS FOR ADMISSIONS to be mailed first class postage prepaid to:

John W. Holt
WINDER & HASLAM PC
Attorney for James Ivers,
Katherine G. Havas and P & F Food Services
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, UT 84110-2668

DATED this 19 day of May, 2007.

MARK L. SHURTLEFF
Utah Attorney General


STEPHEN C. WARD
Assistant Attorney General

CERTIFICATE OF SERVICE

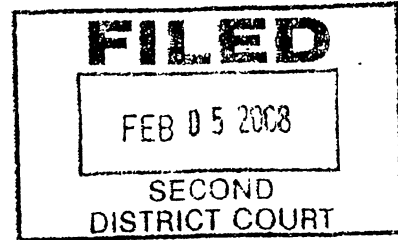
I hereby certify that on this 14th day of May, 2007, I caused a true and correct copy of
the foregoing CERTIFICATE OF SERVICE to be faxed and mailed first class postage prepaid
to:

John W. Holt
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Secretary

ADDENDUM

“D”



IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION (UDOT),	RULING ON UDOT'S MOTION TO ALTER OR AMEND ORDER
Plaintiff,	and
vs.	RULING ON ARBY'S CROSS-MOTION TO REVISE COURT'S RULING ON UDOT'S MOTION IN LIMINE
JAMES IVERS, ET AL (ARBY'S),	Case No. 020700665
Defendants.	Judge Michael G. Allphin

This matter is before the Court on UDOT's Motion to Alter or Amend Order, and Arby's Cross-Motion to Revise Court's Ruling on UDOT's Motion in Limine. The Court has reviewed the moving and responding papers, along with supporting documentation, and for the reasons set forth below, the Court GRANTS UDOT's motion, GRANTS Arby's motion in part, and DENIES Arby's motion in part.

BACKGROUND

This case is before the Court on remand after the Utah Supreme Court determined that the sole issue remaining in this case is whether Arby's owns a right of view. After remand, UDOT filed a motion in limine seeking to preclude Arby's from presenting any evidence that it owns a right of view. In that motion, UDOT claimed for the first time that it had actually obtained Arby's right of view from deeds in 1961 and 1992.

This Court issued a ruling on the motion and denied UDOT's motion in limine on two grounds. First, this Court held that the motion in limine was acting as a motion to amend, because UDOT had sought to condemn all rights appurtenant to this property, and now claims it already owns the right of view. This was a change in the Complaint, and the Court held that the motion to amend was untimely.

The Court also held that the owners of the land could not have foreseen in 1961 that the road would one day become an elevated highway, and that UDOT therefore did not obtain the right of view from the previous owners in 1961. It was unknown whether the owners could have known in 1992 that the road would become an elevated highway, and so the Court allowed the parties to conduct additional discovery on the issue of foreseeability.

UDOT then filed a request to amend or alter the order. UDOT raised four different arguments. First, UDOT claimed that it had not filed a motion to amend. Second, UDOT claimed, again, that Arby's did not own a right of view because Utah Code Ann. § 72-1-102 does not allow a citizen to assert a claim of view.

UDOT's third argument was based on the issue of foreseeability. UDOT noted that the Court had relied on a California case that was distinguishable from this case, and that the Court's reliance was misplaced. UDOT also described a large amount of evidence that it could present at trial to show that the elevation of the highway was foreseeable in 1992, and so even if the Court's reliance on the California case was not misplaced, UDOT argued that Arby's should still be prevented from introducing evidence that it owned a right of view.

UDOT's final argument was that Utah law allowed it to modify its taking at any time, and cited Utah Code Ann. § 78-34-11(2) in support of that argument.

Arby's filed a cross-motion to revise the Court's ruling. Arby's argued that once the Court determined that the motion in limine was an untimely motion to amend, the Court's analysis should have been complete, and the motion in limine was properly denied. Arby's argued that the Court erred in also addressing the issue of foreseeability and in allowing the parties to conduct additional discovery on the issue of foreseeability.

Arby's did not address the statute listed by UDOT that allows UDOT to modify its taking, and thus, to amend its complaint at any time in the proceedings.

On November 30, 2007, Arby's filed a notice to submit on both motions. Arby's noted that UDOT had not filed an opposition to Arby's cross-motion. UDOT did file a reply memorandum on December 4, 2007, after the notice to submit had already been filed. The Court notes that the memorandum was dated on November 29, 2007, which shows that Arby's would not have received it at the time Arby's filed its notice to submit. Arby's then filed another notice to submit on December 4, 2007. One week later, Arby's filed a reply memorandum in support of its cross-motion. In that reply, Arby's noted that UDOT's response was untimely and should not be considered by the Court.¹

ANALYSIS

UDOT and Arby's have addressed five main issues in their memoranda. The first issue, which was raised by UDOT, is that its motion in limine was not a motion to amend. The second issue, again raised by UDOT, is that Utah Code Ann. § 72-1-102(11) states that no property owner owns a right of view over a limited access highway. The third issue is foreseeability. UDOT has argued that the Court's reliance on the *Mehl* case was misplaced, because that case is

¹ The reply memorandum contained no substantive analysis but instead only listed three reasons the Court should deny Arby's motion. The Court will consider Arby's memorandum but because it was so lacking in analysis it is not helpful to the Court in making its decision and so the determination is still based almost entirely on Arby's two memoranda.

distinguishable from the present case and was distinguished by the *Wilson* case. Arby's has argued that the Court should not have addressed the issue of foreseeability because the motion in limine was disposed of when the Court ruled that it was really an untimely motion to amend. The fourth issue, raised by UDOT, is that Utah law allows UDOT to modify its taking at any time, and so UDOT is allowed to seek to condemn a right of view and then change the complaint and no longer to seek to condemn that appurtenant right. Finally, Arby's argued in its reply memorandum that UDOT was not allowed to take more property than it needed for the contemplated public use in 1961 and 1992, and since UDOT did not need to condemn the right of view at those times, the deeds did not convey the right of view.

Each of those issues will be addressed separately below.

I. Motion to Amend

UDOT contends once again that its motion in limine was not a motion to amend. Of course, UDOT stated on page 2 of its original reply memorandum in support of its motion in limine that it was not seeking to amend the pleadings. That argument was considered by the Court when it issued its ruling, and the Court obviously rejected this argument. It is clear that UDOT does not agree with the Court's initial ruling on that issue, but UDOT has provided no additional analysis to show that its motion in limine was not acting as a motion to amend, and the Court declines to amend its initial ruling based on the argument that the motion in limine was not acting as a motion to amend.

II. Utah Code Ann. § 72-1-102(11)

Once again, UDOT argues that Utah Code Ann. § 72-1-102(11) states that a property owner has no claim to a right of view. That argument is incorrect, because UDOT has consistently misread the language of the statute. The statute reads as follows: "'Limited-access facility' means a highway especially designated for through traffic, and over, from, or to which

neither owners nor occupants of abutting lands nor other persons have any right or easement, or have only a limited right or easement of access, light, air, or view.” Contrary to UDOT’s interpretation, the statute specifically states that landowners have a “limited right or easement of access, light, air, or *view*.” (emphasis added).

It is not clear why UDOT continues to raise this argument, even though it was raised on appeal and the Utah Supreme Court apparently discounted the argument as well. The Utah Supreme Court cited Utah Code Ann. § 72-6-117 to show that Utah law does grant an easement of view. This Court notes that Utah Code Ann. § 72-6-117 specifically states that a highway authority has the authority to purchase or condemn the right of view. *See* Utah Code Ann. § 72-6-117(5). It is unknown why the legislature would grant the authority to purchase the right of view if, as UDOT argues, the landowner has no right of view. It is also unknown why the Utah Supreme Court would have remanded this case to determine damages for the right of view if Arby’s had no right of view over the limited-access highway.

The Court concludes that UDOT’s second argument is without merit.

III. Foreseeability

UDOT has argued that the Court’s reliance on *Mehl v. Department of Public Works* is misplaced, because that case was distinguished by the case of *People ex rel. Dept. of Trans. v. Wilson*. UDOT’s argument is correct.

In *Wilson*, the California Court of Appeals noted that in *Mehl*, the landowner expressly waived any claims for damages, but did not relinquish his abutter’s rights, and so the court held that the issue was whether the damages were foreseeable. 25 Cal. App. 4th 977, 981-82 (1994). However, the landowner in *Wilson* had relinquished his abutter’s rights, and so the Court of Appeals ruled that foreseeability was not a basis for awarding or denying severance damages when the landowners has relinquished abutter’s rights, and that *Mehl* was distinguishable. *Id.*

This case is factually similar to the case of *Wilson*. In this case, the landowner relinquished his abutter's rights when he signed the deeds. Thus, the analysis of *Wilson*, rather than *Mehl*, should apply, and foreseeability is not an issue in this case.

The Court's reliance on *Mehl* was based on a failure by the Court to recognize that *Mehl* had been distinguished by *Wilson*. This mistake was first noted by UDOT in its motion to amend or alter the order. The Court notes that it would have been much more helpful to the Court if UDOT had made its argument during the initial litigation of the issue. Arby's first cited to the case of *Mehl* in its memorandum in opposition to UDOT's motion in limine. Although UDOT had cited to *Wilson* in its original memorandum in support of the motion in limine, and therefore was obviously familiar with the case, UDOT failed to notify the Court in its reply memorandum that *Mehl* had been distinguished by *Wilson*.

However, Arby's also failed to notify the Court of that fact. The Court recognizes its error, but encourages both counsel to aid the Court in future proceedings by ensuring that all cited case law supports their arguments and is still good law.

Arby's has also argued, in its cross-motion, that the Court erred when it addressed the issue of foreseeability in the initial ruling. Arby's argument is correct, because in retrospect, the Court should not have included the issue of foreseeability in the ruling (even though it was Arby's that raised that issue, but apparently only as a fall-back defense in the event the Court did not find that the motion to limine was an untimely motion to amend). Once the Court ruled that the motion in limine was in reality acting as a motion to amend, the issue was properly disposed of, and the Court should not have engaged in the foreseeability analysis.

Thus, the Court finds that it should not have addressed the issue of foreseeability in the initial ruling, and that its reliance on *Mehl* was misplaced. Therefore, the Court GRANTS Arby's cross-motion, in part.

As noted above, the Court based its initial ruling on two factors: the motion to amend and the issue of foreseeability. Because the foreseeability issue is resolved, the only issue remaining in this case is the dispositive issue for the purposes of this ruling: did UDOT have the authority to modify its take and thereby amend its complaint? That issue is addressed in section IV, below.

IV. UDOT's Ability to Modify its Taking

UDOT has argued that Utah Code Ann. § 78-34-11(2) gives it the authority to modify its taking at any time after service of summons and before the jury assessment of compensation and damages. UDOT's argument is correct. It appears that the legislature has given UDOT the authority to change its taking at any time during the litigation, and thereby allowed UDOT to amend its complaint at any time, without requiring that UDOT obtain leave of the Court.

The Court notes that UDOT did not raise that argument in its original motion or its reply memorandum, and so the Court was unaware of that statute. Throughout this case, and especially since remand, UDOT has proceeded with a strategy of "shifting theories," in which it first raises what it believes to be winning arguments, but neglects to raise additional arguments that it believes have merit. When the initial arguments fail, UDOT then falls back to a different theory. This is another example of that strategy.

The Court finds that UDOT's approach of "shifting theories" is inappropriate, and has wasted valuable resources. As noted in its earlier ruling, this Court finds that UDOT could have saved much time and money for both parties if it had simply discovered the deeds at the beginning of this litigation, rather than waiting until the matter had proceeded through this Court, the Court of Appeals, and the Utah Supreme Court. However, Arby's also had the opportunity to discover those deeds.

As noted above, UDOT did not cite to Utah Code Ann. § 78-34-11(2) until after the Court had issued its ruling. Normally, the Court would be hesitant to consider the issue, since it

should have been raised earlier. However, the fact remains that this statute does allow UDOT to amend its taking, and little or nothing would be gained by allowing this matter to proceed to trial only to have any potential judgment in favor of Arby's reversed on appeal.

Because this statute allows UDOT to amend its taking, it naturally follows that UDOT can amend the complaint at any time, and so the Court's denial of the motion in limine was improper. Because UDOT has that authority, it can now assert that it is not seeking to condemn the right of view, and can introduce the deeds to show that Arby's does not own a right of view, and Arby's should be precluded from submitting any evidence that it owns a right of view.

In conclusion, because UDOT has the authority to modify its taking, it also had the authority to no longer seek to obtain the right of view. The Court's initial ruling was incorrect, and the Court GRANTS UDOT's motion to amend or alter the order. UDOT's original motion in limine is also GRANTED, and Arby's is precluded from presenting evidence that it owns a right of view for the remaining parcel.

V. UDOT's Need to Take the Right of View

In its reply memorandum, Arby's argued that a condemning authority cannot take an interest greater than that necessary for the contemplated use. Arby's then argued that it would have been unnecessary for UDOT to obtain the right of view in 1961 or 1992, because UDOT was not building an elevated highway at those times.

However, this argument essentially returns to the issue of foreseeability, because it is unknown whether UDOT knew in 1992 that it would need to condemn the right of view because UDOT planned to build an elevated highway in the future. As noted above, the issue of foreseeability is not applicable to this case, because the landowner expressly relinquished his abutter's rights when he gave the deeds to UDOT.

CONCLUSION

The Court's reliance on *Mehl* on the issue of foreseeability was misplaced, and in any case, the Court should not have addressed the issue of foreseeability in its initial ruling. Arby's cross-motion is therefore GRANTED, in part.

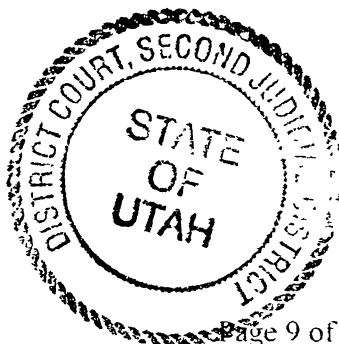
UDOT's argument that it may modify its taking at any time during the litigation is correct, and the Court therefore GRANTS UDOT's motion to amend or alter the order, and GRANTS UDOT's motion in limine. The Court rules that Arby's is precluded from presenting evidence that it owns a right of view for the remaining parcel.


Arby's requested that the Court sustain its initial ruling on all aspects except for the issue of foreseeability. Because the Court's initial ruling on the issue of the motion to amend was incorrect, the portion of Arby's motion in which it requested that the Court uphold its earlier ruling must be DENIED.

When the Utah Supreme Court remanded this case back to this Court, the Utah Supreme Court limited the issues to be addressed on remand. Specifically, the issue to be addressed on remand was whether the taking of Arby's land was essential to the project, and that issue was directly related to the issue of right of view. Given this Court's ruling that Arby's may not present evidence that it owns a right of view, there are no other matters to be addressed by this Court, and the case is resolved.

The Court instructs UDOT to prepare an order reflecting this ruling.

Date signed: 2-5-08




DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing **RULING ON UDOT'S
MOTION TO ALTER OR AMEND ORDER and RULING ON RULING ON ARBY'S
CROSS-MOTION TO REVISE COURT'S RULING ON UDOT'S MOTION IN LIMINE**

postage pre-paid, to the following on this date: 2/5/08.

Donald J. Winder
Winder and Counsel, P.C.
175 West 200 South
Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110

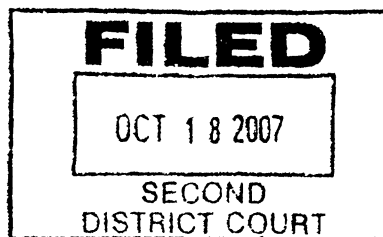
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Jean C. Nelson

ADDENDUM

“E”

COPY



IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION (UDOT),

Plaintiff,

vs.

JAMES IVERS, ET AL,

Defendants.

**RULING ON UDOT'S MOTION IN
LIMINE TO PRECLUDE TESTIMONY
THAT DEFENDANT OWNS A RIGHT
OF VIEW**

Case No. 020700665

Judge Michael G. Allphin

This matter is before the Court on UDOT'S Motion in Limine to Preclude Testimony that Defendant Owns a Right of View. The Court has reviewed the moving and responding papers, along with supporting documentation, and for the reasons set forth below, the Court DENIES the motion.

BACKGROUND

This case began in December 2002, when UDOT sought to condemn a portion of the defendants'¹ land and rights appurtenant to the remaining property. UDOT appraised the value of the property and rights appurtenant at \$48,250 and this amount was disputed by Arby's. The parties stipulated to immediate occupancy, UDOT paid Arby's \$48,250, and Arby's retained their right to contest the appraisal and to seek severance damages.

¹The defendants will be referred to in this ruling as "Arby's".

UDOT then filed a motion in limine, seeking a ruling by this Court on the issue of severance damages, and Arby's filed a motion for partial summary judgment on that same issue. Two of the issues surrounding the determination of severance damages were the loss of visibility and the loss of view suffered by Arby's. This Court issued a ruling on May 30, 2003. The Court found that Arby's was not entitled to severance damages for its loss of access. The Court also found that the loss of view in this case was caused not by something built on Arby's land, but rather by the elevated highway, and that Arby's could not seek damages for its loss of view caused by something built on other property. Using this same analysis, the Court also held that Arby's could not be compensated for loss of visibility caused by the highway. The Court did find that Arby's should be compensated for devaluation of its property. This devaluation had occurred because the condemnation had caused the remaining property to no longer comply with zoning requirements.

Arby's appealed the Court's ruling, but the Utah Court of Appeals initially dismissed the appeal. On February 17, 2005, the parties entered a stipulated judgment, in which UDOT agreed to pay Arby's \$104,500, of which \$48,250 had previously been paid. The remaining balance was \$56,250. Arby's expressly reserved its right to appeal the issues raised in the Court's ruling from May 2003, and subsequently filed another appeal.

The Court of Appeals affirmed this Court's ruling. The Utah Supreme Court granted certiorari to determine whether severance damages should be awarded for a loss of view or visibility when that loss is caused "by construction beyond the boundaries of the landowner's property." *Ivers v. UDOT*, 154 P.3d 802, 803-04 (Utah 2007). The Court held that severance damages should not be granted for loss of visibility, because no such property right exists. The Court then noted that in this case, the condemned land was used for the construction of a frontage

road, and that the loss of view was caused by the elevation of the highway. However, the land was condemned as part of a single project. The Court noted that this was an issue of first impression, and chose to apply a “but for” standard to determine whether severance damages are appropriate in this case. If the loss of view caused by the elevation of the highway could not have occurred but for the expansion of the frontage road, then the taking was part of one project and severance damages could be awarded.

The Supreme Court found that it could not determine whether Arby’s land was or was not essential to the project, and remanded the case back to this Court for the purpose of determining whether the condemned land was essential to the highway project, and if so, to determine severance damages. *See Ivers v. UDOT*, 154 P.3d 802, 807 (Utah 2007).

The parties then began preparing for trial. On May 2, 2007, more than four years after the commencement of this litigation, UDOT filed a motion in limine to preclude testimony that Arby’s owned a right of view. In that motion, UDOT stated that a state right of way had been purchased from the owner of what is now Arby’s property in 1961. As part of that purchase, Ivers’ predecessor in interest signed a deed which conveyed to the State all rights appurtenant to the remaining parcel. The State also purchased another right of way from the owner of the property in 1992, and the deed signed as part of that purchase also conveyed all rights appurtenant to the remaining property.

UDOT argued that because all rights appurtenant to the remaining parcel had already been purchased by the State, Arby’s has no present claim for damages based on its loss of view caused by the elevation of the highway. Arby’s had obtained this property through a deed that specifically stated that the transfer was subject to all rights of record, and Arby’s therefore could not have obtained the right to view for the property because that right had already been transferred to the State.

Arby's then filed a motion in opposition, arguing that the motion should be denied on the following grounds. First, UDOT should not be allowed to raise this issue on remand, after the issues have been narrowed. Second, UDOT's new theory is inconsistent with its complaint and condemnation resolution. Third, Arby's argues that the Utah Supreme Court had recognized that it had a right of view in the property, and that the right of way contracts used to purchase the land and appurtenant rights in 1961 and 1992 demonstrate that the transfer was designed to convey access rights, and did not contemplate the sale of appurtenant rights such as the right to view. Thus, Arby's predecessor in interest was not paid for its loss of view to the remaining property in 1961. Finally, UDOT relies on deeds that conveyed rights appurtenant specifically to allow the State to build an expressway, not an elevated road that obstructs Arby's view to a much greater extent than a normal expressway. Thus, the later construction of an elevated road that obstructs Arby's view was never contemplated by the parties when the 1961 and 1992 deeds were signed, and was not foreseeable.

UDOT responded by noting that no Utah case law prevented UDOT from filing a motion in limine after remand. UDOT noted that it was not seeking to amend its pleadings. UDOT also argued that UDOT's attempt to condemn appurtenant rights that did not really belong to Arby's did not create a new property interest in those rights for Arby's. UDOT concluded by stating that Arby's had simply misunderstood the Utah Supreme Court's ruling, that the Court had never recognized that Arby's had a right of view, and that Arby's foreseeability argument was convoluted and disingenuous.

The parties appeared at a hearing before this Court on August 13, 2007. At that hearing, UDOT initially explained that it had not presented these deeds at an earlier time because it already had a "winning theory" and is now simply seeking to present a second winning theory. After additional questioning by the Court, UDOT noted that the deeds were discovered after a

change of counsel, when Mr. Randy Hunter caused a search for the deeds to be conducted. Apparently, no search had been conducted prior to that time, by either party. UDOT stated that it was prepared to stipulate that the taking was essential to the project. Both parties noted that it was their understanding that this Court was to first decide whether the taking was critical to the project, and that the Court should then conduct a trial on the issue of severance damages.

ANALYSIS

As noted above, the Utah Supreme Court remanded this case to this Court to determine whether the taking of Arby's property was essential to the project, and if so, to determine severance damages for the loss of right to view. At the hearing on August 13, 2007, UDOT specifically stated that it was "prepared to concede that it was necessary in looking at the project in its entirety," and that UDOT did not think it was necessary to hold a hearing to determine whether the taking was essential to the project. Therefore, the first issue on remand has been resolved in favor of Arby's.

The second issue, the determination of severance damages, is not so easily resolved, because UDOT's motion in limine is directly relevant to that issue. The Court first notes that this is a very difficult case. The Court has found no Utah case law that addresses a similar situation, in which a party used one theory for over four years, and suddenly discovered new evidence that essentially rendered much of the lengthy litigation moot. It is very unfortunate that UDOT did not present evidence of these deeds at an earlier time in this litigation. A more timely discovery of these deeds would doubtless have saved numerous hours of work and extensive legal fees. The Court also notes, however, that Arby's also could have discovered these deeds, and UDOT is therefore not entirely to blame for this waste of time and resources.

Arby's has presented four arguments to support its request that a trial be held on severance damages and that Arby's should not be foreclosed from presenting evidence that it

owns a right of view. The first argument is that UDOT should not be allowed to expand the issues on remand. Second, UDOT sought to condemn these rights, including the right of view, in its complaint and condemnation resolution, and therefore waived its right to argue that it already owns the right of view. Third, the Utah Supreme Court recognized Arby's right of view, and the deeds do not show that the landowners were compensated for the loss of their right of view. Finally, Arby's argues that the deeds were designed to convey rights of access, and the boilerplate language used concerning appurtenant rights applied only to the construction of an expressway, not an elevated highway, and it was not foreseeable that the right of view would ever be limited by an elevated highway. The first two arguments will be addressed together, and the Court will then address the third and fourth arguments together.

I. Expansion of Issues After Remand and Waiver of Claim Based on Language used in Complaint and Condemnation Resolution

As noted by both parties at the August 13 hearing, the issue of damages must be resolved by this Court on remand. Arby's argues that UDOT's motion in limine expands the issues on remand. However, the motion in limine is directly related to the issue of damages, because if there is no right to view, there can be no additional severance damages. Therefore, the motion in limine does not improperly expand the issues beyond those which the Supreme Court remanded back to this Court for decision.

The second argument raised by Arby's is that UDOT waived any argument that Arby's does not own a right of view because UDOT sought to condemn that very right in its complaint/condemnation resolution. As noted by UDOT in its reply memorandum, an attempt by the State to condemn rights that do not belong to the landowner does not create those rights anew for the landowner. The mention of such rights in UDOT's condemnation resolution "does not, as [Arby's] claims, show that no such rights were acquired [from Arby's predecessors in

interest]. . . *See Morton v. State*, 181 A.2d 831, 836 (N.H. 1962).

However, it is possible, as Arby's argues, that this motion in limine, and UDOT's change of theories, constitutes an amendment of the pleadings. UDOT has clearly stated that it is not seeking to amend its complaint, but that statement does not automatically mean that UDOT's motion in limine does not have the same effect as a motion to amend. An amendment of pleadings after remand is appropriate so long as the amendment does not cover issues that have been foreclosed by the appellate court. *Call v. City of West Jordan*, 727 P.2d 180, 181 (Utah 1986). As noted above, the motion in limine directly relates to the issue of severance damages, and that issue was not foreclosed by the Supreme Court. Therefore, if UDOT is seeking to amend its pleadings, such an amendment is appropriate so long as UDOT meets the requirements of Rule 15 of the Utah Rules of Civil Procedure.

Before conducting the Rule 15 test for amendment of pleadings, however, the Court must first determine what UDOT alleged in its complaint and whether an amendment is even needed in this case. In the complaint, UDOT specifically sought to acquire "all property and property rights of the Defendants as described and set forth in [the Condemnation Resolution]. *See* Complaint, ¶ 4. Those rights were not specifically listed in the Condemnation Resolution. Instead, UDOT included a description of the parcel of land, followed by the following language: "the Owners of said entire tract of property hereby release and relinquish to said Utah Department of Transportation any and all rights appurtenant to the remaining property of said Owners by reason of the location thereof with reference to said highway . . ."

The use of the phrase "any and all rights appurtenant" in this case appears to be intentionally vague and is simply a catch-all phrase designed to include all rights without going to the trouble of actually listing what UDOT is seeking to condemn.² However, all that is

² UDOT used similar language in the 1961 deed, the 1992 deed, and the Condemnation Resolution.

required in a complaint is that it must “give ‘fair notice of the nature and basis of the claim asserted and a general indication of the type of litigation involved.’” *Gill v. Timm*, 720 P.2d 1352, 1353 (Utah 1986) (quoting *Blackham v. Snelgrove*, 280 P.2d 453, 455 (Utah 1955)).

In this case, the language used by UDOT in the condemnation resolution is interpreted by this Court as an attempt by UDOT to condemn all of the rights appurtenant to the remaining parcel. Rights appurtenant include rights of access, light, air, and view. *See Utah State Road Commission v. Miya*, 526 P.2d 926, 928-29 (Utah 1974). It is also clear from the actions of both parties that UDOT was seeking to condemn the right of view, as well as the other rights appurtenant to the remaining property. UDOT litigated that issue for over four years, and it is doubtful that UDOT would have continued to litigate the issue if it had not sought in its complaint to condemn all of those rights, including the right of view. UDOT now presents a new claim, and UDOT’s motion in limine is therefore acting as a motion to amend the complaint.

A similar situation occurred in *Call v. City of West Jordan*, 727 P.2d 180 (Utah 1986). In that case, the Utah Supreme Court upheld the constitutionality of an ordinance, and remanded to give the plaintiffs an opportunity to show that the requirement placed on them by the ordinance had no reasonable relationship to the purpose of the ordinance. *Id.* at 181. The trial court then allowed the plaintiffs to amend their complaint to include a claim that the ordinance was invalid because West Jordan had not followed the proper procedures in enacting that ordinance. *Id.* On appeal, the Supreme Court held that the pleadings could be amended after remand if the issue had not been foreclosed by the appellate court. *Id.* It appears that such an amendment would be subject to Rule 15(a) of the Utah Rules of Civil Procedure, and UDOT must show that it meets the requirements set forth under that rule before the Court may grant UDOT’s motion.

Under Rule 15(a) of the Utah Rules of Civil Procedure, a “party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . .” or “by leave of

court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” The court must consider at least three factors when determining whether a motion to amend should be granted. These factors are: (A) timeliness of the motion; (B) justification for the delay; and (C) resulting prejudice to the opposing party. *Kelly v. Hard Money Funding, Inc.*, 87 P.3d 734, 742 (Utah 2004). However, the court may also consider additional factors. *Id.* at 745.

A. Timeliness

There is no bright line rule for timeliness of motions to amend. *See id.* at 742. In this case, the motion in limine, acting as a motion to amend the complaint, was filed on May 2, 2007, more than fifty-two months after the original complaint was filed on December 20, 2002.

Motions are typically untimely when they are filed very late into the litigation process. *Id.* In *Hill v. State Farm Mutual Auto Insurance Co.*, the Utah Court of Appeals upheld the trial court’s denial of a motion to amend when the motion to amend was filed after a motion for summary judgment, an appeal to the Utah Supreme Court, and a second motion for summary judgment. 920 P.2d 142, 149 (Utah Ct. App. 1992).

Regardless of how far into the litigation process the motion to amend is filed, courts have also found motions to amend to be untimely when those motions were filed several years into the litigation. *Kelly*, 87 P.3d at 742-43. In *Hill*, cited above, the motion to amend was denied when the motion was filed six years after the suit was filed. *Kelly*, 87 P.3d at 743 (citing *Hill*, 920 P.2d at 149).

In this case, the motion in limine, acting as a motion to amend, is filed both well into the litigation process and several years into the litigation. This Court finds that this motion in limine, acting as a motion to amend, is untimely.

B. Justification for the Delay

The justification prong has typically been evaluated based on whether the moving party

had prior knowledge of the events or claims it seeks to include in the amended motion, but the presence or absence of bad faith and/or dilatory motive should also be considered by the court to determine whether the delay was justified. *Kelly*, 87 P.3d at 744-45. In *Kelly*, the court also noted that “unreasonable neglect in terms of pleading preparation” might also lead to a finding that the delay was not justified and the motion should be denied. *Id.* at 745.

In this case, it is clear that UDOT did not know of the 1961 and 1992 deeds at the time it filed its complaint. It is possible that UDOT’s failure to discover these deeds while preparing its pleadings was unreasonable neglect, but the Court notes that Arby’s also failed to discover these deeds. It is unclear whether UDOT has presented sufficient justification for its delay in amending its complaint.

C. Prejudice

The third prong of the Rule 15(a) analysis is whether the nonmoving party would face “unavoidable prejudice” because he/she would be forced to litigate an issue for which he/she has not had time to prepare. *Id.* at 743. The fact that the nonmoving party might have to conduct additional discovery is insufficient to show that the trial court should deny the motion to amend. *Id.*

In this case, UDOT presented the issue months before any scheduled trial date. Arby’s has not faced “unavoidable prejudice”.

D. Conclusion

Arby’s will not face unavoidable prejudice if UDOT is allowed to amend its complaint. It is also not clear that UDOT’s delay in amending its complaint was unjustified. However, it is clear that the motion in limine, acting as a motion to amend, was filed well into the litigation process, and more than four years after the original complaint was filed. Although the court should use a multi-factored approach in ruling on a motion to amend, “a court’s ruling on a

motion to amend can be predicated on only one or two of the particular factors.” *Id.* at 746 (internal citations omitted). Because the motion in limine, acting as a motion to amend, was untimely, this Court denies the motion.

II. Payment for Appurtenant Rights and Foreseeability

Arby’s also argues that there is no indication that Arby’s predecessor in interest was paid for the sale of appurtenant rights, and that when the 1961 and 1992 deeds were granted to the State, it was not foreseeable that the highway would one day become elevated and infringe even more dramatically on the landowner’s right of view.

It is true that the deeds and contracts show no separate payment or other consideration for the transfer of appurtenant rights. However, it is clear from the language of the two deeds that Arby’s predecessors in interest intended to convey those appurtenant rights. “[T]he main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor, from the language used.” *Hartman v. Potter, et al.*, 596 P.2d 653, 656 (Utah 1979) (emphasis in original). If a deed’s language is plain and unambiguous, “parol evidence is not admissible to vary its terms . . .” and “the intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous.” *Id.*

Just as this Court finds that the language used in the Condemnation Resolution meant that UDOT sought to condemn all of the rights appurtenant to the parcel, the language used in the 1961 and 1992 deeds, which is almost identical to the language used in the Condemnation Resolution, meant that the grantor intended to convey “any and all rights or easements appurtenant to the remaining property of said Owners. . .” The language used was not ambiguous, and the intentions of the parties is therefore not open to interpretation. Arby’s predecessors in interest intended to convey the appurtenant rights of the remaining parcel.

However, Arby’s might be correct in claiming that when the grantors signed the deeds, it

was not foreseeable that the at-grade highway would one day become an elevated highway. In *Mehl v. Department of Public Works*, the Supreme Court of California held that “[w]henver an owner of land has consented by deed to the taking of his property for public use, it is assumed he has been compensated for all *reasonably foreseeable damages* to the property that could result from the taking and public use.” 532 P.2d 489, 492 (Cal. 1975) (emphasis added) (internal citation omitted). However, if the damage was not foreseeable, as was the case in *Mehl*, the landowner may be paid damages for the unforeseeable harm. *Id.* at 492-93.

It is impossible for this Court to determine whether the damage to the landowner’s right of view was foreseeable. It is likely that such an elevated highway was not foreseeable in 1961, more than forty years before this condemnation action, but it is possible that the grantor had knowledge of a future elevated highway in 1992. The Court therefore declines to rule that the damage was foreseeable, but also declines to rule that it was not foreseeable. The parties are free to conduct additional discovery as to this issue and present additional evidence at trial.

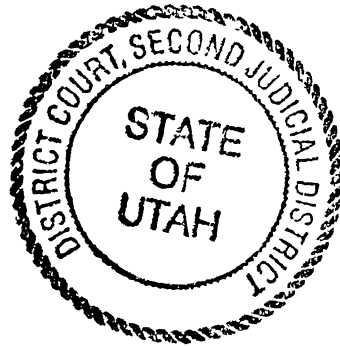
CONCLUSION

UDOT originally sought to condemn “any and all rights appurtenant” to Arby’s remaining property. It is clear to this Court that this language included the right of view. UDOT’s subsequent actions in this litigation also demonstrate that UDOT was seeking to condemn Arby’s right of view. UDOT’s motion in limine to preclude testimony that Arby’s owns a right of view is therefore acting as a motion to amend the complaint. Because this motion was filed more than four years into the litigation, and after a lengthy appeals process, the Court denies the motion and Arby’s is not precluded from presenting evidence that it owns a right of view.

The language of the deeds is plain and unambiguous, and the Court finds that Arby’s predecessors in interest intended to convey all rights appurtenant to the remaining property when they signed deeds in 1961 and 1992. The damage to the right of view was likely not foreseeable

in 1961, but it is possible that the grantor in 1992 knew of the possibility that the highway would one day become an elevated highway. The Court therefore finds that both parties may conduct additional discovery on that issue and may present evidence of foreseeability or lack of foreseeability at trial.

Date signed: 10-18-07.



Michael G. Allphin
DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing **RULING ON UDOT'S
MOTION IN LIMINE TO PRECLUDE TESTIMONY THAT DEFENDANT OWNS A
RIGHT OF VIEW** postage pre-paid, to the following on this date: Oct. 18, 2007.

Donald J. Winder
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Randy Hunter
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A handwritten signature in cursive script, reading "Jan C. Nelson", is written over a horizontal line.

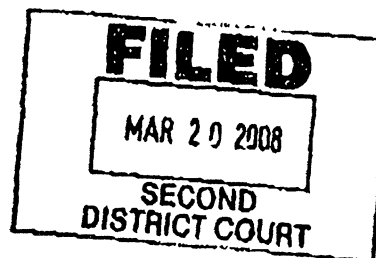
ADDENDUM

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Attorneys for Plaintiff Utah Department of Transportation

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

JAMES IVERS; KATHERINE G. HAVAS;
P and F FOOD SERVICES (Tenant); and
ZIONS CREDIT CORPORATION,

Defendants.

ORDER

Civil No. 020700665

Judge Michael Allphin

This matter came before the Court on the Plaintiff's Motion to Alter or Amend the Court's prior Order and the cross-motion of the Defendants to revise the Court's prior ruling on the Plaintiff's Motion in Limine.

Order



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pages:

020700665 IVERS,JAMES

The Court grants the Plaintiff's motion and also grants a portion of the Defendant's motion but also denies the Defendant's motion in part.

The parties in their respective motions and supporting memoranda addressed multiple issues. A full discussion of these issues is contained in the Court's Ruling of February 5, 2008. That Ruling is incorporated into this order. Based on the reasons contained in that Ruling, the Court now orders that UDOT has a right to modify its taking to remove appurtenant rights and therefore orders that the Court's previous order is altered in that UDOT can now modify its current taking to exclude rights appurtenant.

UDOT's original Motion in Limine is granted, and Arby's is hereby precluded from presenting evidence that it owns a compensable right of view from the remaining parcel.

UDOT's argument that it may modify its taking at any time during the litigation is correct, and the Court therefore GRANTS UDOT's motion to amend or alter the order, and grants UDOT's Motion in Limine, treating it as having the effect of a motion to modify. The Court orders that Arby's is precluded from presenting evidence that it owns a right of view from the remaining parcel.

The Court's reliance on *Mehl* on the issue of foreseeability was misplaced. Arby's cross-motion is therefore GRANTED, in part.

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Arby's requested that the Court sustain its initial ruling on all aspects except for the issue of foreseeability. Because the Court's initial ruling on the issue of the motion to amend was incorrect, the portion of Arby's motion in which it requested that the Court uphold its earlier ruling must be DENIED.

Given this Court's ruling, the Court orders that Arby's may not present evidence that it owns a right of view, there are no other matters to be addressed by this Court, and the case is resolved.

DATED this 20th day of March, 2008.

BY THE COURT:



MICHAEL ALLPHIN
District Court Judge

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **ORDER** was mailed, postage prepaid, this 5th day of March, 2008, to:

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Secretary