

2003

# Kay H. Traveller Investments v. Questar Gas Company : Brief of Appellant

Utah Court of Appeals

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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.

Appellate Case No. 20030495-CA

UTAH COURT OF APPEALS  
BRIEF

UTAH  
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DOCKET NO. 2003 0495-CA

BRIEF OF THE APPELLANT

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

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UTAH APPELLATE COURT  
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## **I. LIST OF PARTIES**

The Appellant (Plaintiff) is Kay H. Traveller Investments, L.L.C., a Utah limited liability company. Appellant will be referred to in this brief as “Traveller.” The Appellee (Defendant) is Questar Gas Company, a Utah corporation. Appellee will be referred to in this brief as “Questar.”

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#### **IV. STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2A-3(2)(j) (2004).

#### **V. ISSUES PRESENTED AND STANDARD OF REVIEW**

Issues Presented: (1) whether the trial court erred by ruling that there was no question of fact as to whether a document that did not contain the signature of the named grantor was on its face and within its four corners clear and unambiguous, and granted an easement and all rights contained therein; (2) whether the trial court erred in ruling that the Builder's Statute of Repose (Utah Code Ann. § 78-12-21.5 (2002)) applies to bar equitable claims for ejectment, declarative relief and quiet title; and (3) whether the trial court erred in ruling that a high-pressure natural gas feeder line that traverses Traveller's property but is otherwise incapable of providing natural gas or any other tangible benefit to Traveller's property because of its size and intended purpose constitutes an "improvement" within the meaning of the Builder's Statute of Repose.

Standard of Review: The first issue on appeal involves a challenge to the discretionary ruling of the trial court. The standard of review for such challenges is abuse of discretion. *Crookson v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993).

The second and third issues on appeal involve questions of law. The standard of appellate review for questions of law following summary judgment is

correctness. *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶9, 995 P.2d 1237. The trial court's conclusions receive no deference. *Id.* Moreover, all facts and reasonable inferences arising from such conclusions are viewed in the light most favorable to the non-moving party. *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993).

## **VI. GOVERNING AUTHORITY**

Utah Code Ann. §57-1-10; Utah Code Ann. §78-12-21.5; and Utah Code Ann. §78-40-1 *et seq.*

## **VII. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT BELOW**

This case deals with a high-pressure natural gas feeder line that is owned by Questar and traverses Traveller's property; and whether said high pressure natural gas feeder line was properly installed pursuant to a validly granted easement; and whether said high pressure natural gas feeder line constitutes an "improvement" to Traveller's property.

On July 26, 2002, Traveller filed a lawsuit, seeking to quiet title to the disputed portion of the subject property, as well as making claims for immediate declaratory relief, trespass, private nuisance and ejectment. R. 1-9.

On August 20, 2002, Questar filed an Answer to Traveller's Complaint. R. 13-16.

On October 9, 2002, Questar filed a motion for summary judgment supported by a memorandum of points and authorities, claiming that all causes of action in Traveller's Complaint were barred (a) by the Builder's Statute of Repose as contained in Utah Code Ann. §78-12-21.5; or (b) by operation of the doctrine of after-acquired title/estoppel by deed. R. 25-58.

On November 8, 2002, Traveller filed a memorandum in opposition to Questar's motion for summary judgment and also filed a cross-motion for summary judgment, contending as follows: (1) that the Builder's Statute of Repose had no application to the disposition of the lawsuit because Questar's high pressure natural gas feeder line was not an "improvement" to Traveller's real property; (2) that the equitable doctrine of estoppel by deed and statute on after-acquired title had no application to the disposition of the lawsuit because this doctrine and statute only applied to conveyances of an estate in land and an easement is not an estate in land;<sup>1</sup> and (3) that the previous owners of the subject property never executed the purported easement document, which rendered the document ineffective to convey a perpetual interest in the subject property. R. 93-120.

On November 19, 2002, Questar filed a reply memorandum in support of its motion for summary judgment; and on November 20, 2002, Questar filed a motion

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<sup>1</sup> Traveller has not appealed this second argument from its cross-motion for summary judgment due to the Utah Supreme Court's recent holding in *Arnold Indus. v. Love*, 2002 UT 133, 63 P.2d 721, which followed other jurisdictions in extending the after-acquired title doctrine to the granting of an easement.

pursuant to Rule 56(f) of the Utah Rules of Civil Procedure, contending that it could not respond to Traveller's cross-motion for summary judgment without first completing more discovery. R. 122-134, and 145-148.

Traveller filed an opposition memorandum to Questar's Rule 56(f) motion on December 4, 2002. R. 149-175. On December 6, 2002, Questar filed a reply memorandum. R. 176-181. On December 12, 2002, the trial court issued an order continuing Traveller's cross-motion for summary judgment. R. 184-185.

On January 21, 2003, the trial court heard oral arguments on Questar's motion for summary judgment. R. \_\_\_\_.<sup>2</sup> At this hearing, the trial court agreed to renew Traveller's cross-motion for summary judgment since it dealt with the converse position of the same arguments addressed in Questar's motion for summary judgment, and ordered the parties to submit supplemental briefs to assist the trial court in resolving both motions for summary judgment.<sup>3</sup>

On February 18, 2003, Questar submitted its supplemental brief addressing "the subject of legislative intent regarding the 'Builder's Statute of Repose,' which [was] at issue in [Traveller's] Motion. R. 192-503.

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<sup>2</sup> For some reason the trial court did not number the document entitled "Minutes: Motion for Summary Judgment" in its files, which was dated January 21, 2003. This document should follow chronologically between R. 191 and 192. A copy of this document appears, unnumbered, in volumes 1 and 2 of the trial court's files.

<sup>3</sup> Although there is no citation to the Record, examination of the parties' supplemental briefs and the trial court's order, dated May 5, 2003, clearly reflects that both motions for summary judgment were argued by the parties at the January 21, 2003 hearing and, thereafter, ruled upon by the trial court.

Also, on February 18, 2003, Traveller submitted its supplemental brief, and argued that the trial court should not

give effect to [Questar's] proposed definition of the term 'improvement' in the Builder's Statute of Repose because (1) it [misapplied] legislative intent and [contravened] legislative history; (2) Utah courts have never applied the term as proposed by [Questar]; and (3) [Questar's] proposed definition would create inherent and unintended conflicts with other longstanding statutory and common laws.

R. 504-512.

The trial court convened a hearing on March 6, 2003, to receive additional oral arguments on the parties' motions for summary judgment. After receiving oral arguments, the trial court granted Questar's motion for summary judgment, ruling that the Builder's Statute of Repose barred all causes of action in Traveller's Complaint and that the doctrine of after-acquired title applied to give Questar an easement across Traveller's property.<sup>4</sup>

On April 21, 2003, Traveller filed a request for hearing to clarify the trial court's March 6, 2003 ruling, as well as an objection to Questar's proposed order on its motion for summary judgment. R. 513-518. Traveller's primary contention was that Questar had prepared a proposed order that had Traveller agreeing or

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<sup>4</sup> Again, for some reason the trial court did not number the document entitled "Minutes: Motion for Summary Judgment" in its files, which was dated March 6, 2003. This document should follow chronologically between R. 512 and 513. A copy of this document appears, unnumbered, as the first page in volume 2 of the trial court's files.

stipulating to the fact that the “Right-of-Way and Easement Grant” document was on its face and within its four corners clear and unambiguous and that it granted an easement to “Mountain Fuel Supply Company, its successors and assigns.” R. 514.

Questar filed a reply to Traveller’s objection to the proposed order on April 25, 2003. R. 519-521.

On May 5, 2003, the trial court convened another hearing to clarify its order on Questar’s motion for summary judgment, which clarifications are included within the text of the trial court’s Order on Summary Judgment Dismissing Complaint with Prejudice and on the Merits. R. 526-538. A copy of the Court’s Order is attached hereto as Addendum No. 2.

On May 21, 2003, Traveller filed its notice of appeal. R. 541-542.

## **B. STATEMENT OF FACTS**

1. In 1988, Questar’s predecessor utility company, Mountain Fuel Supply Company (hereinafter “Mountain Fuel”), installed a high-pressure natural gas utility line through and across certain real property described as 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 (“the subject property”). Mountain Fuel

completed installation of this high-pressure natural gas utility line on or about December 22, 1988. R. 527.

2. On December 2, 1988, Rodney C. Burgess and Elizabeth L. Burgess signed their names to the second page of a document entitled “Right-of-Way and Easement Grant” below a signature block containing the words “agreed and warranted,” which document purportedly granted Mountain Fuel, its successors and assigns, 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. R. 527.

3. Rodney C. Burgess and Elizabeth L. Burgess were not the legal owners of the subject property on December 2, 1988; rather, the record owners of the subject property on this date were 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 24<sup>th</sup> day of February 1986, known as “Red Hills Trust.” R. 66-71, 94-95, 98, 109-110, 527.

4. On August 7, 1989, Rodney C. Burgess and Elizabeth L. Burgess as beneficiaries in interest under a purchase money trust deed became the owners of the subject property through a non-judicial foreclosure sale. R. 527.

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

6. On September 24, 1992, Rodney C. Burgess and Elizabeth L. Burgess 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. 528.

7. On December 31, 1998, Berniece B. Swart, Trustee of the R & E Farms Trust, conveyed the subject property by warranty deed to Traveller. R. 528.

8. Neither Questar nor its predecessor-in-interest, Mountain Fuel, have ever claimed any equitable interest in the subject property, including a prescriptive easement. R. 528.

9. Neither Traveller nor Berniece B. Swart, Trustee of the R & E Farms Trust, have ever granted a written easement to Questar or its predecessor-in-interest, Mountain Fuel, to maintain a high-pressure natural gas utility line across the subject property. R. 74.

10. Traveller discovered the existence of the high-pressure natural gas utility line 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, and requested that Questar remove or relocate the line, which Questar refused to do. R. 74 and 99.



11. From the standpoint of a real estate appraiser, the high-pressure natural gas utility line provides no benefit to Traveller's property because Traveller's property is served by a natural gas distribution line running under Dixie Drive, which runs along the opposite side of Traveller's property. R. 86 and 99.

12. From the standpoint of a real estate appraiser, the high-pressure natural gas utility line does not fit within the definition of an "improvement" to real property as that term is commonly referred to by real estate appraisers because said high-pressure natural gas utility line in no way enhances the value of or otherwise produces a tangible benefit to Traveller's property. R. 87 and 99.

13. On or about July 26, 2002, following certain unheeded written requests to Questar to remove and relocate the high pressure natural gas feeder line, Traveller filed a lawsuit, seeking to quiet title to the disputed portion of the subject property, as well as claims for immediate declaratory relief, trespass, private nuisance and ejectment. R. 1-9.

### **VIII. SUMMARY OF THE ARGUMENT**

Traveller's appeal contains three principal arguments. First, the trial court abused its discretion in granting Questar's motion for summary judgment amid an important disputed material fact. The record before the Court of Appeals clearly reveals that the trial court acknowledged there was a disputed material fact surrounding the execution of the Right-of-Way and Easement Grant document by

the Burgesses through its finding of a “purported” grant, and foreclosed Traveller from conducting discovery to resolve this disputed fact. Thereafter, the trial court ruled as a matter of law that the document it previously suggested was ambiguous, on its face and within its four corners, clearly granted an easement.

Second, the Builder’s Statute of Repose does not bar equitable claims for ejectment, declarative relief and quiet title because the statute was never designed to eliminate these statutory and common law rights.

Third, a high-pressure natural gas utility line that admittedly provides no tangible benefit to Traveller’s property does not constitute an “improvement” within the meaning of the Builder’s Statute of Repose.

These last two issues present legal questions first impression in Utah jurisprudence regarding the scope of the Builder’s Statute of Repose.

## **IX. ARGUMENT**

### **A. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING QUESTAR’S MOTION FOR SUMMARY JUDGMENT BY IGNORING A MATERIAL ISSUE OF FACT**

#### **1. The Presence of a Dispute as to a Material Fact Disallows the Granting of a Summary Judgment**

Rule 56(c) of the Utah Rules of Civil Procedure states in pertinent part as follows:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law.

U.R.C.P. 56(c) (2004). Conversely, Utah courts have recognized that “the presence of a dispute as to material facts disallows the granting of a summary judgment.” *Bill Brown Realty, Inc. v. Abbott*, 562 P.2d 238 (Utah 1977).

When reviewing a trial court’s grant of a motion for summary judgment, Utah appellate courts should review the facts “in the light most favorable to the party opposing a motion for summary judgment.” *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶2, 995 P.2d 1237. “In reviewing a summary judgment, [appellate courts] accord no deference to the trial court and review its ruling for correctness.” *Id.* at ¶9. As explained below, the trial court abused its discretion in granting Questar’s motion for summary judgment because it did so despite the existence of a significant disputed material fact.

## **2. There Is a Material Issue of Fact as to Whether Traveller’s Predecessors in Interest Intended to Grant an Easement**

When opposing Questar’s motion for summary judgment Traveller 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 below the clause “Agreed and Warranted” on the Right-of-Way and Easement Grant document on which they were not identified as the named grantors. *See, e.g., Traveller’s Request for Hearing...and Objection to Defendant’s*

Proposed Order, R. 514. Examination of this document reveals that the Burgesses' signatures are affixed to an arguably unrelated portion of this document. A copy of the Right-of-way and Easement Grant is attached hereto as Addendum No. 1.

Certainly, the terms "agreed" and "warrant" are not customary terms used to grant an easement, and this language coupled with all of the peculiar facts regarding ownership of the subject property, including the Burgesses' own lack of ownership when they signed this document, lend credence to a variety of plausible meanings regarding the Burgesses' intent. For example, as the beneficiaries of a trust deed on the subject property it is more likely they were manifesting their intent to subordinate their security interest in the property to the interest of the intended easement holder. Yet, as set forth above in the statement of facts, even the named grantor on this document, "Progressive Investment Corp.," was not the sole owner of the subject property in December 1988. Rather, it was collectively owned by 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 24<sup>th</sup> day of February 1986, known as "Red Hills Trust." R. 66-71, 94-95, 98, 109-110, 527.

For more than a hundred years Utah courts have recognized that "in construing written instruments, effect is to be given to the instrument or writing as

a whole, though single clauses taken alone [might] give a different construction.” *Cereghino v. Wagener*, 4 Utah 514, 11 P. 568 (Utah 1886). Arguably, therefore, Questar has isolated and focused upon the three-word phrase “Agreed and Warranted” to the complete exclusion of the rest of the document, which identified a different party as the grantor and intended signatory to the document. To date, there has been inadequate discovery on these critical factual issues and consequently there remain significant factual issues for the trier of fact to resolve.

Notwithstanding, examination of the trial court’s Order on Summary Judgment Dismissing Complaint with Prejudice and on the Merits (hereinafter “Order”) reveals that the trial court disregarded this important factual dispute in reaching its conclusions of law. R. 526-538. In the second paragraph of the trial court’s Statement of Undisputed Material Facts it found as follows:

On December 2, 1988, Rodney C. Burgess and Elizabeth L. Burgess 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 document **purportedly** granted Mountain Fuel, its successors and assigns, 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.

R. 527 (emphasis added). The act of granting of an easement is a necessary absolute: it is either granted or it is not. The trial court’s determination that the Burgesses “purportedly” granted an easement necessarily amounts to an

acknowledgement by the trial court that it either made no specific factual finding on this issue or recognized there was a genuine factual dispute between the parties. In either case, the trial court ruled improperly.

Notwithstanding, the trial court then made its third factual finding, which was and is undisputed by the parties and states: “Rodney C. Burgess and Elizabeth L. Burgess were not the legal owners of the subject property on December 2, 1988 [when they signed the purported easement document], rather, they were beneficiaries of a trust deed recorded against the Subject Property.” R. 527. If the trial court was uncertain whether the Burgesses in fact granted an easement to Mountain Fuel, then this third finding of fact further degrades the trial court’s analytical method.

The foregoing analysis of the trial court’s findings of fact reveals that it left this important factual issue unresolved, and then premised its conclusions of law upon these seemingly contradictory and disputed issues of material fact. The trial court should not have considered the applicability of the doctrine of after-acquired title (codified as Utah Code Ann. §57-1-10) until it first resolved the factual issue of whether there was a grantor that intended to grant an easement by signing some document.

In fact, the doctrine of after-acquired title only applies to instances where a person not vested with title attempts to convey an estate in land or grant a

servitude. The beginning words of the after-acquired title statute read as follows: “[i]f any person shall hereafter convey...” Utah Code Ann. §57-1-10. These are action words, suggesting the making, signing and delivery of some instrument. A copy of the after-acquired title statute is attached hereto as Addendum No. 4. If the person never intended to make the conveyance of an estate or grant a servitude, or the instrument was defective, the doctrine would not apply. Yet, examination of the trial court’s analysis of the after-acquired title doctrine reveals that is exactly what it did when it reasoned “[f]urthermore, the ‘Right-of-Way and Easement Grant’ document shows that Rodney C. Burgess and Elizabeth L. 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).

After acknowledging in its second finding of fact that there was a disputed issue of material fact as to whether the Burgesses intended to grant or in fact did grant an easement, the trial court then concluded as a matter of law that the Burgesses “granted the easement,” and specifically foreclosed “Traveller from conducting discovery regarding [the] intent of the Burgesses in signing their ‘Right-of-Way and Easement Grant’ document.” R. 536. In fact, the trial court specifically noted in the interlineated portion of its Order that Traveller objected to these conclusions of law.

For the foregoing reasons, the trial court abused its discretion when it determined amid countervailing issues of material fact that the Burgesses intended to grant an easement. As a result, the Court of Appeals should reverse the trial court's ruling and remand this matter with instructions that the trier of fact receive specific evidence on this factual issue before applying the law. *See Price Dev. Co.*, 2000 UT 26 at ¶¶28-29.

**B. THE BUILDER'S STATUTE OF REPOSE HAS NO  
APPLICATION TO EQUITABLE CLAIMS FOR  
EJECTMENT, DECLARATORY RELIEF AND QUIET TITLE**

**1. Courts Have a Duty to Interpret Statutes so as Not to Render Related Statutes Meaningless**

When called upon to construe legislative enactments, Utah courts apply longstanding rules of statutory construction, and their "primary objective in construing enactments is to give effect to the legislature's intent." *Lyon v. Burton*, 2000 UT 19, ¶17, 5 P.3d 616 (citing *Gohler v. Wood*, 919 P.2d 561, 562 (Utah 1996)). "The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and 'with other statutes under the same and related chapters.'" *Id.* (citing *Roberts v. Erickson*, 851 P.2d 643, 644 (Utah 1993); *Silver v. Auditing Div.*, 820 P.2d 912, 914 (Utah 1991)); and *Osuala v. Aetna Life & Cas.*, 608 P.2d 242, 243 (Utah 1980)). Moreover, courts have a "duty to avoid interpreting a statute in a manner that



renders portions of the statute, **or related statutes**, meaningless.” *Id.* at ¶19, nt. 5 (emphasis added).

The Builder’s Statute of Repose (Addendum No. 3) and the quiet title statute (Addendum No. 5) both concern rights and obligations attendant to real property and are therefore arguably related. In this instance, Questar’s requested application of the Builder’s Statute of Repose and the trial court’s ruling render meaningless the entire chapter of the Utah Code setting forth the process to quiet title to real property.

**2. The Trial Court’s Application of Utah Code Ann. §78-12-21.5 Abrogates Rights Created by the Legislature Under Utah Code Ann. §78-40-1**

Utah Code Ann. §78-40-1 states: “An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.” As drafted, this statute imposes no period of limitation to a person’s ability to quiet title to an estate or right attendant to real property. Only the running of prescriptive periods, such as in a claim for adverse possession or a prescriptive easement, or perhaps the related boundary by acquiescence, could serve to end this legislatively established right. *See Jacobs v. Hafen*, 917 P.2d 1078, 1081 (Utah 1996) (recognizing that the 20-year period to establish a boundary by acquiescence serves “to make the doctrine function like a formal statute of limitations” in a quiet title action).

It is well-established in Utah law that “a prescriptive easement is created when the party claiming the prescriptive easement can prove that ‘use of another’s land was open, continuous, and adverse under a claim of right for a period of twenty years.” *Nyman v. Anchor Dev., L.L.C.*, 2003 UT 27, ¶18, 73 P.3d 357 (citing *Orton v. Carter*, 970 P.2d 1254, 1258 (Utah 1998)). Applying the Builder’s Statute of Repose as requested by Questar, and ruled by the trial court, effectively vested prescriptive rights in Questar that were premature by at least six years when this lawsuit commenced.

Questar would likely contend that its easement rights vested by virtue of a specific written grant, i.e., the Right-of-way and Easement Grant. However, such an argument would miss the point. The operative portion of the trial court’s Order analyzing the Builder’s Statute of Repose focused only upon this statute’s perceived bar to all actions—including those seeking to quiet title—and had nothing to do with whether the Burgesses intended to grant an easement. R. 528-533. Thus, the trial court has effectively used a statute of limitations/repose to create possessory rights in Questar. Following the trial court’s analysis to its logical conclusion reveals that any land owner would be barred from quieting title to real property after only twelve years when the prescriptive easement claims of an adverse party are based on said person’s installation of improvements on the subject property. Although equally established through the common law or by

statute, the trial court has similarly eviscerated Traveller's other equitable causes of action for ejectment and declaratory relief.<sup>5</sup> The Utah legislature quite probably never intended these results when it drafted the Builder's Statute of Repose.

### **3. There Is No Historical or Case Law Support in Utah for Questar's Contention that the Builder's Statute of Repose Was Designed to Grant Possessory Rights to Easements**

The Utah Builder's Statute of Repose has existed since 1967, having been codified in one version or another in the Utah Code as Section 78-12-25.5 until 1999, and as Section 78-12-21.5 from 1999 to the present day. Each amended version of the statute has been subjected to rigorous scrutiny by the courts, resulting in many revisions to the statute as various provisions were deemed unconstitutional or suffered from other legal maladies. Through this process, Utah courts have made helpful pronouncements as to the proper application of the Builder's Statute of Repose, which together provide a context for further analysis of whether the Court of Appeals should allow its application to result in the creation of a possessory interest in real estate.

First, in *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1089-90 (Utah 1989), the Utah Supreme Court recited the history behind the eventual creation of builder's statutes of repose in most states, including Utah. Historically, English

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<sup>5</sup> An action in ejectment is an alternative to a quiet title action. *Gibson v. McGurrian, et al.*, 37 Utah 158, 167, 106 P. 669 (Utah 1910). The right to petition a court for declaratory relief is governed by statute. See Utah Code Ann. §78-33-1 *et seq.*

precedent established that claims for improvements to real property required privity of contract. *Id.* at 1089 (citing *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842)). Initially, early American courts followed the English precedent until the landmark case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which struck down the privity requirement in products liability cases. *Id.* Thereafter, courts around the country began eliminating the privity requirement as applied to architects. *Id.* In response to these and other cases abolishing the privity requirement for other professionals, including builders and engineers, “the construction industry, through the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors, responded with an extensive lobbying campaign to enact legislation limiting the duration of liability on construction professionals.” *Id.* Utah enacted its first builder's statute of repose in response to the national tide of lobbying efforts. *Id.* at 1090.

Second, the Builder’s Statute of Repose was designed to address unsafe conditions as they affect third parties, or parties for whom there is no contractual relationship. *See, Good v. Christensen*, 527 P.2d 223, 224-25 (Utah 1974); *see also, Maack v. Resource Design & Constr., Inc.*, 875 P.2d 570, 580, nt. 10 (Utah App. 1994) (stating the Builder’s Statute of Repose “expressly applies only to

damages arising out of ‘unsafe conditions’”). Obviously, there is no unsafe condition at issue in the present matter.

Examining the historical perspective around which Utah enacted the Builder's Statute of Repose, it is clear that it has never been used to create a possessory interest in real property. On the contrary, this examination reveals that the statute was designed primarily to provide engineers, architects and contractors with a period of repose after which they could be relieved from liability. Moreover, Utah courts' application of the Builder's Statute of Repose has dealt exclusively with latent construction defects. Clearly no such facts exist in this case. Accordingly, the Court of Appeals should take this opportunity to clarify the proper application and breadth of the Builder's Statute of Repose.

### **C. QUESTAR'S HIGH PRESSURE NATURAL GAS UTILITY LINE IS NOT AN "IMPROVEMENT" WITHIN THE MEANING OF THE BUILDER'S STATUTE OF REPOSE**

#### **1. Not Every Building, Structure, Infrastructure, Road, Utility, or Other Similar Man-made Change, Addition, Modification, or Alteration to Real Property Is an "Improvement"**

In this case the plain meaning of the term “improvement” and its statutory definition appear at odds. The plain meaning of the term “improvement” is “a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it to further

purposes.” BLACK’S LAW DICTIONARY 757 (6<sup>th</sup> ed. 1990). The Builder’s Statute of Repose defines the term as “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). While Black’s definition of “improvement” could fit within the definition of the term contained in the Utah Code, clearly, the Utah Code’s definition would not in every case fit within the definition in Black’s because every “building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property” does not necessarily enhance the value, beauty or utility of a property.

A court’s “primary objective in construing legislative enactments is to give effect to the Legislature’s underlying intent.” *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) (citing *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982)). “Generally, the best indication of that intent is the statute’s plain language.” *Id.* (citing *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1038 (Utah 1989)). Moreover, Utah courts have reasoned that “[considering] the basic reasonableness of [the courts’] interpretation of [a] statute” is an “appropriate double-check on the interpretation [they] conclude emerges from a straightforward reading of the statute’s plain language.” *Epperson v. Utah State Retirement Bd.*, 949 P.2d 779, 783 (Utah App. 1997). “It is axiomatic that a statute should be

given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.” *Id.* (citing *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988)).

Respectfully speaking, however, the trial court achieved a legally “absurd or unreasonable result” in adopting Questar’s argument that its high pressure natural gas feeder line is an “improvement” to Traveller’s property. As explained above in the statement of facts, Questar’s high pressure natural gas feeder line is a main feeder line, and because of its size, construction and intended purpose, it has no ability to provide natural gas to Traveller’s property. R. 59, 86, 87 and 99.

Additionally, the high pressure natural gas feeder line adds no value to Traveller’s property and actually reduces its commercial utility because the line is impeding development. R. 86, 87 and 99. Therefore, under the most logical analysis it is not an improvement to Traveller’s property.

## **2. Utah Courts Have Implied that There May Be Instances when the Plain Meanings of the Key Terms within the Builder’s Statute of Repose Are Unreasonable**

Most Utah cases discussing the Builder’s Statute of Repose concern challenges to the constitutionality of the statute or the applicability of a discovery rule. Traveller is aware of only one Utah case that examined the plain meaning of some of the key terms within the Builder’s Statute of Repose, although unfortunately the plain meaning of the term “improvement” was not one of them.

However, this case provides some helpful guidance for how the Court of Appeals should address Traveller's contention that Questar's high pressure natural gas feeder line is not an "improvement" to Traveller's property.

In *State Farm Fire & Cas. Co. v. Sundance Dev. Corp.*, 2003 UT App 367, ¶¶2 and 10, 78 P.3d 995, the Court of Appeals examined the issue of whether a developer's act of determining boundaries, size, location, and placement of lands on a plat made the developer a "provider" performing an "activity in relation to an 'improvement.'" Some of the lots identified on this plat were in an avalanche zone, and years later a home that was constructed in the avalanche zone was destroyed by an avalanche. *Id.* at ¶2. The trial court determined that the developer was a "provider," which had the effect of time-barring the insurance company subrogee's claims against the developer. *Id.* at ¶3.

In reviewing the trial court's decision to grant the developer's motion for summary judgment, the Court of Appeals first acknowledged the statutory definitions of the terms "provider" and "improvement." *Id.* at ¶7. The Court of Appeals then observed as follows:

The trial court ruled that the activities of [the developer], in relation to Lot 2, were an improvement to real property because "after extensively reviewing the statute of repose as it existed in 1997, and the Supreme Court's holding in *Craftsman*, the [trial] court finds that the legislature included—within the statutory definition of 'improvement'—a developer's activities in relation to subdividing raw land.



*Id.* at ¶8. This observation is important because the Court of Appeals followed with a clarification that

*Craftsman* never addressed the definition of an improvement to real property, let alone the issue of whether site selection and subdivision of raw land are improvements to real property. Accordingly, it was inappropriate for the trial court to rely upon *Craftsman* for that proposition.

*Id.* at ¶9. The Court of Appeals then reasoned:

In this case we need not go beyond the plain language of the statute. Here, it is undisputed that the activities of [the developer] did not constitute a “building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property.”

*Id.* (citing Utah Code Ann. 78-12-25.5(1)(c) (Supp. 1997)). This language by the Court of Appeals clearly implies that there will be cases when a court must look beyond the plain language of the key terms in the Builder’s Statute of Repose.

In *Andrus v. Allred*, 17 Utah 2d 106, 109, 404 P.2d 972, 974 (1965), the Utah Supreme Court reasoned as follows regarding proper statutory construction:

Allowance should be made for the fact that statutes are necessarily stated in general terms, and that often there is neither the prescience to foresee, nor sufficient flexibility of language to cover with exactitude, all of the exigencies of life which may arise. For this reason one of the fundamental rules of statutory construction is that the statute should be looked at as a whole and in the light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness.

In this instance, the trial court succumbed to the over-application of “technical literalness”; Questar’s high pressure natural gas feeder line is simply not an “improvement” to Traveller’s property within the meaning of the Builder’s Statute of Repose.

### **3. Court’s in Other Jurisdictions Interpreting Statutes of Repose Have Applied a Common Sense Analysis and Reasoned that Similar Structures Are Not “Improvements to Real Property”**

In most instances state and federal legislative bodies are incapable of divining every conceivable factual scenario to which a particular statute may be applied. The many revisions to Utah’s Builder’s Statute of Repose and the facts of the present controversy serve to illustrate this point. Fortunately, however, courts in other jurisdictions have examined similar builder’s statutes of repose to determine whether some structure that admittedly provides no tangible benefit to particular real property should because of an overbroad definition in a statute be classified as an “improvement.”

The overwhelming majority of jurisdictions utilize a common sense approach to reconcile this inevitable contradiction in builder’s statutes of repose between plain meaning and reality. Gerald W. Heller, *Article: The District of Columbia’s Architects’ and Buildings’ Statute of Repose: Its Application and Need for Amendment*, 34 Cath. U.L. Rev. 919, 931-934 (1985). “The relevant inquiry in this test centers upon whether the object is an ‘improvement’ pursuant to the

common usage or literal meaning of the term.” *Id.* at 932. Courts applying the common sense approach have “buttress[ed] their conclusions” by examining the “degree of annexation and physical size of an object” contemplated as an improvement to real property. *Id.* at 934. As its hallmark, “the common sense approach provides a flexible analytical framework that can accommodate the facts of a particular situation.” *Id.*

Admittedly, the District of Columbia’s builder’s statute of repose critiqued by Mr. Heller (D.C. Code Ann. § 12-310 (1981 & Supp. 1985)) differs from Utah’s Builder’s Statute of Repose. Most notably, unlike Utah’s statute, the District of Columbia’s statute did not define the term “improvement.” However, as the facts of the present controversy clearly illustrate, there are instances where a legislature’s best efforts to define a term prove unworkable and unreasonable. Traveller contends that in such instances Utah courts should apply a common sense analysis.

Many jurisdictions examining facts similar to the present controversy have reasoned that a device such as Questar’s high pressure natural gas utility line, which admittedly provides no tangible benefits to Traveller’s property, is not an “improvement to real property” within the meaning or purpose of such jurisdictions’ builder’s statutes of repose or limitations. For example, in *Johnson v. Steele-Waseca Coop. Elec.*, 469 N.W.2d 517, 518 (Minn. App. 1991), the Court

of Appeals of Minnesota considered whether electrical distribution equipment installed on a landowner's property but owned by the electric utility was an "improvement to real property" under Minn. Stat. § 541.051.

In this case, the appellants operated a dairy farm and in 1980 built a new barn and had respondent, the local power distributor, install new electrical equipment and wiring to the barn. *Id.* The utility also installed a center pole and transformer to bring power to the farm. *Id.* Shortly after appellants transferred cattle to the new barn, they began noticing problems with the herd, which was eventually attributed to stray voltage from the new transformer. *Id.* In 1989, the dairy brought suit against the electric utility for breach of contract, negligence, nuisance and strict liability. *Id.* The trial court determined that the pole and transformer constituted improvements to the dairy's property and dismissed the dairy's case based upon the bar of Minnesota's various statutes of limitations. *Id.*

On appeal, the Court of Appeals of Minnesota reversed the trial court and observed that courts "must use a 'common sense analysis' to determine in each case what is an improvement to real estate." *Id.* at 519. Furthermore, the Minnesota court reasoned that

[u]nlike earlier cases involving improvements attached to buildings, here respondents installed an electric pole and transformer which stands independently on appellant's property as serves the distribution purposes of the cooperative. This equipment enables respondent to increase its electric service to appellant's farm. Rather than being an

improvement to appellant's property, this equipment is an addition to respondent's distribution system.

*Id.*

In *Turner v. Marable-Pirkle, Inc.*, 233 S.E.2d 773, 774 (Ga. 1977), the Supreme Court of Georgia considered whether an electric utility's conversion of a utility pole to increase distribution capabilities constituted an improvement to real property. The plaintiff received serious personal injuries in April of 1973 when a roto-tiller he was operating upon his property came into contact with an energized ground wire running from a utility pole that was owned by the city. *Id.* The plaintiff sued the city and electric utility. *Id.*

In 1964, the electric utility was employed by the city to convert the city's electrical distribution system to a higher voltage system, which required the replacement of every transformer in the city's system. *Id.* After the plaintiff filed his lawsuit, the electric utility filed a motion for summary judgment, claiming that the action was time-barred pursuant to Ga. Code Ann. § 3-1006 (1968). *Id.* The 1968 statute provided that

no action to recover damages for any deficiency in the ... construction of an improvement to real property ... shall be brought against any person performing the construction of such an improvement more than eight years after substantial completion of such an improvement.

*Id.* (citing Ga. Code. Ann. § 3-1006 (1968)). The trial court granted summary judgment to the electric utility. *Id.*

In reversing the judgment of the trial court, the Supreme Court of Georgia stated as follows:

The erection of a power pole, and the placing of the necessary equipment thereon, for the transmission of electricity is not such an improvement to real estate as was contemplated by the 1968 statute. And, as in this case, the mere changing or replacement of such equipment on a pole already erected is not an improvement to realty pursuant to this statute. Therefore, the statute simply is not applicable in this case; it does not constitute a bar to the plaintiff's action; and the trial court committed error in granting summary judgment and dismissing [the electric utility] as a party defendant.

*Id.* at 775; *accord Atlanta Gas Light Co. v. City of Atlanta, et al.*, 287 S.E.2d 229, 232 (Ga. App. 1981) (clarifying that the Georgia statute “applies regardless of when the injury occurs or, indeed, whether a cause of action has accrued at all prior to the expiration of the period”; and holding that installation of a natural gas transmission line did not constitute an “improvement to real property” within the meaning of Ga. Code. Ann. § 3-1006 (1968)).

By citing the above cases Traveller does not intend to imply that natural gas lines may not ever be properly classified as improvements to real property within the meaning of a builder's statute of repose. Indeed, courts in a few jurisdictions have recognized that natural gas lines were an improvement to real property. *See, e.g., Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 508 (8<sup>th</sup> Cir. 1983) (interpreting South Dakota law); *Ebert v. South Jersey Gas Co.*, 723 A.2d 599 (N.J. 1999). However, in each of these cases the gas lines at issue physically

connected to homes or other improvements located upon the real property. *Van Den Hul*, 716 F.2d at 507; *Ebert*, 723 A.2d at 600. Clearly, this is not the case with Questar's natural gas line.

Based on the foregoing analysis of other jurisdictions' treatment of this issue, the Utah Court of Appeals should apply a common sense analysis and determine that Questar's high pressure natural gas feeder line is not an improvement to Traveller's property and, therefore, the Builder's Statute of Repose does not bar any of the causes of action in Questar's Complaint.

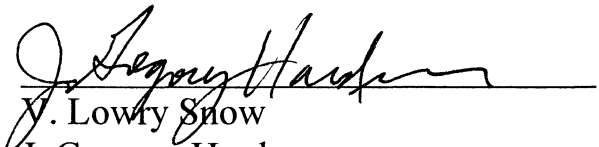
## **X. CONCLUSION**

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 that 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. 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 12<sup>th</sup> day of August, 2004.

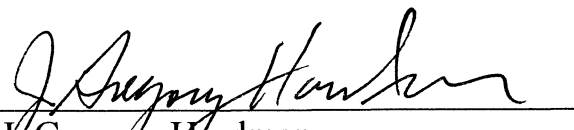
SNOW JENSEN & REECE

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

**CERTIFICATE OF HAND-DELIVERY**

This is to certify that on this 12<sup>th</sup> day of August, 2004, I caused a true and correct copy of the BRIEF OF THE APPELLANT to be hand-delivered to the following:

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

  
J. Gregory Hardman



**XI. ADDENDUM**

ADDENDUM NO. 1: RIGHT-OF-WAY AND EASEMENT GRANT

ADDENDUM NO. 2: ORDER ON SUMMARY JUDGMENT  
DISMISSING COMPLAINT WITH PREJUDICE  
AND ON THE MERITS

ADDENDUM NO. 3: UTAH CODE ANN. §78-12-21.5

ADDENDUM NO. 4: UTAH CODE ANN. §57-1-10

ADDENDUM NO. 5: UTAH CODE ANN. §78-40-1

Tab 1

RIGHT-OF-WAY AND EASEMENT GRANT

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;

EXHIBIT B

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

STATE OF UTAH } ss.  
COUNTY OF WASHINGTON }

THE UNDERSIGNED, DO HEREBY CERTIFY THIS TO BE  
TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE AND  
RECORD IN MY OFFICE.

WITNESS MY HAND AND SEAL

THIS 3 DAY OF October 20 02

RUSSELL SHIRTS, RECORDER

BY Deborah A. Hindman  
DEPUTY Recorder



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:

Rodney C. Burgess  
Rodney C. Burgess

Elizabeth L. Burgess  
Elizabeth L. Burgess

Randall Helms  
12/1/88

STATE OF HAWAII )  
County of \_\_\_\_\_ ) ss.

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 )  
County of Iron ) ss.

0399171 Ek C16+0 Pg C587

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

My Commission Expires: \_\_\_\_\_

JAN 1, 1990

[Signature]  
Notary Public  
Residing at 2152 W. 12th St. Salt Lake City, UT 84111



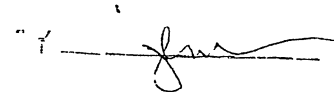
Tab 2

Russell S. Mitchell (USB #6938)  
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301 North 200 East, Suite 3-A  
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FILED  
FEB 11 2003

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CLERK



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IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

---

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

Plaintiff,

v.

QUESTAR GAS COMPANY, a Utah  
Corporation,

Defendant.

:  
:  
:  
: **ORDER ON SUMMARY**  
: **JUDGMENT DISMISSING**  
: **COMPLAINT WITH PREJUDICE**  
: **AND ON THE MERITS**

:  
:  
: Case No. 020501454  
:  
: Judge James L. Shumate

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This matter came before the Court on January 21, 2003, at the time set for Defendant's Motion for Summary Judgment, and based on arguments presented at that time before the Court, both parties prepared supplemental briefs and oral argument was continued to and heard on March 6, 2003, at 9:00 a.m. Plaintiff Kay H. Traveller Investments, L.L.C. ("Traveller") was represented by V. Lowry Snow of Snow, Jensen & Reece. Defendant Questar Gas Company ("Questar") was represented by Russell S. Mitchell of Jones, Waldo, Holbrook & McDonough, P.C. The Court having heard oral arguments, and having read all of the relevant pleadings and all exhibits attached

thereto, case law, and Utah statutes regarding the same, concludes that there are no genuine issues of material fact.

### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. On December 22, 1988, Questar's predecessor utility company, Mountain Fuel Supply Company, installed a high-pressure natural gas utility line through and across certain real property described as 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 ("Subject Property").

2. On December 2, 1988, Rodney C. Burgess and Elizabeth L. Burgess 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 document purportedly granted Mountain Fuel, its successors and assigns, 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.

3. Rodney C. Burgess and Elizabeth L. Burgess were not the legal owners of the Subject Property on December 2, 1988, rather, they were beneficiaries of a trust deed recorded against the Subject Property.

4. On August 7, 1989, Rodney C. Burgess and Elizabeth L. Burgess became the owners of the Subject Property through a Trustee's Deed Upon Sale.

5. On February 5, 1992, Mountain Fuel caused to be recorded the Right-of-Way and Easement Grant document.

6. On September 24, 1992, Rodney C. Burgess and Elizabeth L. Burgess 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.”

7. 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.”

8. Traveller filed its Complaint in this matter on July 26, 2002.

9. Neither Questar nor its predecessor in interest, Mountain Fuel, has claimed a prescriptive easement in the Subject Property.

### ANALYSIS

Questar’s Motion for Summary Judgment has two basic grounds: that all claims are barred by the statute of limitations and repose located at Utah Code Ann. § 78-12-21.5, and that the “Right-of-Way and Easement Grant” is a valid conveyance of an easement under the doctrine of after-acquired title (“estoppel by deed”). The Court grants Questar’s Motion on both grounds for reasons set forth below.

#### A. STATUTE OF LIMITATIONS – REPOSE

The Utah State Legislature has enacted specific legislation to bar all claims against manmade alterations to real property after a certain number of years have passed, which is now commonly referred to as the “Builder’s Statute of Repose.” Utah Code Ann. § 78-12-21.5(3)(b) states:

All other actions by or against a provider shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. If the cause of action is discovered or discoverable before



completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

In addition to this two-year statute of limitations, there is a cutoff period of twelve years from the time the improvement is completed. Utah Code Ann. § 78-12-21.5(4) states:

Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than 12 years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eleventh or twelfth year of the 12-year period, the injured person shall have two additional years from that date to commence an action.

In the case at hand, Mountain Fuel was a “provider” in that it did construct a manmade natural gas high-pressure utility underground pipeline across portions of the Subject Property. This pipeline altered the Subject Property, is manmade, is a utility, and therefore fits the definition of “improvement” under the statute. Traveller’s arguments to the contrary are without merit. This improvement was completed on December 22, 1988, and Mountain Fuel recorded the Right-of-Way and Easement Grant on February 5, 1991, thereby giving notice to the world of its existence. “A recorded document imparts notice of its contents regardless of any defect, irregularity, or omission in its execution, attestation, or acknowledgment” Utah Code Ann. § 57-4a-2.

All of the causes of action set forth in Traveller’s Complaint fit within the statutory definition of “action” because the definition includes “any claim” for relief regardless which legal theory the claim is based on, as it includes the all-inclusive “other source of law.” In addition to the claims pled in Traveller’s complaint, during oral argument Traveller argued extensively regarding the theory of quiet title, asserting that the relief it sought was basically a request to quiet title in its favor to the disputed Subject Property. Whether Traveller wishes to rely on the statutory sources of law of quiet title or declaratory relief, equitable relief of ejectment, tort relief of trespass and nuisance, all of

Traveller's causes of action are related to this improvement on the Subject Property. Because these causes of action and the improvement fit squarely within the statutory definition, Utah's "Builder's Statute of Repose" applies directly to this case.

Traveller's attempts to construe a contrary meaning of the statutory language through affidavits is without merit. Under the rules of statutory construction, it is a matter of law for the Court to decide the meaning of the words used in Utah Code Ann. § 78-12-21.5 and is not subject to the testimony of various fact or expert witnesses. *See Taghipour v. Jerez*, 2002 UT 74, ¶ 8, 52 P.3d 1252 ("Additionally, because the paramount issue in this case is a question of statutory construction, it is a question of law that we review for correctness."); *Brixen & Christopher Architects, P.C. v. State*, 2001 UT App 210, ¶ 15, 29 P.3d 650 ("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.'") (citations omitted).

Furthermore, in construing statutes, the 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.

"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. v. Johnson*, 1999 UT 35, ¶ 9, 977 P.2d 479 (citations omitted).

It is the Legislature's prerogative to modify a term by expanding or limiting its definition. Once the Legislature sets the definition, the Court has no authority to rewrite the definition to assign

it a different meaning. *See Salt Lake City v. Roberts*, 2002 UT 30, ¶ 17, 44 P.3d 767 (“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.”)

The Utah Supreme Court has determined that where a defined term is used differently in different statutes, the term can have distinctly different meanings. *See O’Keefe v. Utah State Retirement Bd.*, 956 P.2d 279, 282 n. 3 (Utah 1998) (“Although it is certainly true that the FLSA governs when Ogden City must pay its peace officers overtime compensation, the FLSA does not define overtime for the purposes of the PSRA, nor does it change the usually accepted meaning of the term to hours worked in excess of 43 per week.”)

Pursuant to Utah Code Ann. § 78-12-21.5(4), all claims are barred after twelve years of the date the improvement is completed. Since the improvement was completed on December 22, 1988, any claims to be made against Mountain Fuel or Questar should have been made by December 22, 2000. Because Traveller received the property by warranty deed on December 31, 1998, Utah Code Ann. § 78-12-21.5(3)(b) provided Traveller two years from December 31, 1998, to bring its complaint against Questar. However, in the case at hand, Traveller filed its Complaint on July 26, 2002, approximately 19 months past the deadline.

Traveller claims that because the Legislature did not clearly and specifically state that Utah Code Ann. § 78-12-21.5 would apply to the specific facts and circumstances in the case at hand (i.e., quiet title and trespass), the Legislature could not have intended for the statute to apply in this case, and therefore that the Court should not apply this statute. Traveller has argued that the Court must thoroughly analyze the legislative history surrounding the passage of this statute in order to determine the legislative intent. Traveller claims that the intent of the Legislature was to limit the

statute to only those claims arising out of defective design and construction. However, Utah law is clear on the issue of when it is appropriate to analyze the legislative history of a statute to determine the legislative intent. Although there are appropriate times for the courts to scrutinize the legislative history and floor debates, etc., to determine the intent of the Legislature in passing certain statutes, this is not one of those times.

The Utah Supreme Court reiterated in Wood v. University of Utah Medical Center, 2002 UT 134, ¶ 19, 464 Utah Adv. Rep. 8, that it is not always proper to analyze legislative history, stating:

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 the case at hand, the legislative purpose is expressly stated within the legislation that was passed.

That legislative intent is located in Utah Code Ann. § 78-12-21.5(2), which states as follows:

- (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.

The Legislature, in passing this legislation, has 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. This is done without any limitation as to types of actions, such as for defects in constructions or latent defects in construction or design. Because of this express statement regarding intent and purpose of the Legislature, the statute must be interpreted without regard to legislative history.

However, this Court has examined the legislative history, including the minutes from floor debates, interim committee notes, and other documents produced by the Legislature when dealing with this statute, which were supplied by the parties in their supplemental memoranda. The Court still reaches the conclusion that the Legislature's intent was that this statute has a comprehensive application, and that this statute would apply to all claims and causes of action that could be brought against a provider arising out of the installation of an improvement to real property, as those terms are defined in the statute.

Because Traveller failed to bring any claims within the two years after it knew or should have known about the pipeline and easement, and because the twelve years have run since the pipeline construction across the Subject Property was completed, Traveller is barred from bringing any cause of action for any claim of relief related to Questar's pipeline, including trespass, ejectment, quiet title, or any other equitable action to secure superior rights of title and possession.

**B. AFTER-ACQUIRED TITLE**

Rodney C. Burgess and Elizabeth L. Burgess specifically warranted a conveyance of a commercial easement in gross to Mountain Fuel for construction of the high-pressure natural gas utility underground pipeline across the Subject Property. Based on the equitable doctrine of after-acquired title as recognized by the Utah Supreme Court, the Burgesses and any of their assigns or grantees are thereby estopped from disclaiming this conveyance of interest. After-acquired title is the equitable theory whereby a grantor who does not have title at the time of the conveyance but who subsequently acquires title is estopped from denying that he had title at the time of the transfer and such after-acquired title inures to the benefit of the grantee or his successors.

As applied to the case at hand, Rodney C. Burgess and Elizabeth L. Burgess warranted the conveyance of a specific interest – a 22-foot-wide commercial easement in gross across the Subject Property at a time they did not have title to the Subject Property. Later, the Burgesses became the owners of the Subject Property through the conveyance of a Trustee's Deed upon sale. Therefore, the Burgesses, once they acquired the title of the Subject Property, are estopped from denying this conveyance by claiming that they did not have title at the time they signed the Right-of-Way and Easement Grant. Those who acquire title from the Burgesses cannot acquire any more right or interest to the Subject Property than that which the Burgesses had, which right was subject to this easement. Therefore, these subsequent owners, such as Traveller, are similarly barred from disclaiming the grant of easement.

Although the Burgesses were not identified on the first page of the "Right-of-Way and Easement Grant" document as "Grantors," the Burgesses did acknowledge that they "warranted" the conveyance stated within the document, therefore, it is the same. The 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. Therefore, because the Burgesses have warranted the conveyance of the easement to Mountain Fuel, Mountain Fuel's possession shall be undisturbed. It was after the Burgesses received title to the Subject Property through the Trustee's Deed upon sale, and before they transferred their interest to anyone else, that Mountain Fuel recorded the Right-of-Way and Easement Grant.

There is no dispute raised by Traveller that Berniece Swart, as Trustee, obtained the Subject Property from the Burgesses or that the Burgesses obtained the Subject Property through a trustee's sale. Those documents evidencing these transfers are not in dispute. Furthermore, the "Right-of-Way and Easement Grant" document 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.

The Utah Supreme Court in Arnold Industries v. Love, 2002 UT 133, ¶ 18, 63 P.3d 721 stated:

We agree with the reasoning of that case but only as it supports validation of a *written* attempt to grant an easement. We therefore extend recognition of the doctrine of estoppel by deed to cover the written easement attempted to be granted in the instant case. To 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.

(Emphasis in original.) Utah law is now clear on the point that a *written* attempt to grant an easement is subject to the doctrine of after-acquired title. The Right-of-Way and Easement Grant in this case is a valid grant of an easement, and the terms of this conveyance cannot now be denied.

## CONCLUSIONS OF LAW

1. The Court concludes that the “Right-of-Way and Easement Grant” document attached to Questar’s principal Memorandum as Exhibit “B” and which bears the signatures of Rodney C. Burgess and Elizabeth L. Burgess is clear and unambiguous on its face and that at the time it was so signed, Rodney C. Burgess and Elizabeth L. Burgess ~~intended to grant~~ <sup>granted</sup> the easement and all rights contained therein to Mountain Fuel Supply company, its successors and assigns. *This conclusion is over Plaintiff's objection*

2. The Court further concludes that this specifically forecloses Traveller from conducting discovery regarding intent of the Burgesses in signing their “Right-of-Way and Easement Grant” document.

3. The Court concludes as a matter of law that through the doctrine of 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, including all rights and terms specifically contained within the text of the document; and Traveller is now estopped from disclaiming this conveyance.

4. The Court concludes that, because Questar has a valid easement, Traveller cannot maintain an action against Questar to quiet title to the Subject Property in its favor; similarly, Traveller has no claims against Questar for ejectment for wrongful possession, trespass, nuisance, or declarative relief regarding the validity of the Right-of-Way and Easement Grant.

5. The Court concludes as a matter of law that Utah Code Ann. § 78-12-21.5 is applicable to this case. Therefore, the Court concludes that because the improvement to the Subject Property was completed on December 22, 1988, and because Traveller’s current claims were filed on July 26, 2002, such filing was past the deadline for filing. Traveller’s Complaint and all causes



of action set forth therein, including the argued but unpled claim for quiet title, are all therefore subject to, and barred by, this statute of limitations and repose.

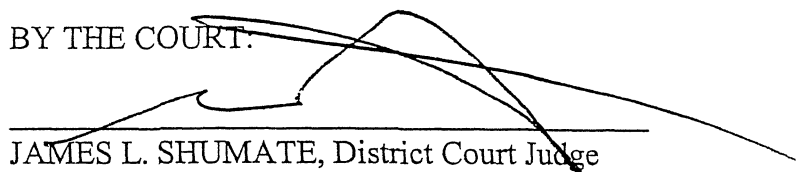
Based on the foregoing, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment is granted on both grounds: That it is time-barred by Utah Code Ann. § 78-12-21.5, and that Defendant has a valid easement across the Subject Property. Plaintiff's Complaint and all causes of action set forth therein, as well as Plaintiff's argued but unpled cause of action to quiet title to the Subject Property as to Questar, are hereby dismissed with prejudice and on the merits, each party to bear its own fees and costs incurred in this matter.

Under Rule 54(b) of the Utah Rules of Civil Procedure, this judgment is certified as the final judgment of all claims raised by the parties.

DATED this 5 day of ~~April~~ <sup>May</sup>, 2003.

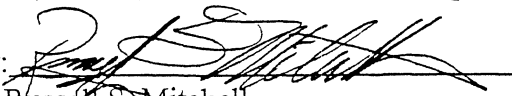
BY THE COURT:

  
JAMES L. SHUMATE, District Court Judge

Approved as to Form:  
Snow, Jensen & Reece

By: \_\_\_\_\_  
V. Lowry Snow  
J. Gregory Hardman  
Attorney's for Plaintiff

Jones, Waldo, Holbrook & McDonough

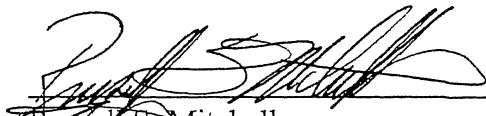
By:   
Russell S. Mitchell  
Attorney's for Defendant

### NOTICE

Please take notice that the undersigned attorney for Defendant will submit the above and foregoing Order on Summary Judgment Dismissing Complaint With Prejudice and on the Merits to the Fifth District Court for signature on the expiration of five (5) days from the date of this Notice unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 25<sup>th</sup> day of April, 2003.

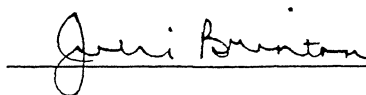
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

  
\_\_\_\_\_  
Russell S. Mitchell  
Attorneys for Defendant

### CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of April, 2003, I caused to be hand-delivered a true and correct copy of the foregoing unexecuted **ORDER ON SUMMARY JUDGMENT DISMISSING COMPLAINT WITH PREJUDICE AND ON THE MERITS** to:

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

  
\_\_\_\_\_

Tab 3

Source [My Sources > Utah > Statutes & Regulations > UT - Utah Code Annotated](#)

TOC [Utah Code Annotated > / / > ARTICLE 1 REAL PROPERTY > § 78-12-21.5. Actions related to improvements in real property](#)

*Utah Code Ann. § 78-12-21.5*

UTAH CODE ANNOTATED

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\*\*\* STATUTES CURRENT THROUGH THE 2004 THIRD SPECIAL SESSION \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH 2004 UT 27, 2004 UT APP 102 \*\*\*

\*\*\* AND APRIL 1, 2004 (FEDERAL CASES) \*\*\*

TITLE 78. JUDICIAL CODE

PART II. ACTIONS, VENUE, LIMITATION OF ACTIONS

CHAPTER 12. LIMITATION OF ACTIONS

ARTICLE 1. REAL PROPERTY

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 78-12-21.5 (2004)

§ 78-12-21.5. Actions related to improvements in real property

(1) As used in this section:

(a) "Abandonment" means that there has been no design or construction activity on the improvement for a continuous period of one year.

(b) "Action" means any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty arising out of or related to the design, construction, or installation of an improvement, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law.

(c) "Completion of improvement" means the date of substantial completion of an improvement to real property as established by the earliest of:

(i) a Certificate of Substantial Completion;

(ii) a Certificate of Occupancy issued by a governing agency; or

(iii) the date of first use or possession of the improvement.

(d) "Improvement" means any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property.

(e) "Person" means an individual, corporation, limited liability company, partnership, joint venture, association, proprietorship, or any other legal or governmental entity.

(f) "Provider" means any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, cost or quantity estimates, surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement.

(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 seven years following completion or abandonment; and

(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.

(3) (a) An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) All other actions by or against a provider shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than nine years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eighth or ninth year of the nine-year period, the injured person shall have two additional years from that date to commence an action.

(5) Subsection (4) does not apply to an action against a provider:

(a) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty; or

(b) for a willful or intentional act, error, omission, or breach of duty.

(6) If a person otherwise entitled to bring an action did not commence the action within the periods prescribed by Subsections (3) and (4) solely because that person was a minor or mentally incompetent and without a legal guardian, that person shall have two years from the date the disability is removed to commence the action.

(7) This section shall not apply to an action for the death of or bodily injury to an individual while engaged in the design, installation, or construction of an improvement.

(8) The time limitation imposed by this section shall not apply to any action against any person in actual possession or control of the improvement as owner, tenant, or otherwise, at the time any defective or unsafe condition of the improvement proximately causes the injury

for which the action is brought.

(9) This section does not extend the period of limitation or repose otherwise prescribed by law or a valid and enforceable contract.

(10) This section does not create or modify any claim or cause of action.

(11) This section applies to all causes of action that accrue after May 3, 2003, notwithstanding that the improvement was completed or abandoned before May 3, 2004.

**HISTORY:** C. 1953, 78-12-25.5, enacted by L. 1991, ch. 290, § 1; 1997, ch. 149, § 1; renumbered by L. 1999, ch. 123, § 1; 2004, ch. 327, § 1.

**NOTES:**

**REPEALS AND REENACTMENTS.** --Laws 1991, ch. 290, § 1 repeals former § 78-12-25.5, as last amended by Laws 1988, ch. 61, § 1, relating to the seven-year limitation on actions for injuries due to defective improvements to real property, effective April 29, 1991, and enacts the present section.

**AMENDMENT NOTES.** --The 1999 amendment, effective May 3, 1999, renumbered this section, which formerly appeared as 78-12-25.5, and rewrote the section.

The 2004 amendment, effective May 3, 2004, substituted "seven years" for "ten years" in Subsection (2)(d); in Subsection (4), substituted "eighth or ninth year" for "eleventh or twelfth year" and "nine years" for "12 years" twice; in Subsection (11), substituted the years "2003" and "2004" for "1998" and "1999"; and made two minor stylistic changes.

**CROSS-REFERENCES.** --Product Liability Act, statute of limitations, § 78-15-3.

Wrongful death, §§ 78-11-6, 78-11-7.

**NOTES TO DECISIONS**

**ANALYSIS**



Constitutionality.



Applicability.



Discovery doctrine.



Express warranty.



Running of statute.



Statute of repose.



Cited.

**CONSTITUTIONALITY.**

Former seven-year limitation was applicable to the owner or tenant in possession at time of construction, or to his successors; those in possession and control of realty had a continuing duty to make repairs, and should discover any fault in construction within seven years; claim that the statute was unconstitutional was without merit. Good v. Christensen, 527 P.2d 223 (Utah 1974).

The former section violated the open courts provision of the Utah constitution (Utah Const. art. I, § 11) because it did not provide an injured person with an effective and reasonable alternative remedy for vindication of his or her constitutional interest, and abrogation of the

remedy is arbitrary and unreasonable. Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, 782 P.2d 188 (Utah 1989).

The former section denied a remedy for injury to one's person or property when the injury was caused by a latent defect and was therefore unconstitutional under the open courts provision of the Utah constitution (Utah Const. art. I, § 11). Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989).

Given the legislative intent in enacting this section, and the remote chance of injury or damage after a period of years, the statute is not an arbitrary or unreasonable means of eliminating the stated evils, and is constitutional under the open courts clause of the state constitution. Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, 974 P.2d 1194.

#### APPLICABILITY.

This statute applies to products liability actions when they relate to improvements in real property. Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, 974 P.2d 1194.

This section merely prescribes certain situations to which the periods of repose do not apply; it does not purport to set up a substitute remedy. Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, 974 P.2d 1194.

This section did not bar claim against property developer whose activities involved determining boundaries, size, location, and placement of lands, as those were not improvements to the property. State Farm Fire & Cas. Co. v. Sundance Dev. Corp., 2003 UT App 367, 485 Utah Adv. Rep. 32, 78 P.3d 995.

#### DISCOVERY DOCTRINE.

The discovery doctrine was inapposite in an action for injuries sustained when plaintiffs struck a pole on a city-constructed sled-run, where the defect, if it was such, was patent, and there was no injury inflicted that was unknown at the time of its infliction. Jackson v. Layton City, 743 P.2d 1196 (Utah 1987).

#### EXPRESS WARRANTY.

Without evidence of an express warranty period, let alone one extending beyond six years, plaintiff was unable to satisfy this section. Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, 974 P.2d 1194.

#### RUNNING OF STATUTE.

Plaintiff's slander of title and tortious interference claims against a builder did not accrue until after the house was sold at a foreclosure sale by the bank, when plaintiff first became able to demonstrate special damages. Valley Colour, Inc., v. Beuchert Bldrs., Inc., 944 P.2d 361 (Utah 1997).

#### STATUTE OF REPOSE.

The former section was a statute of repose, and not a statute of limitations, because it barred all actions against planners, designers, and builders of improvements to real property for injuries occurring after seven years from the date of construction, as well as actions based on injuries occurring within the seven-year period if no action is filed within that period. Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989).

Fifteen year time between construction of building and collapse of its roof barred a cause of action because this section acts not as a statute of limitation but as a statute of repose, for which latency of a defect does not toll the limitation period. Craftsman Bldr.'s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, 974 P.2d 1194.

Where a faulty electrical system in an apartment building caused a fire approximately eighteen years after it was built, this section barred the plaintiffs' action. Olsen v. McMillen Elec., 1999 UT 19, 976 P.2d 606.


CITED in Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986); Lichtefeld v. Cutshaw, 784 P.2d 143 (Utah 1989); Stilling v. Skankey, 784 P.2d 144 (Utah 1989).

## COLLATERAL REFERENCES

A.L.R. --What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

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*Utah Code Ann. § 57-1-10*

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\*\*\* STATUTES CURRENT THROUGH THE 2004 THIRD SPECIAL SESSION \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2004 UT 27, 2004 UT APP 102 \*\*\*  
\*\*\* AND APRIL 1, 2004 (FEDERAL CASES) \*\*\*

TITLE 57. REAL ESTATE  
CHAPTER 1. CONVEYANCES

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 57-1-10 (2004)

§ 57-1-10. After-acquired title passes

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 or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.

**HISTORY:** R.S. 1898 & C.L. 1907, § 1979; C.L. 1917, § 4879; R.S. 1933 & C. 1943, 78-1-9.

NOTES TO DECISIONS

ANALYSIS

⚡  
Conveyance without ownership.  
⚡  
-- After-acquired interest.  
⚡  
-- After-acquired title.  
⚡  
-- Title conveyed.  
⚡  
Easements.  
⚡  
Cited.

CONVEYANCE WITHOUT OWNERSHIP.

-- AFTER-ACQUIRED INTEREST.

Assignment to grantor of rights under an outstanding lease of property at time of conveyance, after grantor had purported to convey the entire fee of such property by warranty deed to grantee, gave grantor no rights under the outstanding lease and all such

rights passed to grantee at time of the assignment. Cox v. Ney, 580 P.2d 1085 (Utah 1978).

-- AFTER-ACQUIRED TITLE.

Where one who conveyed coal lands subsequently acquired title to lands by patent, after-acquired title inured to grantee. 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).

-- TITLE CONVEYED.

Under this section, one who conveys coal lands before he has applied to the government to purchase the same conveys a good title thereto. Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 Utah 395, 168 P. 86 (1917).

Where grantor purporting to convey title to mining claims described them in his deed by name of claim and survey number, he was estopped from making any claim to property described in deed when he subsequently acquired title thereto. Wall v. Utah Copper Co., 277 F. 55 (8th Cir. 1921).

EASEMENTS.

This section applied to a written easement; the grant of an easement was binding upon the grantor when it later obtained title after the deed granting the easement was executed. Arnold Indus. v. Love, 2002 UT 133, 63 P.3d 721.


CITED in Barlow Soc'y v. Commercial Sec. Bank, 723 P.2d 398 (Utah 1986); Utah Farm Prod. Credit Assoc. v. Wasatch Bank, 734 P.2d 904 (Utah 1987).

COLLATERAL REFERENCES

AM. JUR. 2D. --23 Am. Jur. 2d Deeds §§ 341, 342.

C.J.S. --26 C.J.S. Deeds § 105.

A.L.R. --Property insurance, or public liability insurance, as covering, in absence of express provision, after-acquired premises or realty, or subsequent additions to described realty, 18 A.L.R.3d 795.

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*Utah Code Ann. § 78-40-1*

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TITLE 78. JUDICIAL CODE  
PART IV. PARTICULAR PROCEEDINGS  
CHAPTER 40. QUIET TITLE

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 78-40-1 (2004)

§ 78-40-1. Action to determine adverse claim to property -- Authorized

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

**HISTORY:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-1.

**NOTES:**

CROSS-REFERENCES. --Action brought in county where property situated, § 78-13-1.

Allowance for improvements made under color of title, §§ 57-6-1 et seq., § 78-40-5.

Jurisdiction in district courts, Utah Const., Art. VIII, Sec. 5; § 78-3-4.

Limitations of actions, § 78-12-1 et seq.

Tax sales of real property, § 59-2-1303 et seq.

NOTES TO DECISIONS

ANALYSIS



Adverse possession.



Due process.



Heirs.



Judgment.



Nature and scope of proceedings.



Option to purchase.



Presumptions and burden of proof.



Proof of claim.



Tax titles or claims.



Water rights.



What claims may be assailed.

What constitutes "claim" of "estate or interest."



Wrongful possession.

#### ADVERSE POSSESSION.

One claiming by adverse possession does not arrest the running of this section in his favor by commencing an action to quiet title. Welner v. Stearns, 40 Utah 185, 120 P. 490, Ann. Cas. 1914C, 1175 (1911).

#### DUE PROCESS.

Repossession of real property under a contract and the quiet title procedure did not constitute state action under the fourteenth amendment, thereby giving the vendees a right to reasonable notice prior to the destruction of their security interest, where the state did not create the rights leading to the vendees' deprivation of their interest in the contract. Dirks v. Goodwill, 754 P.2d 946 (Utah Ct. App. 1988).

#### HEIRS.

Heirs could bring action to quiet title though there had been no adjudication of heirship. Chamberlain v. Larsen, 83 Utah 420, 29 P.2d 355 (1934).

#### JUDGMENT.

Court of equity, in an action to quiet title, may not only enter judgment quieting title, but may include in the judgment a general order restraining the defendant from asserting any claim adverse to, and in derogation of, the plaintiff's right, and may prohibit the defendant from doing any act that would tend to impair or destroy such right. Richey v. Beus, 31 Utah 262, 87 P. 903 (1906).

Decree in an action to quiet title can only bind the parties to the action. Fisher v. Davis, 77 Utah 81, 291 P. 493 (1930).

Effect of a decree quieting title is not to vest title, but to perfect an existing title as against other claimants. State ex rel. Utah State Dep't of Social Servs. v. Santiago, 590 P.2d 335 (Utah 1979).

#### NATURE AND SCOPE OF PROCEEDINGS.

The language used in this section is very comprehensive. In terms, it authorizes an action by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. Bullion, Beck & Champion Mining Co. v. Eureka Hill Mining Co., 5 Utah 3, 11 P. 515 (1886), appeal dismissed, 131 U.S. 431, 9 S. Ct. 796, 33 L. Ed. 224 (1888).

Action to quiet title is an action at law and thus either side, upon request, is entitled to a jury trial. Holland v. Wilson, 8 Utah 2d 11, 327 P.2d 250 (1958).

Statutory action to quiet title is an action in rem, or quasi in rem, requiring either a state or federal court to obtain jurisdiction over the property in dispute before proceeding to adjudication on the merits. 1st Nat'l Credit Corp. v. Von Hake, 511 F. Supp. 634 (D. Utah 1981).

#### OPTION TO PURCHASE.

Validly exercised option to purchase cannot fail for the reason that funds are secured from

a source not contemplated in the option; and, thus, a plaintiff who had placed the purchase money in escrow and had notified the owner of his intent to exercise the option should have his title quieted against claims of the assignee of the owner. Bradshaw v. Kershaw, 529 P.2d 803 (Utah 1974).

#### PRESUMPTIONS AND BURDEN OF PROOF.

In action to quiet title, a plea of the statute of limitations was an affirmative defense with regard to which the burden of proof was on the defendant. Tate v. Rose, 35 Utah 229, 99 P. 1003 (1909).

In an action to quiet title, where the plaintiff proved that he was entitled to possession and that legal title was in him, the law would presume that he was in constructive possession, and, in the absence of evidence to the contrary, he was entitled to actual possession. Gibson v. McGurrian, 37 Utah 158, 106 P. 669 (1910).

In an action to quiet title, the plaintiff must succeed by virtue of the strength of his own title rather than on the weakness of the defendant's title. Babcock v. Dangerfield, 98 Utah 10, 94 P.2d 862 (1939); Mercur Coalition Mining Co. v. Cannon, 112 Utah 13, 184 P.2d 341 (1947).

When the defendant admits the plaintiff's allegation of ownership, but denies his present ownership, the defendant has the burden of going forward with proof as to the present state of the title. Gatrell v. Salt Lake County, 106 Utah 409, 149 P.2d 827, 153 A.L.R. 1100 (1944).

In an action to quiet title wherein the plaintiff relies not on record title but upon possession, it is incumbent upon the plaintiff to show sufficient facts to justify the trial court in finding that the plaintiff was in possession. Mercur Coalition Mining Co. v. Cannon, 112 Utah 13, 184 P.2d 341 (1947).

#### PROOF OF CLAIM.

In action to quiet title, it is sufficient if the plaintiff establishes that legal title is in him, and that the defendants had no right, title, or interest adverse to him in the premises in controversy; the plaintiff need not be in possession himself. Gibson v. McGurrian, 37 Utah 158, 106 P. 669 (1910).

Plaintiff could prevail on a claim of record title only by showing good title in itself, not by showing some defects in the title of the defendant. Home Owners' Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160 (1943).

Stipulation that land was conveyed to the plaintiff by an insolvent bank through the state banking commissioner, and that title to the land had previously been quieted in that commissioner on behalf of the bank and its creditors, was sufficient proof of the fact that the plaintiff was legal titleholder and as such was presumed to have been in possession of the land, so as to be entitled to prevail in a suit to quiet title. Day v. Steele, 111 Utah 481, 184 P.2d 216 (1947).

Actual possession under a claim of ownership makes out a prima facie case against a stranger to the title and, unless controverted by one claiming an interest in the property, is sufficient to justify a decree quieting title in plaintiff. Mercur Coalition Mining Co. v. Cannon, 112 Utah 13, 184 P.2d 341 (1947).

Plaintiffs made out a prima facie case in a suit to quiet title by introduction in evidence of a tax title to the land in dispute. Smith v. Nelson, 114 Utah 51, 197 P.2d 132 (1948).

#### TAX TITLES OR CLAIMS.

The owner who seeks to have a title quieted against a void tax deed must reimburse the tax title purchaser for all taxes lawfully levied and paid by the tax title purchaser. Reeve v. Blatchley, 106 Utah 259, 147 P.2d 861 (1944).

All that a court of equity should require as a condition to quieting title in the owner against a tax title claimant is that he pay to such claimant the sum advanced by the latter to pay the taxes less any benefit which he derived from the property supposedly purchased. Reeve v. Blatchley, 106 Utah 259, 147 P.2d 861 (1944).

Where there was no showing that the county made any representations or that the plaintiff

relied upon any representations of the county in purchasing a tax deed, the county and its successors in interest were not estopped from denying the validity of that deed in a suit to quiet title. Duncan v. Hemmelwright, 112 Utah 262, 186 P.2d 965 (1947).

#### WATER RIGHTS.

An action to quiet title to water rights is in the nature of an action to quiet title to real estate. Church v. Meadow Springs Ranch Corp., 659 P.2d 1045 (Utah 1983).

#### WHAT CLAIMS MAY BE ASSAILED.

Plaintiff in a quiet title action may assail a judgment, deed, or any other instrument affecting his title, upon the ground of fraud or for any other reason rendering such judgment or instruments void. If a judgment is assailed in such an action, it is a direct, and not a collateral, attack. Doyle v. West Temple Terrace Co., 43 Utah 277, 135 P. 103 (1913).

#### WHAT CONSTITUTES "CLAIM" OF "ESTATE OR INTEREST."

The words "claims an estate or interest" in this section are used in a broad sense, and are not technical in their meaning. They are evidently intended to embrace every species of adverse claim set up by a party out of possession. Goldberg v. Taylor, 2 Utah 486 (1880).

#### WRONGFUL POSSESSION.

In a possessory action the plaintiff must show that at the time of bringing suit the defendant was wrongfully in possession. Federal Land Bank v. Sorenson, 101 Utah 305, 121 P.2d 398 (1942).

The rule that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's title, does not require the plaintiff to exhibit a perfect chain of title as against one wrongfully in possession. Campbell v. Nelson, 102 Utah 78, 125 P.2d 413 (1942).

#### COLLATERAL REFERENCES

AM. JUR. 2D. --65 Am. Jur. 2d Quieting Title and Determination of Adverse Claims § 7 et seq.

C.J.S. --28 C.J.S. Ejectment § 1 et seq.; 74 C.J.S. Quieting Title § 1 et seq.

A.L.R. --Common source of title doctrine, 5 A.L.R.3d 375.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 A.L.R.3d 330.

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