

2003

Kay H. Traveller Investments, L.L.C., a Utah Limited Liability Company v. Questar Gas Company, a Utah Corporation: Reply Brief

Utah Court of Appeals

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V. Lowry Snow, J. Gregory Hardman; Snow, Jensen and Reece; attorneys for plaintiff/appellant. Russell S. Mitchell; Jones, Waldo, Holbrook and McDonough, P.C.; C. Scott Brown, Jenniffer N. Byde; Questar Regulated Services Company; attorneys for defendant/appellee.

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BRIEF

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DOCKET NO. 20030495-CA

IN THE UTAH COURT OF APPEALS

KAY H. TRAVELLER INVESTMENTS,
L.L.C., a Utah Limited Liability
Company,

Plaintiff and Appellant,

v.

QUESTAR GAS COMPANY, a Utah
Corporation,

Defendant and Appellee.

REPLY BRIEF OF THE APPELLANT

Appellate Case No. 20030495-CA

APPEAL FROM ORDER ON SUMMARY JUDGMENT DISMISSING COMPLAINT
WITH PREJUDICE AND ON THE MERITS
ENTERED IN THE FIFTH JUDICIAL DISTRICT COURT,
WASHINGTON COUNTY, STATE OF UTAH.
HONORABLE JAMES L. SHUMATE

JONES, WALDO, HOLBROOK &
MCDONOUGH, P.C.

Russell S. Mitchell [6938]
301 North 200 East, Suite 3-A
St. George, UT 84770-3041
Telephone: (435) 628-1627

C. Scott Brown [4802]
Jennifer N. Bye [7984]
QUESTAR REGULATED SERVICES
COMPANY

180 East 100 South
Salt Lake City, Utah 84145

Attorneys for Defendant/Appellee

SNOW JENSEN & REECE

V. Lowry Snow [3030]
J. Gregory Hardman [8200]
134 North 200 East, Suite 302
P.O. Box 2747
St. George, Utah 84771-2747
Telephone: (435) 628-3688

Attorneys for Plaintiff/Appellant

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UTAH APPELLATE COURTS

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Telephone: (435) 628-1627

C. Scott Brown [4802]
Jennifer N. Bye [7984]
QUESTAR REGULATED SERVICES
COMPANY
180 East 100 South
Salt Lake City, Utah 84145

Attorneys for Defendant/Appellee

SNOW JENSEN & REECE

V. Lowry Snow [3030]
J. Gregory Hardman [8200]
134 North 200 East, Suite 302
P.O. Box 2747
St. George, Utah 84771-2747
Telephone: (435) 628-3688

Attorneys for Plaintiff/Appellant

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III. ARGUMENT

A. STATEMENTS IN TRAVELLER'S BRIEFS IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT HAVE NO BEARING ON THIS APPEAL

In its appellate brief, Questar focused considerable attention upon selected statements from Traveller's briefs in support of its motion for summary judgment. Questar's Appellate Brief, pp. 1-3, 9, and 14-16. Questar contends in citing to these statements that Traveller previously agreed there were no disputed material facts regarding the Right-of-Way and Easement Grant. In response, however, Traveller asserts that Questar has misinterpreted or misconstrued these statements; and, additionally, that Utah appellate courts have consistently recognized that assertions of undisputed material facts to support a cross-motion for summary judgment are not undisputed facts for appellate review purposes.

1. Questar Misinterpreted or Misconstrued Traveller's Statements Regarding the Burgesses' Intent

Shortly after the pleadings in this case were framed and before the completion of any substantive discovery, Questar filed a motion for summary judgment, which was supported by a memorandum of points and authorities. R. 27-58. Traveller then filed a memorandum in opposition to Questar's motion for summary judgment and cross-motion for summary judgment. R. 93-120. The following statements of purported material fact from Questar's memorandum and Traveller's detailed denials thereof clearly demonstrate

that Traveller never accepted Questar's factual contentions regarding the Right-of-Way and Easement Grant:

Questar's statement of undisputed material fact (R. 28):

2. At the time Mountain Fuel installed the pipeline, Rodney C. Burgess and Elizabeth L. Burgess were the beneficiaries of a Trust Deed wherein Progressive Investment Corp. was the trustee [sic], which Trust Deed covered the Subject Property.

Traveller's response (R. 94-95):

2. Denied. Although Plaintiff acknowledges there is a document on record with the Washington County Recorder's Office entitled "Trustee's Deed Upon Sale" as set forth in Paragraph 2 of Defendant's Statement of Undisputed Material Facts, **Plaintiff asserts that there is a very real and material dispute of fact as to whether Progressive Investment Corporation was the sole legal owner of the Subject Property at the time of said foreclosure proceeding.** In reality, between June 10, 1980, and July 26, 1989, the Subject Property was collectively owned in varying portions by the following entities: Progressive Acquisition, Inc., a Nevada corporation; St. George #5 Partnership; St. George #6 Partnership; St. George #7 Partnership; and Progressive Investment Corporation, a Nevada corporation, as trustee under a trust agreement dated the 24th day of February 1986, known as "Red Hills Trust;" rather than being owned singly throughout this period by Progressive Investment Corporation as intimated by Defendant. Progressive Acquisition, Inc., acquired its right, title and interest in the real property described in Exhibit 1 on or about June 10, 1980. *See* Aff. Heiner ¶6 on file with the Court. St. George #5 Partnership acquired its right, title and interest in the real property described in Exhibit 1 on or about December 3, 1980. *See Id.* St. George #6 Partnership acquired its right, title and interest in the real property described in Exhibit 1 on or about January 14, 1981. *See Id.* St. George #7 Partnership acquired its right, title and interest in the real property described in Exhibit 1 on or about December 3, 1980. *See Id.* Progressive Investment Corporation, as trustee under a trust agreement dated the 24th day of February 1986 (known as "Red Hills Trust") acquired its right, title and interest to the real property described in Exhibit 1 on or about February 5, 1986. *See Id.* All of these entities collectively retained the above rights, titles and interests in the real property described in Exhibit 1 until July 26, 1989. *See Id.* (Emphasis added).

Questar's statement of undisputed material fact (R. 28):

4. On December 2, 1988, Rodney C. Burgess and Elizabeth L. Burgess agreed to and warranted a Right-of-Way and Easement Grant wherein Mountain Fuel, its successors and assigns, were granted a specific right-of-way and easement 22' feet wide to "lay, maintain, operate, repair, inspect, protect, remove and replace pipe lines, valves, valve boxes and other gas transmission and distribution facilities through and across" the Subject Property. (Emphasis in original).

Traveller's response (R. 95-96):

4. Denied. Although Plaintiff acknowledges there is a document on record with the Washington County Recorder's Office entitled "Right-of-Way and Easement Grant" as set forth in Paragraph 4 of Defendant's Statement of Undisputed Material Facts, **Plaintiff asserts that there is a very real and material dispute of fact as to what Rodney C. Burgess and Elizabeth L. Burgess meant or intended by affixing their signatures below the phrase "AGREED and WARRANTED" on the last page of the document.** At the time of executing this document neither Rodney C. Burgess nor Elizabeth L. Burgess had any legal ownership interest in the Subject Property. As such, stating that they "WARRANTED" the granting of an easement to Mountain Fuel does not carry the same legal effect as if the Burgesses were the legal owners of the Subject Property. Defendant's contention that the Burgesses were warranting title to the Subject Property as if they were in fact the legal owners of the same is misplaced and speculative. Under Utah law although recitals in deeds are presumptively valid, it is improper to imply anything more from such recitals than is clear from the bare terms and facts surrounding the deed. *Judkins v. Toone*, 27 Utah 2d 17, 492 P.2d 980 (1972). **Aside from the above-referenced clause "AGREED and WARRANTED" there is no other language in the document that refers to the Burgesses. Moreover, Defendant has not offered any affidavit or other means of credible evidence to support its theory of what the Burgesses meant by signing their names beneath the phrase "AGREED and WARRANTED."** Without such foundational support for a **purported undisputed material fact in a motion for summary judgment, the fact should not be accepted as "undisputed."** *Connor v. Union Pac. R.R.*, 972 P.2d 414, 418 (Utah 1998) (reasoning that a mere assertion that is wholly unsupported by valid evidence cannot become an undisputed material fact for purposes of supporting a motion for summary judgment). (Emphasis added).

Obviously, these quoted passages provide the clearest statement of what Traveller agreed were, or in this case were not, undisputed material facts. Moreover, it is clear from the argument portion of Traveller's memorandum in opposition/cross-motion for summary judgment that it believed the Right-of-Way and Easement Grant was so facially flawed, lacking the typical structure and content of a written easement, that the trial court should have granted Traveller's cross-motion for summary judgment and denied Questar's motion for summary judgment. R. 109-110.

In response to Traveller's cross-motion for summary judgment, Questar filed a motion under Rule 56(f) of the Utah Rules of Civil Procedure, contending that additional discovery was needed before it could reasonably respond to the statement of facts and arguments set forth in Traveller's cross-motion for summary judgment. R. 145-148. Traveler opposed Questar's Rule 56(f) motion, and therein put forth the statement Questar has now seized upon in support of its argument that Traveller agreed before the trial court that there were no issues of material fact in dispute. R. 149-175.

Questar's assertion loses all credibility when Traveller's statements that "both parties have asked the Court to examine the 'Right-of-Way and Easement Grant' document on its face and within its four corners" (R. 152), and "intent and notice are immaterial to the resolution of the parties' Motions for Summary Judgment because the Court can examine the document on its face and within its four corners and make a ruling" (R. 154), are placed in proper context alongside the argument underpinning Traveller's cross-motion for summary judgment: namely, that the document is so facially

defective that is supports summary dismissal in favor of Traveller. Traveller remains committed to this position.

Thus, Traveller never agreed before the trial court that the Burgesses' intent to grant an easement was clearly manifested within the four corners of the Right-of-Way and Easement Grant. Rather, Traveller asserted then, just as it now does, that there were material issues of fact regarding the Burgesses' intent and before the trial court examined the Burgesses' intent it should have first determined whether the document met the legal requirements necessary to effect a conveyance of an interest in real property.

2. Facts in Cross-motions for Summary Judgment Do Not Amount to Concessions on Appeal

Next, assuming *arguendo* that Traveller had stated for purposes of supporting its cross-motion for summary judgment that the Burgesses' intent was clearly manifested in the Right-of-Way and Easement Grant, such a "fact" would have no bearing upon an appellate court. *See, e.g., Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 825 (Utah Ct. App. 1989) (stating "cross-motions for summary judgment do not *ipso facto* dissipate factual issues, even though both parties contend . . . that they are entitled to prevail because there are no material issues of fact" (citations omitted)). Rather, cross-motions may be viewed as involving a contention by each movant that no genuine issue of fact exists under the theory it advances, but not as a concession that no dispute remains under the theory advanced by its adversary" (citations omitted). "In effect, each cross-movant implicitly contends that it is entitled to judgment as a matter of law, but that if the court determines otherwise, factual disputes exist which preclude summary judgment as a

matter of law in favor of the other side” (citations omitted)). Further, in *Amjacs Interwest, Inc. v. Design Associates*, 635 P.2d 53, 55 (Utah 1981) (quoting 6 Moore’s Federal Practice para. 56.13 at 341-344 (2d Ed. 1976)), the Supreme Court of Utah observed as follows:

The well-settled rule is that cross-motions for summary judgment do not warrant the court granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed.

Good sense and sound theory, if these be distinguishable, combine to produce the rule. Good sense, because neither a single motion nor multiple motions can dissipate factual disputes. Sound theory, for at least three reasons: (1) because a party entitled to summary judgment must bear the burden of establishing the indisputability of the facts which warrant judgment in his favor; (2) while the facts, which would justify judgment for one party on a particular legal theory, may be indisputable, the facts, which would justify judgment for the adverse party on a different legal theory, may be disputed; and (3) a party may make concessions for the purpose of his motion that do not carry over and support the motion of his adversary.

In light of the above procedural reasoning by Utah courts, perhaps both parties were premature in filing their motions for summary judgment in this case. Nevertheless, based on the foregoing analysis of the trial court record and Utah law, Traveller is clearly entitled to argue on appeal that the trial court abused its discretion when it determined, “over Plaintiff’s objection” and amid disputed material facts regarding the Burgesses’ intent and facial challenges to the Right-of-Way and Easement Grant, that the Burgesses “granted an easement.” R. 536. Therefore, Questar’s assertion that Traveller failed to “properly raise issues of intent before the trial court, and cannot raise such issues now on appeal” is incorrect. Questar’s Appellate Brief, p. 7.

B. THE ‘RIGHT-OF-WAY AND EASEMENT GRANT’ FAILS TO MEET BASIC STANDARDS FOR AN INSTRUMENT OF CONVEYANCE; THEREFORE, THE AFTER-ACQUIRED TITLE DOCTRINE DOES NOT APPLY

1. There Is a Minimum Standard Under Utah Law for an Instrument of Conveyance

Examination of the Right-of-Way and Easement Grant reveals the following facial defects: (1) the Burgesses are not the named grantor in the document; (2) the Burgesses’ signatures are not on the signature lines prepared for the grantor; (3) the operative granting language in the document was specifically directed to Progressive Investment Corporation; and (4) the Burgesses only “agreed and warranted” the grant set forth in the document. Apart from these obvious facial defects, Traveller introduced additional evidence before the trial court, through the Affidavit of Mark C. Heiner, a certified title examiner, that on the date the Burgesses signed the Right-of-Way and Easement Grant, neither the named grantor, Progressive Investment Corp., nor the Burgesses were the record owners of the subject property. R. 66-71. Yet, in the face of all this countervailing evidence, Questar argues that “[t]here is nothing within the Right-of-Way and Easement Grant to suggest a contrary intent.” Questar’s Appellate Brief, p. 10. Quite literally, then, Questar is arguing that there are no threshold prerequisites to the application of the after-acquired title doctrine; or, stated another way, any piece of paper with a legal description and a signature will do.

Questar’s literal position is defeated on several points. Before discussing these points it is important to note that there does not appear to be any Utah case summarizing formal requirements for the application of the after-acquired doctrine to easements.

Indeed, the extension of the after-acquired title doctrine to easements was only recently recognized in Utah. *See Arnold Indus. v. Love*, 2002 UT 133, 63 P.3d 721. Yet, there is a considerable body of Utah case law discussing the application of this doctrine to conveyances of estates in land.

First, in every Utah case annotating the after-acquired title statute (Utah Code Ann. §57-1-10) the named grantor in the intended instrument of conveyance was also the person or entity that signed the document. *See, e.g., Cox v. Ney*, 580 P.2d 1085 (Utah 1978); *Ketchum v. Pleasant Valley Coal, Co.*, 257 F. 274 (8th Cir.), *cert. denied*, 250 U.S. 668, 40 S. Ct. 14, 63 L. Ed. 1198 (1919), *appeal dismissed*, 254 U.S. 616, 41 S. Ct. 147, 65 L. Ed. 440 (1920); *Wall v. Utah Copper Co.*, 277 F. 55 (8th Cir. 1921); *Arnold Indus. v. Love*, *supra*; *Barlow Soc'y v. Commercial Sec. Bank*, 723 P.2d 398 (Utah 1986); and *Utah Farm Prod. Credit Assoc. v. Wasatch Bank*, 734 P.2d 904 (1987). As noted above, the Burgesses were not the named grantor in the Right-of-Way and Easement Grant and never signed their names on the signature lines provided for the named grantor.

Second, Utah courts have recognized that not all written instruments are sufficient to invoke the after-acquired title doctrine. For example, the after-acquired title doctrine will not apply to a conveyance made by quit claim deed. *See Barlow Soc'y*, 723 P.2d at 400; *see also Duncan v. Hemmelwright*, 112 Utah 262, 268-69, 186 P.2d 965, 968 (1947). This analytical point obviously disproves Questar's literal position that any piece of paper with a legal description and a signature will do.

Third, if a quit claim deed does not pass after-acquired title, logic would dictate that the formalities of a warranty deed are necessary. The Utah statute describing the

requisite form of a warranty deed clearly provides through its exemplary text that the grantor named in the instrument must also sign the instrument.

WARRANTY DEED

(here insert name), grantor, of (insert place of residence), hereby conveys and warrants to (insert name), grantee, of (insert place of residence), for the sum of [] dollars, the following described tract of land in County, Utah, to wit: (here describe the premises).

Witness the hand of **said grantor** this (month/day/year).

Utah Code Ann. §57-1-12 (2004) (emphasis added). As stated above, the Right-of-Way and Easement Grant failed in this regard.

Furthermore, the absence of express granting language makes the Right-of-Way and Easement Grant instrument legally deficient. The express granting language in this document is contained in the first paragraph and by its clear terms applies only to Progressive Investment Corporation, the named grantor. The Burgesses merely “agreed and warranted” the document, which is legally insufficient.

In *Potter v. Chadaz*, 1999 UT App 95, ¶9, 977 P.2d 533, the Court of Appeals stated: “Words that clearly show an intention to grant an easement are sufficient, provided the language is certain and definite.” Furthermore, even where it appears that the intent of the parties was to create an easement, if there is “language that is vague, inconsistent, [or] ambiguous” the instrument will fail. *Id.* at ¶11. In the present controversy, there are significant questions of fact regarding the Burgesses’ intent and, perhaps more importantly, the document is facially defective in many ways as noted above, making it legally vague, inconsistent and ambiguous. As such, the trial court

should not have applied the after-acquired title doctrine to grant Questar's motion for summary judgment.

In *Dowse v. Kammerman*, 122 Utah 85, 87, 246 P.2d 881, 882 (1952), the Supreme Court of Utah said: "There is no diversity of opinion to the rule that estoppel by deed [and the after-acquired title doctrine] operate[] only where the conveyance is intended to convey a particular estate, which the **grantor** subsequently acquires" (emphasis added). The defendant in *Dowse* sought to enlarge the doctrine of estoppel by deed by citing to cases of equitable estoppel in support of the proposition that an after-acquired title should pass by quitclaim deed. *Id.* In rejecting this position, the Supreme Court observed that

the existence of the estoppel does not rest on the prevention of fraud, or on the fact of a representation actually believed to be true. It is a technical effect of a technical representation, the extent of which is determined by the scope of the words devoted to making it.

Id. at 89.

The Right-of-Way and Easement Grant fails as a "technical representation" that should give rise to the "technical effect" of an easement by estoppel or after-acquired title. Arguably, the Burgesses' language of "agreeing" and "warranting" an easement was not as technically precise and appropriate as "granting" an easement, which, following the model set forth in Utah Code Ann. §57-1-12 and the *Dowse* case, would have provided the clearest expression of their intent. Therefore, at the very least, the trial court should have required the parties to delve into the Burgesses' intent; instead, it

abused its discretion by ignoring disputed material facts and read into the Right-of-Way and Easement Grant meanings and actions that were not facially evident.

2. The Burgesses Never Intended to Grant an Easement When They Signed the Right-of-Way and Easement Grant; Instead, They Were Subordinating Their Security Interest in the Property to that of the Intended Easement Holder

Examination of the Right-of-Way and Easement Grant begs the question: If the Burgesses were the intended grantors of the easement-creating document, as argued by Questar, why were they neither the named grantors nor signatories on the signature lines provided for the grantors? Traveller suggested in its appellate brief that “as the beneficiaries of a trust deed on the subject property it is more likely [the Burgesses] were manifesting their intent to subordinate their security interest in the property to the interest of the intended easement holder.” Traveller’s Appellate Brief, p. 12. Questar assailed this suggestion in its appellate brief, suggesting that such a position was speculative and unfounded. Questar’s Appellate Brief, pp. 13-16. In fact, Questar challenged Traveller to identify any evidence from the record to sustain its suggestion. Questar’s Appellate Brief, pp. 13-16.

The Trustee’s Deed Upon Sale, which is appended as Exhibit “A” to Questar’s Memorandum of Points and Authorities in Support of Summary Judgment, is just the piece of record evidence to support Traveller’s “suggestion.” R. 39-44. Within this document are contained the following statements concerning the trust deed that was foreclosed:

WHEREAS, Progressive Acquisitions, Inc., a Nevada corporation, as Trustor, by Deed of Trust dated June 10, 1980, and recorded in the office of

the County Recorder of Washington County, State of Utah, on June 19, 1980, . . .

WHEREAS, Rodney C. Burgess and Elizabeth L. Burgess, the Beneficiary and holder of the Note, made a declaration of default and demand for sale upon the Trustee, and filed for record, through the Trustee, on March 22, 1989, . . . a Notice of Default and Election to Sell . . .

WHEREAS, Trustee did [on July 26, 1989] according to the Notice, . . . sell at public auction [the property to the Burgesses by credit bid].

According to the document itself, the Burgesses signed the Right-of-Way and Easement Grant on December 2, 1988. R. 46. Approximately four months later, the subject property was noticed for a foreclosure sale; and four months thereafter, the Burgesses became the owners of the subject property after purchasing it a foreclosure sale by credit bid. R. 39-44.

This chronology of events makes it very unlikely that the Burgesses intended to grant an easement when they signed the Right-of-Way and Easement Grant only a few months before they became the legal owners of the property. Having been the beneficiaries of a trust deed on the subject property since 1980, the Burgesses most likely knew they were not the legal owners of the subject property, or why would they have caused their trustee to commence foreclosure proceedings on the subject property in March, 1989. Indeed, the granting language and manner of identifying the parties in the Right-of-Way and Easement Grant support this conclusion as well. Thus, it is much more likely that the Burgesses were merely intending to subordinate their security interest in the subject property to that of the intended easement holder when they signed the Right-of-Way and Easement Grant.

Although there may not yet be enough evidence to conclusively establish the Burgesses' real intent when they signed the Right-of-Way and Easement Grant, there is, on balance, much more record evidence in support of Traveller's assertions regarding the Burgesses' intent. Therefore, regardless of whether the Court of Appeals examines these arguments from the perspective of an abuse of discretion or employs the correctness standard as advocated by Questar (Questar's Appellate Brief, p. 1), the result is the same—the trial court reached an improper conclusion.

C. THE COURT OF APPEALS SHOULD TAKE THIS OPPORTUNITY TO CLARIFY THE SCOPE OF THE BUILDER'S STATUTE OF REPOSE TO PREVENT AN UNINTENDED APPLICATION OF THE STATUTE

Traveller and Questar have each cited to a myriad of Utah cases and statutes in support of their opposing arguments regarding the proper application of the Builder's Statute of Repose. Traveller has additionally cited to extensive secondary sources, primarily well-reasoned cases from other jurisdictions, and also identified the unintended impact Questar's requested application of the Builder's Statute of Repose would have upon other equally important statutory and common law rights.

Admittedly, all of the cases cited by Traveller and most of the cases cited by Questar support the parties' opposing positions regarding the proper application of the Builder's Statute of Repose. Yet, there is an inherent disconnect with these positions that must be resolved by the Court of Appeals to settle the law in this area. Thus, the Court of Appeals should take this opportunity to define the proper scope of the Builder's Statute of Repose. In doing so, the Court of Appeals will be performing an appropriate and

important “double-check” on the legislature. *See Epperson v. Utah State Retirement Bd.*, 949 P.2d 779, 783 (Utah App. 1997) (stating “the basic reasonableness of [the courts’] interpretation of [a] statute” is to provide an “appropriate double-check on the interpretation [they] conclude emerges from a straightforward reading of the statute’s plain language.”). By so doing, the Court of Appeals is not improperly replacing the judgment of the legislature; instead, it is aiding the legislature by preventing an “absurd” application of a statute. *Id.* (citing *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988)). Traveller asserts that after examining all of the legal authorities cited by the parties and the purpose of the Builder’s Statute of Repose a clear decision will emerge—the legislature simply never intended to apply the Builder’s Statute of Repose as requested by Questar because its high-pressure natural gas feeder line is not an “improvement” within the meaning of the statute or under any other common sense meaning, and, secondly, applying the statute as requested by Questar will eviscerate a myriad of other longstanding statutory and common law rights.

D. CERTAIN OF QUESTAR’S MISCELLANEOUS STATEMENTS AND REPRESENTATIONS REGARDING THE PARTIES’ CITATION OF THE RECORD AND CASE HOLDINGS OR PROPOSITIONS OF LAW WARRANT CORRECTION OR ADDITIONAL COMMENT

1. To the Extent the Parties Have Made Incorrect Citations to the Record such Citations Are Not Germane to the Issues on Appeal

In its Appellate Brief, Questar criticized Traveller for asserting that its motion from summary judgment was also at issue before the Court of Appeals. Questar’s Appellate Brief, p. 4. Traveller never intended by its statement that the trial court

“agreed to renew” its cross-motion for summary judgment it was properly at issue in this appeal. Traveller’s Appellate Brief, p. 4. Rather, Traveller’s cross-motion for summary judgment was essentially the “converse” position of the same arguments addressed in Questar’s motion for summary judgment. *Id.* Traveller acknowledges that its cross-motion for summary judgment is not technically at issue on appeal.

Next, Questar contended in its appellate brief that the record was silent as to when Traveller discovered the high pressure natural gas feeder line on its property. Questar’s Appellate Brief, p. 7. Traveller acknowledges that the page references to the record it cited (R. 74 and 99) do not specifically state that Traveller discovered the high pressure natural gas feeder line on its property in 2002. However, this was not an attempt by Traveller to mislead the Court of Appeals. Kay H. Traveller’s affidavit, which was cited in support of this statement of fact, was executed on November 1, 2002, and states:

“Questar Gas Company has refused to remove its natural gas line from my property despite being requested to do so.” R. 74. Moreover, Traveller’s Complaint in this case was filed on July 26, 2002, after Questar refused to remove the high pressure natural gas feeder line. R. 1-9. Paragraph 7 of the Complaint states:

Plaintiff and its associated entities are **presently engaged** in a real estate development project upon and around portions of the Subject Property. Defendant’s improper and unauthorized maintenance of a natural gas utility line across portions of the Subject Property is impeding Plaintiff and its associated business from completing their real estate development project.

R. 2-3 (emphasis added). Accordingly, these references in the record support Traveller’s statement of fact #10 that “Traveller discovered the existence of the high-pressure natural gas utility upon its property in 2002 while it was performing certain excavation work in

furtherance of a commercial real estate development known as the Tonaquint Center, . . .” Traveller’s Appellate Brief, p. 8.

Regardless of the sufficiency of record support for this factual assertion by Traveller, Questar is correct in pointing out that such fact is immaterial to the resolution of this appeal. Again, Traveller never intended to mislead the Court of Appeals; instead it included this “fact” only to set forth a more detailed chronology of events.

To the extent there was any impropriety by Traveller’s inclusion of foregoing “fact” Questar is guilty of similar impropriety. Questar asserted in its appellate brief that “because of the feeder utility line, natural gas is now available to the very buildings Traveller has erected on its property.” Questar’s Appellate Brief, p. 20. There is no support in the record for this assertion of fact, and it is plainly contradicted in the record by the Affidavit of Stanford S. McConkie in which he set forth his understanding “that the Subject Property is served by a natural gas distribution line running under Dixie Drive, which runs along the opposite side of the Subject Property” [from where the natural gas line at issue is located]. R. 86.

2. Questar Is Guilty of the Very Same Analytical Method for which It Criticizes Traveller; the Cases in Questar’s Appellate Brief Reinforce Traveller’s Arguments

In its appellate brief, Questar criticized Traveller for citing to other Utah cases, statutes and secondary sources to demonstrate that Questar’s high-pressure natural gas feeder line is not an “improvement” to Traveller’s property. Questar’s Appellate Brief, pp. 8-9. In fact, elsewhere in its appellate brief, Questar went so far as to say the following:

Although it is the Legislature's prerogative to modify a term by expanding or limiting its definition, once the Legislature defines a term, a reviewing court has no authority to assign it a different or contrary meaning.

Questar's Appellate Brief, p. 18. This statement is inaccurate. Courts frequently look to other cases, statutes and secondary sources to divine the meanings of terms in statutes when the proper application of such terms is unclear. By doing so, a court is not assigning different or contrary meanings; rather, it is comparing, cross-checking and verifying that by ruling a certain way it will give full effect to the legislature's intent.

Some of the very cases cited by Questar in its appellate brief demonstrate or cite with authority this process. In *O'Keefe v. Utah State Retirement Bd.*, 956 P.2d 279, 281 (Utah 1998), the Supreme Court of Utah affirmed the Court of Appeals, on other grounds, and reasoned that although the Court of Appeals achieved the correct result it improperly constricted the definition of a key term within the operative statute. The Supreme Court observed as follows:

In concluding that the definition of full-time service sets a boundary which defines overtime and that any hours worked in excess of forty hours per week constitute overtime, the court of appeals **ignored the usually accepted meaning of the term.** As [the plaintiff] himself acknowledges, the usually accepted meaning of overtime is work in excess of some defined, regularly scheduled work period. **This understanding of overtime is well illustrated by its definition in several dictionaries.** (Citations to Black's Law Dictionary, Webster's Third New International Dictionary, and Random House Webster's Unabridged Dictionary omitted). **Because we see nothing in this interpretation that would render the statute inoperable or contradict the purpose of the [statute], we believe that overtime, as used in the [statute], is properly defined as hours worked in excess of an employee's regularly scheduled work period.**

Id. at 281-282 (emphasis added). In this case, the Supreme Court consulted dictionaries and recognized common, every-day usage of the term and reasoned that its "ruling

necessitate[d] a case-by-case determination of an employee's regularly scheduled work period" to determine proper application of the definition in the statute. *Id.* at 282.

Similarly, the Court of Appeals should examine dictionary definitions, common usage of the term among real estate professionals, and reasoning from other cases and statutes, as advocated by Traveller, to determine whether Questar's high-pressure natural gas feeder line constitutes an improvement to Traveller's property within the meaning of the Builder's Statute of Repose.

In *Salt Lake City v. Roberts*, 2002 UT 30, ¶22, 44 P.3d 767, the Supreme Court of Utah cited with approval the following longstanding principles of statutory construction:

Although courts generally presume a legislative body chooses its words advisedly, "a majority of cases permit the substitution of one word for another **if necessary to carry out the legislative intent or express clearly manifested meaning**" (internal citations omitted). "Properly understood, an exercised with due caution, substitution of one word for another **is not judicial legislation, but arriving at a legislative intent defectively expressed**" (internal citations omitted) (emphasis added).

Traveller contends that the legislative findings in the Builder's Statute of Repose are "defectively expressed" because they do not set any boundaries to the application of the statute, and, as explained elsewhere, by applying the statute so expansively as requested by Questar, other statutory rights and longstanding common law doctrines are destroyed.

Another case cited by Questar in its appellate brief is *Brixen & Christopher Architects, P.C. v. Utah*, 2001 UT App 210, 29 P.3d 650. In *Brixen*, the Court of Appeals reasoned as follows:

Where we are faced with two alternative readings, and we have no reliable sources that clearly fix the legislative purpose, **we look to the consequences of those readings** to determine the meaning to be given the

statute (internal citations omitted). We “look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute” [with which we are dealing] (internal citations omitted). Further, we look “with an eye toward the construction that will achieve the best results in practical application, will avoid unacceptable consequences, and will be consistent with sound public policy” (internal citations omitted). **In other words, we interpret a statute to avoid absurd consequences** (internal citations omitted).

Id. at ¶17 (emphasis added). Traveller implores the Court of Appeals to follow its prior reasoning and interpret the Builder’s Statute of Repose so as to avoid an absurd consequence.

Lastly, Questar itself used the above-described analytical process when it cited to the Public Utilities title of the Utah Code to demonstrate that it was a “utility” as defined in the Builder’s Statute of Repose. Questar’s Appellate Brief, p. 21. Therefore, Questar has effectively acknowledged the need to consult additional sources to clarify the proper application of the Builder’s Statute of Repose. As such, Questar’s criticism of Traveller’s similar analytical method is misplaced.

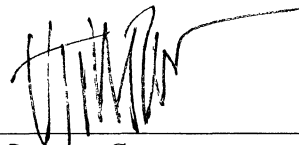
IV. CONCLUSION

Traveller respectfully requests that the Court of Appeals clarify the scope of the Builder’s Statute of Repose by ruling that the statute does not bar equitable claims for ejectment, declarative relief and quiet title; and also by ruling that because Questar’s high-pressure natural gas utility line provides no tangible benefit to Traveller’s property it is not an “improvement” within the meaning of the Builder’s Statute of Repose. Lastly, Traveller requests that the Court of Appeals rule that there was a disputed issue of material fact regarding the Burgesses’ execution of the Right-of Way and Easement

Grant and so the trial court abused its discretion in granting Questar's motion for summary judgment; or as argued by Questar, the Court of Appeals may apply the correctness standard to determine that the trial court misapplied the law in making legal conclusions about the Right-of-Way and Easement Grant; either way the result is the same. After so ruling, Traveller requests that the Court of Appeals remand this case to the trial court with instructions to reinstate all causes of action in Traveller's Complaint, as well as its argued but unpled cause of action to quiet title, and take further evidence and reserve for the trier of fact the issue of the Burgesses' intent regarding the Right-of-Way and Easement Grant.

Respectfully submitted this 10th day of November, 2004.

SNOW JENSEN & REECE



V. Lowry Snow
J. Gregory Hardman
Attorneys for Appellant K.H. Traveller
Investments, L.L.C.


CERTIFICATE OF MAILING

This is to certify that on this 16th day of November, 2004, I caused a true and correct copy of the REPLY BRIEF OF THE APPELLANT to be delivered via first class U.S. Mail, postage prepaid, to the following:

Russell S. Mitchell
JONES, WALDO, HOLBROOK & MCDONOUGH, P.C.
301 North 200 East, Suite 3-A
St. George, UT 84770-3041

C. Scott Brown
Jennifer N. Bye
QUESTAR REGULATED SERVICES COMPANY
180 East 100 South
Salt Lake City, UT 84145

Attorneys for Appellee



Legal Assistant