

2003

Kay H. Traveller Investments, LLC, a Utah limited liability company v. Questar Gas Company, a Utah corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAY H. TRAVELLER INVESTMENTS,
LLC, a Utah limited liability company,

Plaintiff/Appellant,

v.

QUESTAR GAS COMPANY, a Utah
corporation

Defendant/Appellee,

**BRIEF OF APPELLEE
QUESTAR GAS COMPANY**

Case No. 20030495-CA

**Appeal from the Order of Summary Judgment of the Fifth Judicial District Court
in and for Washington County, State of Utah
Judge James L. Shumate, Case No. 020501454**

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**UTAH COURT OF APPEALS
BRIEF**

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Pursuant to Rules 24, 26 and 27 of the Utah Rules of Appellate Procedure, Appellee Questar Gas Company (“Questar”) submits its Responsive Brief in the captioned case.

I. PRELIMINARY MATTERS

A. JURISDICTION OF THE COURT

Questar agrees that this Court has jurisdiction.

B. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The issues presented are:

1. Did the trial court correctly conclude that the signatories to the document titled Right-of-Way and Easement Grant intended to grant the easement set forth within the four corners of the document?

2. Did the trial court correctly conclude that the Utah Builder’s Statute of Repose, Utah Code Ann. § 78-12-21.5 (“the Statute of Repose”), is applicable to bar K. H. Traveller Investments, LLC (“Traveller”) from asserting claims of ejectment, declaratory relief and quiet title?

3. As a primary element in Issue No. 2, did the trial court correctly conclude that the natural gas pipeline was an “improvement,” as defined in the Statute of Repose?

Contrary to Traveller’s assertion, there are no factual issues to be resolved by the trial court. (Traveller’s issue number (1)). Both parties represented, during the course of the proceedings below, that there were no issues of material fact. Traveller represented, on the record, that “[d]espite what either party has said to the contrary in its Motion for

Summary Judgment, *there are no disputes of material fact* Essentially, *both parties* have asked the Court to examine the ‘Right-of-Way Easement Grant’ document *on its face and within its four corners.*” Traveller’s Memorandum in Opposition to Defendant’s Rule 56(f) Motion to Continue Plaintiff’s Motion for Summary Judgment. (R. 152 (emphasis added)). Traveller further stated, “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. at 154 (emphasis added)). Traveller’s attempt to now create an issue of fact related to the Burgesses intent should be disregarded.

The issues presented involve solely questions of law and are to be reviewed for correctness. *Ault v. Holden*, 2002 UT 33, ¶ 37, 44 P.3d 781.

C. DETERMINATIVE STATUTES

The only determinative statute is Utah Code Ann. § 78-12-21.5, the Statute of Repose. The text of the statute is set out as Addendum No. 3 in Traveller’s Brief.

D. STATEMENT OF THE CASE

1. Nature of the Case. This case deals with Traveller’s desire to force Questar to move an existing high-pressure natural gas feeder utility line from one portion of Traveller’s property to another (at no cost to Traveller) so that Traveller can develop a portion of its property presently encumbered by the utility line. The utility line at issue has been in place since December 22, 1988. Ten years after the utility line was placed,

Traveller purchased the property. Three and one-half years after the purchase, Traveller brought its lawsuit to try to force Questar to relocate or remove the utility line.

2. Course of Proceedings. Traveller filed its Complaint on July 26, 2002. It sought declaratory relief, stating that “[Questar’s] predecessor-in-interest, Mountain Fuel Supply Company, attempted to obtain an easement for the installation of a natural gas utility line” and requested that the trial court rule that this attempt is *not* a valid easement (“First Cause of Action,” R. 3-4). Traveller also claimed that the utility line trespasses upon Traveller’s property (“Second Cause of Action,” R. 4), and that the utility line causes a private nuisance (“Third Cause of Action,” R. 5-6).

On October 9, 2002, Questar filed its Motion for Summary Judgment before any discovery, other than initial disclosures, had begun. In its motion, Questar argued that Traveller’s claims should be dismissed with prejudice as a matter of law because (a) the doctrine of after-acquired title applies to the Right-of-Way and Easement Grant and renders it fully valid and enforceable, and (b) the Statute of Repose bars Traveller’s claims to force Questar to move its utility line at no cost to Traveller.

Traveller responded by filing a Cross-Motion for Summary Judgment requesting that the trial court rule on its “declarative relief” cause of action to “resolve the threshold issue of whether [Questar] has a valid easement based upon the *uncontroverted facts* set forth above.” (R. 112 (emphasis added)). Traveller’s cross-motion was unclear as to whether Traveller contended that the Right-of-Way and Easement Grant could be interpreted on its face, or whether it contended that extrinsic evidence regarding intent

would be needed. To clarify this, Questar moved under Rule 56(f) of the Utah Rules of Civil Procedure to have Traveller's Cross-Motion continued on the grounds that, if the document were determined to be ambiguous or the intent not clear, Questar should be allowed to conduct further discovery regarding intent, notice and other factors. (R. 145-48). However, if the document were to be found unambiguous on its face and the trial court could interpret it, then the trial court should rule. Traveller responded to Questar's Motion by clarifying its position and affirming that there were no disputes as to any material fact and that, for purposes of the Motions for Summary Judgment, the trial court could interpret the document on its face and within its four corners. (R. 152, 154).

The trial court granted Questar's Motion to Continue Traveller's Cross-Motion for Summary Judgment. Neither the trial court nor Questar ever considered Traveller's Motion to still be at issue when Questar's Motion was granted. Traveller's present assertions to the contrary lack support. Traveller's Cross-Motion was not "renewed," nor is it at issue now. There is no record showing that the trial court entered a new order to modify its previous order continuing Traveller's motion.

3. Disposition Below. After oral argument, the trial court ruled in favor of Questar on two independent grounds: (a) the doctrine of after-acquired title validates and makes effective the granted easement as recorded; and (b) the Statute of Repose bars Traveller's claims to force Questar to move its utility line at no cost to Traveller.

4. Statement of Facts. On summary judgment, only material facts are to be considered. The trial court carefully set forth facts that were both material to the legal conclusions and uncontroverted. These facts are as follows:

a. On December 2, 1988, Rodney C. Burgess and Elizabeth L. Burgess (the “Burgesses”) signed their names to the second page of a document entitled “Right-of-Way and Easement Grant” in a signature block below the words “agreed and warranted,” which purportedly¹ granted Questar’s predecessor, Mountain Fuel Supply Company (“Mountain Fuel”) and its successors and assigns a specific right-of-way and easement twenty-two (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 property described more specifically in subparagraph c below (the “Subject Property”). (R. 28, 45-46, 527).

b. On December 2, 1988, the Burgesses were not the legal owners of the Subject Property; rather, they were beneficiaries of a trust deed recorded against the Subject Property. (R. 527).

c. On December 22, 1988, Mountain Fuel Supply Company, installed a high-pressure natural gas utility line across the Subject Property which is described as

¹ Traveller has seized on the word “purportedly” in the trial court’s order (R. 527, ¶ 2) to be a sign of a disputed fact. “Purportedly” in this context meant only that the court concluded the Burgesses thought they were conveying and granting an easement at a time when they did not yet have the authority to do so. It did not mean that there is a dispute about their intentions.

follows: the Northeast Quarter of Section 2, Township 42 South, Range 16 West, Salt Lake Base and Meridian, and the Southeast Quarter of Section 35, Township 42 South, Range 16 West, Salt Lake Base and Meridian. (R. 28, 527).

d. On August 7, 1989, the Burgesses became the owners of the Subject Property through a Trustee's Deed Upon Sale. (R. 29-30, 527).

e. On February 5, 1992, Mountain Fuel caused to be recorded the Right-of-Way and Easement Grant document. (R. 29, 45, 527).

f. On September 24, 1992, the Burgesses quit-claimed their interest in the Subject Property to "Berniece B. Swart, Trustee, or her successor in trust as Trustee of the R&E Farms Trust under agreement dated September 17, 1992." (R. 29, 528).

g. On December 31, 1998, Berniece B. Swart, Trustee of the R&E Farms Trust, conveyed the Subject Property by Warranty Deed to K. H. Traveller Investments, LLC, specifically subject to "Easements, Rights of Way and Restrictions of Record." (R. 29, 53, 528).

h. Traveller filed its Complaint in this matter on July 26, 2002. (R. 1-9, 528).

i. Neither Questar nor Mountain Fuel has claimed a prescriptive easement in the Subject Property. (R. 528).

Other “statements of fact” set forth in Traveller’s Brief of Appellant (“Traveller’s Brief”)² are immaterial. It does not matter who the owner of the property was when the Right-of-Way and Easement Grant was signed. Instead, it matters only that Burgesses later became the owners. These are the only points material to the after-acquired title doctrine. Furthermore, the trial-court record is completely *silent* as to when Traveller discovered the utility line. Thus, it is not only immaterial, but there is no trial-court record concerning the point. Finally, the trial court determined that the opinion of a real estate appraiser regarding definitions of terms was both immaterial and without merit. (R. 530).

II. SUMMARY OF THE ARGUMENT

As a matter of law, the Right-of-Way and Easement Grant is valid and enforceable. This written document constitutes either an actual grant of an easement before and without any court action, or it is an attempt to grant an easement that became subject to the doctrine of after-acquired title, and became fully enforceable upon transfer of title to the Burgesses. The law of after-acquired title provides that easements obtained under circumstances like those here are fully enforceable and valid. It provides that parties who, like the Burgesses, do not have title to the property at issue but sign a Right-of-Way and Easement Grant and intended³ to grant an easement, will be bound by that easement if they later acquire the

² See, e.g., Traveller’s Brief ¶¶ 3, 9, 10, 11, 12, 13.

³ Notably, Traveller did not properly raise any issues of intent before the trial court ruled on this matter, and it cannot raise such issues now on appeal. *Walter v. Stewart*, 2003 UT App 86, ¶ 33, 67 P.3d 1042, *cert. denied*, 73 P.3d 946.

property. Here, the trial court properly evaluated the Right-of-Way and Easement Grant on its face and the subsequent 1989 Trustee's Deed Upon Sale and concluded that, as a matter of law, there was a valid grant of an easement. The trial court's decision is correct and should not be disturbed.

The trial court was also correct in its determination that, as an entirely separate and distinct ground for dismissal, the Statute of Repose barred Traveller's claims. Central to this determination, the trial court correctly noted that a natural gas utility line is an "improvement" under the definition set forth in the Statute of Repose. Utah's state legislature was unequivocal in defining "improvement," as it is used in the statute, to include "any . . . infrastructure, *utility*, or other *similar man-made change*, addition, modification or alteration to real property." Utah Code Ann. § 78-12-21.5(1)(d) (Supp. 2004) (emphasis added). Traveller's attempts to superimpose some other definition drawn from materials outside the Statute of Repose is directly contrary to the express intent of the Statute of Repose. The Statute of Repose makes clear that the legislature intended to protect those who provide man-made alterations to the property regardless of what might be deemed an "improvement" in another context. Tax statutes and common dictionary definitions are irrelevant, particularly when the legislature is as unequivocal as it was in drafting the Statute of Repose. Similarly, case law from other states whose statutes do not clearly define the term "improvement" is simply irrelevant.

Additionally, the Statute of Repose does not contain any "exemption" for a quiet-title action. Like other causes of action, quiet-title is subject to the statutes of limitations

and repose, such as those limiting claims based upon contracts, fraud, trespass or negligence, as well as those affecting an improvement to real property (as defined by the Statute of Repose). The plain language of the Statute of Repose states that it will apply to all causes of action and that the only effect it will have on other limitation periods will be to not extend such periods. The plain language does not prohibit shortening limitation periods that would otherwise be applicable.

Finally, there were and are no issues of material fact that preclude affirming the trial court's result. Traveller's belated assertion that some issue exists concerning the Burgesses' intent in signing the Right-of-Way and Easement Grant is directly contrary to the clear expression of intent contained on the face of the document, it is pure conjecture, and is contrary to Traveller's representations to the trial court. Traveller presented no evidence—by affidavit or otherwise—suggesting that the intent was anything other than that expressed in the document itself.

III. ARGUMENT

A. THE AFTER-ACQUIRED TITLE DOCTRINE RENDERS THE RIGHT-OF-WAY AND EASEMENT GRANT FULLY ENFORCEABLE AND VALID.

The Right-of-Way and Easement Grant is clear on its face and, after examining the document, the trial court correctly concluded that “[t]he Right-of-Way and Easement Grant shows that Rodney C. Burgess and Elizabeth Burgess *intended* to grant Mountain Fuel and its successors and assigns an easement and right-of-way according to the terms set forth within the document.” (R. 535, emphasis added). There is nothing within the Right-of-

Way and Easement Grant to suggest a contrary intent. Upon determining that the intent of the Burgesses was clear within the document itself, the trial court then properly applied the after-acquired title doctrine to conclude the document that purported to grant the easement became an actual and valid grant of the easement when the Burgesses acquired actual title.

1. Under the Doctrine of After-Acquired Title, the Right-of-Way and Easement Grant is Valid.

The trial court's detailed order shows that the court employed the appropriate analysis of the undisputed material facts and the law to reach the conclusion that the Right-of-Way and Easement Grant is valid and enforceable.

Utah statutory law provides:

If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors, assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.

Utah Code Ann. § 57-1-10 (2000). The Utah Supreme Court has recently extended the doctrine of after-acquired title or estoppel by deed to apply to written attempts to grant easements. *Arnold Industries v. Love*, 2002 UT 133, 63 P.3d 721. It reasoned that “[t]o allow a grantor to deny the terms of its conveyance after acquiring title by repudiating an easement originally intended to be granted would be an invitation to fraud and would contravene the central purpose of the equitable doctrine of estoppel by deed.” *Id.* at ¶ 18.

In the present matter, there is no dispute that the document was signed by the Burgesses, the very people who later obtained the property. Moreover, after examining the face of the document, the trial court concluded that it clearly “shows that Rodney C . Burgess and Elizabeth Burgess intended to grant Mountain Fuel and its successors and assigns an easement and right-of-way according to the terms set forth within the document.” (R. 535). Despite Traveller’s claims, nothing in the record supports a contrary conclusion.

Having reached this conclusion, the trial court applied *Arnold* and determined that the doctrine of after-acquired title applied. The Right-of-Way and Easement Grant was, in the terms of § 57-1-10, a “conveyance purporting to convey” the easement, by the Burgesses, who did not at the time “have the legal estate in such real estate,” but afterwards “acquire[d] the same.” Accordingly, “the legal estate subsequently acquired shall immediately pass to” Mountain Fuel (Questar) and “such conveyance shall be as valid as if such legal estate had been in [the Burgesses] at the time of conveyance.” *See Arnold*, at ¶ 15. In the face of the undisputed facts, the trial court correctly concluded that, pursuant to the doctrine of after-acquired title, the easement became valid upon the conveyance of the property to the Burgesses. The court said, “[t]hrough the doctrine of the after-acquired title that within the four corners of the Right-of-Way and Easement Grant, Rodney C. Burgess and Elizabeth L. Burgess granted an easement to Mountain Fuel and that the document is a valid conveyance of the described easement.” (R. 536). It could reach no other conclusion.

2. The Trial Court Correctly Determined That the Right-of-Way and Easement Grant Was Not Ambiguous and That It Could Be Interpreted Within its Four Corners.

Regardless of whether Traveller claims that intent was clear from the document, the trial court properly looked only to the document to determine the Burgesses' intent. It is well-established law that, if a document is clear, extrinsic evidence is not needed. In *Meridian Ditch Company, Inc. v. Koosharem Irrigation Co.*, 660 P.2d 217, 221 (Utah 1983), the Utah Supreme Court discussed the issue, stating "[b]eing thus unambiguous, it would be superfluous, and moreover, inappropriate, to consider extrinsic evidence in determining the provision's meaning." This rule applies equally to documents involving real property. In *Ault v. Holden*, 2002 UT 33, ¶ 37, 44 P.3d 781, the Supreme Court stated "[d]eeds are construed like other written legal instruments." The Supreme Court further remarked that, like any other document, "we determine the parties' intent from the plain language of the four corners of the deed." *Id.* at ¶ 38.

The trial court rightly declined to consider extrinsic evidence because it determined that the Right-of-Way and Easement Grant was unambiguous. The trial court observed that, although the Burgesses are not specifically identified as "grantors" on the document, they "did acknowledge that they 'warranted' the conveyance stated within the document." (R. 534). According to the Court, therefore, it was as if the Burgesses had been the "grantors." (R. 534). The court continued, stating "[t]he term 'warrant' as used in a conveyance means both to assure the title to the property sold by an express covenant and that the title of the grantee shall be good, and the possession undisturbed." (R. 534-35).

Indeed, the first line of the Right-of-Way and Easement Grant states that the grantor “do[es] hereby convey *and warrant* to Mountain Fuel Supply Company . . .,” showing that it was the grantors’ intent to warrant the right-of-way and easement identified in the document. (R. 45 (emphasis added)). Therefore, when the Burgesses signed off on their intent to *warrant* the Right-of-Way and Easement Grant, they were using the identical language set forth at the beginning of the document.⁴

The Right-of-Way and Easement Grant contains the language needed to grant the right of way and easement, provides for maintenance of the easement, and sets forth limits to the use of the easement. These facts show a clear and undisputed intent to convey a right-of-way and an easement to Questar’s predecessor, Mountain Fuel. Nothing in the document even hints of some alternate use or meaning.

Traveller now makes the unsupported claim that the Right-of-Way and Easement Grant was ambiguous and requests a remand to the trial court for a factual determination. Not only is the Right-of-Way and Easement Grant unambiguous, there is simply no factual information that would suggest that the Burgesses harbored any other intent in signing it.

⁴ The copy of the Right-of-Way and Easement Grant attached to Traveller’s Appellant Brief as Addendum 1 is not a true and correct copy of the document in the trial court’s record. The back page of Appellant’s Addendum No. 1, has lines near the signatures and the words “agreed and warranted” on the original. (R. 46). A true and correct copy of the Right-of-Way and Easement Grant is provided herewith as Exhibit A to the Addendum.

3. There Are No Disputed Issues of Fact as to Whether the Right-of-Way and Easement Grant Is Unambiguous on its Face.

The trial court was correct in examining the face of the document to determine intent. Traveller's claim that it "argued that it was necessary for the trial court to receive evidence to determine exactly what Rodney C. Burgess and Elizabeth L. Burgess intended when they signed their names" is directly contrary to the record.⁵ Traveller's Brief at 11. Indeed, Traveller itself asserted below that no material facts were at issue. Traveller's Memorandum in Opposition to Questar's Motion for Summary Judgment, which was filed on November 6, 2002, was unclear as to whether Traveller claimed a disputed issue of fact existed. (R. 95). Traveller clarified the ambiguity in its pleading when, in its Memorandum in Opposition to Questar's Rule 56(f) Motion to Continue Traveller's Motion for Summary Judgment, it said, "[d]espite what either party has said to the contrary in its Motion for Summary Judgment, *there are no disputes of material fact* and/or need for the parties to undertake additional discovery before the Court may properly rule on the parties' Motions for Summary Judgment." (R. 152, emphasis added). Traveller went on to state "[e]ssentially, *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 (emphasis added)).

⁵ The record before this Court contains only those pleadings and memoranda that the parties submitted to the trial court. It does not include the transcript of oral arguments. Traveller has "certifie[d] that no transcript of any district court hearing is required to supplement the record on appeal." (R. 543).

In fact, Traveller was quite emphatic that there was no need to look outside of the document itself to determine the intent of the Burgesses, stating in the same Memorandum that “[i]ntent 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 on both parties’ Motions for Summary Judgment.” (R. 154 (emphasis added)). Until now both parties and the trial court all agreed that no issues of disputed fact existed, and that the trial court was merely considering issues of law.

Traveller erroneously interprets the trial court’s acknowledgment of the defect in the original conveyance as a factual dispute when it was simply a predicate to the application of the after-acquired title doctrine. If the document clearly sets forth all of the information needed to grant the conveyance, there would be no need to apply the after-acquired title, as the document would already be the conveyance. The after-acquired title doctrine presumes that the original conveyance was technically defective and that other, equitable reasons support its enforcement. What Traveller advances as an ambiguity between the trial court’s statement of a material undisputed fact and its ultimate conclusion is nothing more than the very analysis intended by the doctrine of after-acquired title.

Moreover, if Traveller saw an issue of fact during the proceedings below, it was obligated to raise the issue then. It did not. Traveller cannot, at this late date, change its approach. This Court should reject Traveller’s manufactured argument that further discovery or a resolution of a factual issue is necessary.

Finally, Traveller offers no admissible evidence to sustain its claim that there is a genuine fact in dispute that precludes disposition on summary judgment. In order to sustain such a claim, Traveller must show by “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits”⁶ that there is a genuine issue of material fact. Traveller has cited none of these indicia of a *bona fide* material fact.

Although Traveller made a claim in its Cross-Motion for Summary Judgment⁷ that there is a “material dispute of fact” (R.95, ¶ 4), it has provided no evidence that there actually is such a dispute. Its conjectures and assertions that there is an issue of material fact do not create one. *Tripp v. Vaughn*, 746 P.2d 794 (Utah App. 1987). Absent some admissible evidence to the contrary, Traveller’s claims of disputed fact cannot prevail.

B. THE STATUTE OF REPOSE WAS INTENDED TO AND DOES BAR ACTIONS DIRECTED TO QUESTAR’S UTILITY LINE, WHICH IS A STATUTORY IMPROVEMENT TO REAL PROPERTY.

Because the application of the doctrine of after-acquired title directly resolves the issues on appeal, this Court need go no further. However, the Statute of Repose provides a second independent ground for upholding the trial court’s dismissal of Traveller’s Complaint.

The Statute of Repose provides that “[a]n action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the

⁶ Utah R. Civ. P. 56(c).

⁷ Traveller’s November 11, 2002 Rule 56 Cross-Motion was combined with its Memorandum in Opposition to Defendant’s Motion for Summary Judgment.

improvement or abandonment of construction” Utah Code Ann. § 78-12-21.5 (Supp. 2004). Traveller does not dispute that Mountain Fuel was a “provider,” and that Traveller did not commence this action within the time limits imposed by the Statute of Repose. Traveller’s sole contention is that the natural gas utility line at issue is not an “improvement,” as that term is used in the Statute of Repose. (R. 99-103).

Contrary to Traveller’s assertion, the statute unequivocally defines the term “improvement” to include “any building, structure, *infrastructure*, road, *utility*, or *other similar man-made change, addition, modification, or alteration to real property*.” Utah Code Ann. § 78-12-21.5(1)(d) (emphasis added). As described at greater length below, this term applies directly to this case. Moreover, under the statute, any claim by Traveller against the pipeline installed by Questar had to have been brought within the time prescribed by the Statute of Repose—i.e., by December 22, 2000. Traveller’s Complaint was filed on July 26, 2002, long after the statute had run.

1. Questar’s Pipeline Is an “Improvement” as Defined by the Statute of Repose.

The meaning of the word “improvement” as used in Statute of Repose expressly includes *utilities* and *any* man-made alteration to real property. In *Brixen & Christopher Architects, P.C. v. State*, 2001 UT App 210, 29 P.3d 650, this Court discussed statutory construction, stating: “When ‘statutory language is plain and unambiguous, we do not look beyond the language’s plain meaning to divine legislative intent.’” *Id.* at ¶ 14 (citations omitted). “Moreover, ‘the interpretation must be based on the language used, and the court

has no power to rewrite the statute to conform with an intention not expressed.” *Id.* at ¶ 15 (citations omitted). Furthermore, Utah Code Ann. § 68-3-11 (Supp. 2004) states that, “words and phrases . . . defined by statute [] are to be construed according to such . . . definition.”

The mandate to the courts is clear. This Court must approach the interpretation of the words used in the statute with the understanding that the Legislature used each word and combination of words intentionally and should not substitute any other definition or meanings for words that are defined by the Legislature.

“When faced with a question of statutory construction, we look first to the plain language of the statute.” . . . “We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.” . . . Furthermore, “courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to confirm to an intention not expressed.”

C.T. ex rel. Taylor v. Johnson, 1999 UT 35, ¶ 9, 977 P.2d 479 (citations omitted). 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.

The Utah Supreme Court has rejected attempts to replace or modify statutory terms with other definitions. *Salt Lake City v. Roberts*, 2002 UT 30, ¶ 17, 44 P.3d 767. The Court of Appeals in *Roberts* relied on a definition of “place open for public view” from other jurisdictions rather than using the definition of the term found in the Salt Lake City ordinances. *Salt Lake City v. Roberts*, 2000 UT App 201, ¶¶ 8-11, 7 P.3d 789. The

Supreme Court overturned that conclusion, stating “Salt Lake City contends that, in interpreting this language, the Court of Appeals should not have relied on the case law of other jurisdictions, but instead *on the definition provided by the Salt Lake City Council. We agree.*” *Id.* at ¶ 17 (emphasis added).

Traveller urges this Court to replace the Legislature’s definition of the word “improvement” with either (a) the definition proposed by a property-value appraiser, which is similar to that used in Utah’s tax code, or (b) with the definition used in other states whose statutes lack a specific definition for the word. Neither proposed definition is relevant or applicable. Traveller urges this replacement with the proposition that “improvement” must have the same meaning in all real property- related statutes. Such a proposition is without support. In fact, the Utah Supreme Court has determined that the same term can have distinctly different meanings, even when the term is used in related statutes. In *O’Keefe v. Utah State Retirement Board*, 956 P.2d 279, 280 (Utah 1998), the Supreme Court noted that, when a word (“overtime”) was defined in one statute, other definitions outside the statute were irrelevant to determining its meaning, and when the word was undefined in another statute, outside definitions were relevant in determining its meaning.

In enacting the Statute of Repose, the Legislature adopted a specific definition for “improvement,” which is purposely different from the use of the word in other statutes that deal with real property. In applying the definition of “improvement,” the Court must rule that the broad definition set forth in the Builder’s Statute of Repose governs.

Traveller argues that the definition of the Legislature is at odds with the “common sense” approach, claiming that it does not comport with the Black’s Law Dictionary definition. However, this is not the case. Quite apart from the irrelevance of definitions external to the statute, the Black’s definition relied on by Traveller includes an addition to property that “increases . . . its utility.”⁸ Because of this feeder utility line, natural gas is now available to the very buildings Traveller has erected on its property, thereby increasing the general functionality and value of that property. Even before these buildings were constructed, the existence of the utility line helped it adapt to the further purpose of commercial development. If there are no feeder utility lines, there can be no gas-delivery utility lines and no gas delivery. Feeder utility lines are the means to supply natural gas to the delivery system and then to the buildings ultimately constructed, thereby enhancing the general “utility” of the properties.

None of Traveller’s proposed definitions of “improvement” are applicable here. The presence of an express definition in the statute renders Traveller’s proposed definitions irrelevant. This Court is bound to look first to the definition set forth in the statute. Under that definition, “improvement” includes infrastructure, *utilities* and “*other similar man-made change[s]*, addition[s], modification[s], or alteration[s] to real property.” Utah Code Ann. § 78-12-21(5) (emphasis added). The utility line is plainly infrastructure and a utility.

⁸ *Black’s Law Dictionary* at 761 (6th ed. 1999). Interestingly, Black’s 7th Edition has restructured the definition of “improvement,” and it reads somewhat differently from that cited in Traveller’s Brief.

Indeed, this line is a “utility” as defined by the Utah State Legislature. In Utah Code Ann. § 54-2-1, the term “‘public utility’ includes *every . . . gas corporation . . .*” Pursuant to that same statute, Questar in general, and this pipeline in particular, are utilities regulated by the Utah Public Service Commission. The utility line at issue in this case is, in every sense of the word, a “utility.” The utility line is also unquestionably a change, addition, modification or alteration to the real property.

Additionally, the Statute of Repose is specific, and its application to Questar’s utility line does not render Utah Code Ann. § 78-40-1 “meaningless,” as suggested by Traveller. That provision is quite specific that *no action* may be commenced after the specified time with respect to “improvements.” The statute is not plenary and it does nothing to modify the state of the law regarding a variety of other interests and circumstances. The Statute of Repose does not, as Traveller implies, eviscerate the law governing all prescriptive easements. Rather, the Legislature deliberately provided a carefully circumscribed safe harbor for “providers” who installed “improvements.” Questar is entitled to the benefits of that safe harbor.

In a final effort to avoid the consequences of the Statute of Repose, Traveller argues that *Maack v. Resource Design & Construction, Inc.*, 875 P.2d 570 (Utah App. 1994), established that the Statute of Repose applied only to unsafe conditions. The case has no application here, because the *Maack* Court was interpreting the statute as it existed in 1967, many years before the sweeping changes of 1991. *Id.* at 580 n. 10. The Court should therefore disregard Traveller’s attempt to apply a long-superseded decision.

2. A Review of the Legislative Record Is Unnecessary Because the Legislative Intent Is Plainly Set Forth in the Statute.

There is no need for an examination of the legislative history of the Statute of Repose. The Utah Supreme Court has made clear that such analyses are only appropriate and necessary when the statute itself is vague. The Court reiterated in *Wood v. University of Utah Medical Center*, 2002 UT 134, ¶ 19, 67 P.3d 436 (emphasis added), that it is not always necessary to analyze legislative history:

Plaintiffs' contention that the statute's legislative history evidences that the statute's purpose is to prevent or hinder abortions is unavailing as *we need not examine the legislative history of this statute to discover the legislative intent*. "When examining a statute, we look first to its plain language as the best indicator of the legislature's intent and purpose in passing the statute." *Wilson v. Valley Mental Health*, 969 P.2d 416, 418 (Utah 1998). Legislators may decide that a statute should be passed for myriad, often even different, reasons, but *where the legislative purpose is expressly stated and agreed to as part of the legislation, we do not look to the views expressed by one or more legislators* in floor debates, committee minutes, or elsewhere, in determining the intent of the statute.

In this case, the legislative intent is expressly stated in the statute, Utah Code Ann.

§ 78-12-21.5(2) (Supp. 2004) (emphasis added):

(2) The Legislature finds that:

(a) *exposing a provider to suits and liability for acts, errors, omissions, or breach of duty after the possibility of injury or damage has become highly remote and unexpectedly creates costs and hardships to the provider and the citizens of the state;*

(b) these costs and hardships include liability insurance costs, records storage costs, undue and unlimited liability risks during the life of both a provider and an improvement, and difficulties in defending against claims many years after completion of an improvement;

(c) these costs and hardships constitute clear social and economic evils;

(d) the possibility of injury and damage becomes highly remote and unexpected ten years following completion or abandonment;

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

In passing this legislation, the Legislature expressly stated that its purpose is to impose a period of limitation and repose upon *all causes of action* related to the installation of the improvement. The statute contains no language that would limit its application to claims for construction defects, or to limit it in any other relevant sense. “Because the legislature expressly set forth its intent and purpose in section 78-11-23 in enacting the instant legislation, we do not look at its legislative history.” *Wood*, 2002 UT 134, ¶ 19. It is unnecessary for the Court to investigate a full legislative history of the statute.

Even if the legislative history were relevant, it would show that the Statute of Repose applies to virtually all causes of action. The Legislature considered what impact this Statue of Repose should have on the limitation periods that may already exist and stated “[t]his section does not *extend* the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.” Utah Code Ann. § 78-12-21.5(9) (emphasis added). Had the Legislature wanted to otherwise limit the Statute of Repose’s application or to carve out some exception, it would have expressly done so.⁹

⁹ This position of the Supreme Court was explained in *Lehi City v. Meling*, 87 Utah 237, 48 P.2d 530, 535 (1935): “It is one of the objects of government to promote the public welfare of the state and provide for the material prosperity of its people. It is for the Legislature to determine the manner and extent to which it will exercise this function of

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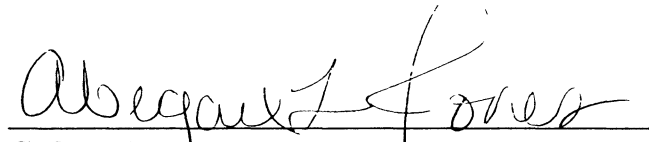
Moreover, such a review does not aid the analysis of the issue before this Court. The statute has already been deemed constitutional. Therefore, the only question is whether it should apply to all causes of action, even if the cause of action is quiet title or trespass. Even if the full analysis of the legislative history showed that there was discussion during the legislative process that the statute should be limited to only latent defects in construction or workmanship, the fact remains that the legislation was enacted *without* any such limiting language. By its passage of the legislation, the Legislature rejected such arguments and points of view in favor of the all-inclusive language that this statute of limitations and repose was to be effective against *all* causes of action.

government, and its determination upon that point is limited by its own discretion, and is beyond the interference of the courts.”

IV. CONCLUSION

Questar respectfully requests this Court to affirm the ruling of the trial court that, through the doctrine of after-acquired title, the Right-of-Way and Easement Grant is a valid grant of the easement described, and, on independent grounds, that Traveller's claims regarding the gas pipeline are barred by the Builder's Statute of Repose.

Respectfully submitted this 27th day of September 2004.

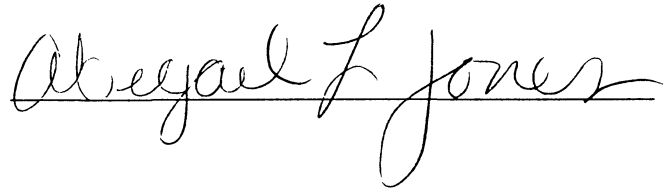

C. Scott Brown
Abigail L. Jones
QUESTAR REGULATED SERVICES COMPANY

Attorneys for Appellee Questar Gas Company

CERTIFICATE OF SERVICE

I certify that on the 27th day of September 2004, I caused to be mailed, postage prepaid, two copies of the Responsive Brief of Questar Gas Company to the following:

V. Lowry Snow
J. Gregory Hardman
SNOW & JENSEN
134 North 200 East, Suite 302
P.O. Box 2747
St. George, Utah 84771-2747

A handwritten signature in cursive script, reading "Abigail L. Jones", written over a horizontal line.

ADDENDUM

Tab A

RIGHT-OF-WAY AND EASEMENT GRANT

UT 16934

PROGRESSIVE INVESTMENT CORP., a Nevada corporation, Trustee
Grantor, do(es) hereby convey and warrant to MOUNTAIN FUEL SUPPLY COMPANY, a
Corporation of the State of Utah, Grantee, its successors and assigns, for the
sum of TEN DOLLARS (\$10.00) and other good and valuable considerations, receipt
of which is hereby acknowledged, a right-of-way and easement 22.0 feet in
width to lay, maintain, operate, repair, inspect, protect, remove and replace
pipe lines, valves, valve boxes and other gas transmission and distribution
facilities (hereinafter collectively called "facilities") through and across the
following described land and premises situated in the County of Washington,
State of Utah, to-wit:

Land of the Grantor located in the Northeast Quarter of Section 2,
Township 43 South, Range 16 West, Salt Lake Base and Meridian; and the
Southeast Quarter of Section 35, Township 42 South, Range 16 West,
Salt Lake Base and Meridian;

the center line of said right-of-way and easement shall extend through and
across the above described land and premises as follows, to-wit:

Beginning at a point South 0°22'25" East 652.67 feet along the section
line from the Northeast Corner of said Section 2; running thence North
63°57'51" West 1256.18 feet; thence North 1°01'00" West 214.92 feet;
thence North 10°34'01" East 104.29 feet; thence North 8°12'13" West
167.39 feet; thence North 1°01'00" West 745.10 feet; thence North
52°35'37" East 249.08 feet; thence North 34°40'41" East 324.06 feet,
more or less, to Grantor's Northeast property line.

TO HAVE AND TO HOLD the same unto the said Mountain Fuel Supply Company,
its successors and assigns, so long as such facilities shall be maintained,
with the right of ingress and egress to and from said right-of-way to maintain,
operate, repair, inspect, protect, remove and replace the same. During
temporary periods Grantee may use such portion of the property along and
adjacent to said right-of-way as may be reasonably necessary in connection with
construction, maintenance, repair, removal or replacement of the facilities.
The said Grantor(s) shall have the right to use the said premises except for the
purposes for which this right-of-way and easement is granted to the said
Grantee, provided such use does not interfere with the facilities or any other
rights granted to the Grantee hereunder.

If the facilities are installed at any point within a roadway or any point
that may be construed to be a road right-of-way, said installation is for
Grantee's convenience and shall not constitute an admission by Grantor(s) that
said right-of-way is available for public use.

The Grantor(s) shall not build or construct nor permit to be built or
constructed any building or other improvement except curb, gutter, driveways,
roadways, sidewalks, parking lots, landscaping, sprinkling systems or similar
improvements over or across said right-of-way, nor change the contour thereof
without written consent of Grantee. This right-of-way shall be binding upon and
inure to the benefit of the successors and assigns of Grantor(s) and the
successors and assigns of the Grantee, and may be assigned in whole or in part
by Grantee.

0399171 Bk 0640 Pg 0586

RUSSELL SHIRTS * WASHINGTON CO RECORDER
1992 FEB 05 11:39 AM FEE \$8.00 BY PJ
REQUEST: MOUNTAIN FUEL SUPPLY CO

It is hereby understood that any parties securing this grant on behalf of the Grantee are without authority to make any representations, covenants or agreements not herein expressed.

WITNESS the execution hereof this _____ day of _____, 19__.

PROGRESSIVE INVESTMENT CORP., a Nevada Corporation, Trustee

Bradley A. Erickson, President

AGREED and WARRANTED:

Randall Helms
12/1/88

Rodney C. Burgess
Rodney C. Burgess
Elizabeth L. Burgess
Elizabeth L. Burgess

STATE OF HAWAII)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 1988, by Bradley A. Erickson, President of Progressive Investment Corp., a Nevada corporation, Trustee.

My Commission Expires:

Notary Public

Residing at _____

STATE OF UTAH)
) ss.
County of Iron)

0399171 Bk 0640 Pg 0587

The foregoing instrument was acknowledged before me this 2nd day of December, 1988, by Rodney C. Burgess and Elizabeth L. Burgess.

My Commission Expires:

Jan 1, 1992

Notary Public

Residing at

2152
Cedar

