

1989

# John Wagner Associates dba Grabber Utah v. Hercules, Inc. : Reply Brief

Utah Court of Appeals

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James M. Elegante; Parsons, Behle and Latimer; Attorneys for Respondent.

Robert F. Babcock; Darrel J. Bostwick; Walstad and Babcock, P.C.; Attorneys for Appellant.

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**BRIEF**

**890017-CA**

**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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JOHN WAGNER ASSOCIATES,  
d/b/a GRABBER UTAH,

Plaintiff-Appellant,

vs.

HERCULES, INC.,

Defendant-Respondent.

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CASE NO. 890017-CA

Category No. 14b

\* \* \* \* \*

**REPLY BRIEF OF APPELLANT**

\* \* \* \* \*

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
Honorable Frank G. Noel, District Court Judge

Robert F. Babcock  
Darrel J. Bostwick  
WALSTAD & BABCOCK, P.C.  
254 West 400 South, #200  
Salt Lake City, UT 84101  
Telephone: (801) 531-7000

ATTORNEYS FOR APPELLANT

James M. Elegante  
PARSONS, BEHLE & LATIMER  
185 South State Street, Suite 700  
P. O. Box 11898  
Salt Lake City, Utah 84147-0898

ATTORNEYS FOR RESPONDENT

**FILED**

**COURT OF APPEALS**

IN THE COURT OF APPEALS OF THE STATE OF UTAH

\* \* \* \* \*

JOHN WAGNER ASSOCIATES,	:	
d/b/a GRABBER UTAH,	:	
	:	
Plaintiff-Appellant,	:	CASE NO. 890017-CA
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vs.	:	
	:	Category No. 14b
HERCULES, INC.,	:	
	:	
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## ARGUMENT

### I. STATEMENT RELATING TO FACTUAL ISSUES.

Most of the facts in the present case are not in dispute. One fact which is in dispute is the factual finding that the removal of the office complexes would not damage the property. The photographic exhibits presented at the trial clearly show that the removal of an adjacent modular office complex left large holes in the asphalt, conduit and utility stub-outs protruding from the ground, etc. Plaintiff believes that the trial court's finding that the removal of the complexes will not damage the property is against the clear weight of photographic evidence, the only competent evidence on that issue. Further, Plaintiff disputes the statement of facts proffered by Hercules in that the interior walls were not demountable partitions as stated in Paragraph 8 of the Statement of the Facts contained in Hercules brief but were to be traditionally finished drywall with vinyl wall coverings. The document at Record 170, Exhibit 4, does not specify demountable partitions as Hercules would lead this Court to believe. The testimony at the trial was that while demountable partitions were common in the Modulaire office units, the Hercules units were of traditional interior wall finish.

Hercules, at Paragraph 21 of its Statement of the Facts, also erroneously states that the units were not fixed to the ground. This is simply not true since the testimony at trial indicates that the office complexes were attached to underground utilities

and services. The fact that there were not concrete foundations or piers does not preclude fixation to the ground.

Whether the workers who installed the underground utilities and the asphalt and concrete pavement would be entitled to mechanic's lien and payment bond rights is important since there are instances where services which of themselves would not normally give rise to mechanic's lien or bond rights do give rise to such rights when performed in conjunction with a construction project. See Bachus v. Hooten, 4 Utah 2d 364, 294 P.2d 703 (1956) and Frehner v. Morton, 18 Utah 2d 422, 424 P.2d 446 (1967). If the actual construction of the office complexes alone does not give rise to mechanic's lien and bond rights, then when performed in connection with the installation of the utilities, asphalt, etc. should give rise to such rights.

II. PLAINTIFF AND HERCULES ARE NOT IN AGREEMENT AS TO THE LAW WHICH SHOULD GOVERN IN THIS CASE; THE PERSONAL PROPERTY/FIXTURE TEST AS STATED IN PAUL MUELLER CO. V. CACHE VALLEY DAIRY ASS'N., 657 P.2d 1279 (Utah 1982) SHOULD NOT APPLY TO THE CASE AT BAR.

In its brief, Hercules erroneously states that both parties to this appeal are in agreement as to the law to be applied to the case at bar. That assertion is not true. Plaintiff does not believe that the personal property/fixture test as stated in the case of Paul Mueller Co. v. Cache Valley Dairy Ass'n., 657 P.2d 1279 (Utah 1982) is applicable to this case. As discussed in Plaintiff's brief, while Plaintiff believes that the office complexes in question meet the Mueller test, it is abundantly clear that the situation in the case at bar is far different from

that in the Mueller case and that the Mueller test should not apply.

The personal property/fixture distinction as discussed in Mueller deals with items which are attached to a building (i.e., equipment) rather than to the actual building itself as is the situation in the present case. Certainly the same test cannot apply to equipment and to actual buildings containing more than 25,000 square feet of office space. To carry Hercules' logic to the full extension, one would have to conclude that the metal building to which the equipment was attached in the Mueller case does not give rise to a mechanic's lien or to payment bond liability since such metal buildings are removable without too much difficulty. However, the manwalks in the Mueller case were lienable, and, therefore, presumably the building would be a lienable item.

For this appeal, the operative language of the mechanic's lien statute is "the construction, alteration , or improvement of any building, structure or improvement to the premises in any manner." Utah Code Annotated § 38-1-3 (1953). The operative language of the payment bond statute is "the construction, addition to, alteration, or repair of any building, structure or improvement." Utah Code Annotated § 14-2-1 (1953 as amended in 1985). These phrases state the type of work which is covered by the statutes and object of such. First, there must be construction, addition to, alteration, or repair work. This work must relate to (1) a "building," (2) a "structure," or (3) an



"improvement." Historically, when there was never any question about buildings or a structures being covered by these statutes, even though they could be moved from the land. See Sanford v. Kunkel, 30 Utah 379, 85 P. 363 (1906). It was in connection with "improvements" that the issue of personal property v. fixtures became critical.

There is no reason to depart from that distinction now. Clearly these office complexes comprise buildings or structures or that they were constructed and placed upon the subject property. Blacks Law Dictionary defines "building" as a

Structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within walls, and usually, but not necessarily, covered with a roof.

Black's Law Dictionary 1979, p. 176.

Blacks Law Dictionary defines "structure" as

Any construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind.

A combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land.

Black's Law Dictionary 1979, p. 1276.

It is important to note that there is no requirement for affixation or attachment to the land upon which it is placed. In fact the definition of structure specifically allows for installation above the land.

Such a result has been indicated previously by the Utah Supreme Court in the case of King Brothers, Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 440 P.2d 17 (1968). The Court stated:

The duty of obtaining a bond as imposed by Section 14-2-1 is upon: "The owner of any interest in land" who enters into a contract to construct an improvement thereon. The word "land" as used in the law, has since time immemorial been regarded as a generic term. It "\* \* \*" includes not only the soil, but everything attached to it, whether by nature, as trees, herbage, and water, or by the hand of man, as buildings, fixtures, and fences." This is particularly true with respect to these lien statutes which should be liberally construed to effectuate their purposes. This court has allowed a materialman's lien to attach to interests less than fee simple, such as a leasehold estate, an equitable interest, and a building separate and apart from the soil upon which it was erected. (citations omitted) (emphasis in original)

King Brothers at 440 P.2d 19.

It is clear that the Utah Supreme Court views "buildings" as separate and distinct from "fixtures." A building does not have to be attached to the soil in the same manner as a fixture must be attached in order to give rights to mechanic's lien and bond rights. It is sufficient that the "building" or "structure" be placed upon the land.

Hercules would have this Court treat the office complexes as traditional personal property/fixtures. This ignores the fact that the office complexes are buildings or structures to which the traditional personal property/fixture tests do not apply.

Buildings or structures of the magnitude in this case should be deemed to be part of the realty upon which they are placed

regardless of the manner in which they are placed upon the land. This is particularly true given the ability of man to move even traditionally constructed buildings with relative ease and the advance of technology in the area of premanufactured buildings which are transported to the site and placed upon the land. The case of Sanford v. Kunkel, 30 Utah 379, 85 P. 363 (1906) provides an example of such a situation. In that case, the Utah Supreme Court held that where a building is moved from one parcel of land to another after improvements to the building were made, that a mechanic's lien could attach to both parcels of land.

The fact that the office complexes in the present case can be torn apart and moved as individual units should not alter the outcome as stated in Sanford. As far as Plaintiff's claim is concerned, the work required to construct the office complexes was the same as for any traditionally constructed building. There was nothing to alert the Plaintiff that this construction project would not afford mechanic's lien or payment bond protection as with any other construction project.

Hercules places a great deal of emphasis on the third part of the Mueller test, (i.e., intent of the owner). However, that element is clearly inappropriate in this case which involves buildings of considerable size which were procured through a lease/purchase arrangement between Hercules and its contractor, Modulaire, when lease/purchase arrangements are routinely used in commercial transactions as a financing instruments. This is particularly true when at the time of trial, the lease period had

been twice extended and to Plaintiff's knowledge, the office complexes remain on the subject property in which Hercules has an interest.

Further, any agreement between Hercules and its contractor as to the status of the office complexes should not be binding on the Plaintiff herein who was a complete stranger to that transaction, being thrice removed in the contract chain from the Hercules/U.S. Government contract and twice removed from the Hercules/Modulaire contract. This principal is illustrated in the case of Saunders v. Kidman, 284 P. 997 (Utah 1930). In Saunders, a purchaser of real property succeeded in establishing that a cabin on the property was part of the realty despite a separate agreement between the seller and a third-party that the cabin could be removed. The trial court found, and the Utah Supreme Court held, that as between the seller and the third-party the cabin was personal property but as between the seller and the purchaser the cabin was part of the realty.

Similarly, in the case at bar, it could be appropriate to treat the office complexes as personal property as between Hercules and the U.S. Government or as between Hercules and Modulaire. But as between Hercules and Plaintiff, the office complexes should be deemed to be part of the realty. Such a holding makes good common sense.

Such a holding not only make good common sense, it is in accord with other Utah case law. In Metals Manufacturing Co. v. Bank of Commerce, 16 Utah 2d 74, 395 P.2d 914 (1964), the Utah

Supreme Court confronted a situation similar to the one presented in the present case. In Metals Manufacturing, the Bank of Commerce held a 10-year lease which provided that the Bank could "make alterations, attach fixtures, and erect additions \* \* \*" which would remain the property of the bank and be removed upon the expiration of the lease. A second-tier supplier and installer of metal hand rails and grates made a claim for failure to obtain a bond and the Bank defended on the basis that the goods did not become fixtures due to the provisions in the lease specifying that they remain the personal property of the Bank. The trial court ruled in favor of the Bank and dismissed the supplier's cause of action. In reversing the trial court, the Utah Supreme Court held that:

[I]t would seem unrealistic and unreasonable to conclude that [the bank and its contractor] by agreeing among themselves, could bind third party suppliers of materials to the terms of an agreement to which such suppliers were not privies and the terms of which they did not know. Such conclusion could result in the easy circumvention of the statute whose purpose clearly is to protect suppliers, if what they supply falls within the clear import of the statute. (emphasis in original)

Id. at 395 P.2d 914, 915.

The Utah Supreme Court had another occasion to discuss this principal. The Court summarized its holding in Metals Manufacturing as follows:

We held that irrespective of the agreement of the parties inter se, as to third-party suppliers, the installation should be regarded as part of the realty. It was pointed out that it would be unfair to bind such suppliers to the terms of agreements to which they were

not parties and of whose contents they had no knowledge.

King Brothers, Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 440 P.2d 17, 18 (1968). As in both the Metals Manufacturing and King Brothers cases, it would be unreasonable and unfair to hold Plaintiff herein to the terms of any agreements between Hercules and the U.S. Government or between Hercules and Modulaire.

Plaintiff was in no position to determine the intent of Hercules with respect to these office complexes and this Court should not impose such a burden. This is particularly true since the materials furnished by Plaintiff were essentially no different than those furnished by Plaintiff to any traditionally constructed buildings. There was no indication whatsoever that this project would not afford the Plaintiff protection under the mechanic's lien and payment bond statutes.

Further, it cannot be fairly said that based upon the the use contract between Hercules and the U.S. Government the parties thereto intended that the office complexes be personal property. In fact, the use contract specifically includes a covenant by Hercules that it will keep the property free from liens and encumbrances. Certainly such a covenant contemplates that Hercules has an ownership interest sufficient to empower Hercules with the ability to create a lien on the property and contemplates that such liens are possible. See second sentence of Paragraph 8 b of the General Provisions for Use Contract. Record at 275.

Additionally, it cannot be fairly said that the agreement between Hercules and Modulaire contemplated that the office

complexes were to be personal property since on its fact the agreement is nothing more than a financing arrangement for the procurement of the office complexes, complete with renewal clauses and purchase options. See Record at 240.

Based upon the foregoing, Plaintiff seeks this Court to hold that the trial court erred in ruling that the office complexes were personal property which were not affixed to the subject real property. Based upon the full facts and circumstance presented to the trial court, the correct legal conclusion is that the office complexes do constitute "construction, addition to, alteration or repair of any building, structure or improvement."

III. THE UNDERLYING PRINCIPAL FOR THE MECHANIC'S LIEN AND PAYMENT BOND STATUTES IS TO ASSURE THAT LABORERS AND MATERIALMEN GET PAID; WHERE AN IN PARI MATERIA READING OF THESE STATUTES AND CASES DECIDED THEREUNDER WOULD DEFEAT THIS CLEAR PURPOSE, THE STATUTES AND CASES DECIDED THEREUNDER SHOULD BE READ INDEPENDENTLY TO GIVE EFFECT TO THE UNDERLYING PURPOSE.

The doctrine of in pari materia should not be used to defeat the purpose of the mechanic's lien and bond laws. The doctrine of in pari materia concerns those statutes which relate to the same person or thing or have a common purpose. Blacks Law Dictionary, 1979, p. 711. Truly, as Hercules has pointed out, the Utah mechanic's lien and the Utah payment bond statutes have the same purpose (i.e., to assure that laborers and materialmen receive payment). However, Hercules would have this Court apply the doctrine of in pari materia to defeat the clear purpose of the mechanic's lien and bond statutes.

The purpose of the payment bond and mechanic's lien statutes is to assure that laborers and materialmen get paid. The Utah Supreme Court has stated:

As we pointed out in Metals Manufacturing Co. v. Bank of Commerce, [16 Utah 2d 74, 395 P.2d 914 (1964),] these statutes should be interpreted and applied in such a manner as to carry out the purpose for which they were created: to protect those who supply labor and materials.

King Brothers, Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 440 P.2d 17, 18 (1968). Hercules would have this Court ignore the clear and long held purpose of the mechanic's lien and payment bond statutes.

Hercules would have this Court apply a personal property/ fixture test which was created in the context of the mechanic's lien statute to defeat Plaintiff's claim for Hercules failure to obtain a payment bond. This clearly would be inappropriate.

In order to accomplish this stated purpose of assuring payment to laborers and materialmen, the Utah legislature has established certain mechanisms to assist laborers and materialmen to get paid. The first is the mechanic's lien which allows an encumbrance upon the property which was improved by the labor or materials to secure the payment of the debt. Usually, the mechanic's lien attaches only to the extent of the interest of the person who contracts for the improvement.

The potential for mechanic's liens being filed against the property carries with it the possibility that an owner might have to pay twice for the services or materials received if the



mechanic's lien claimant is a lower tier subcontractor or supplier. The public policy established by the Utah legislature is that it is better for an owner to pay twice than to have laborers and suppliers go unpaid. However, an owner is not without a means to protect himself. One protection is that the owner may withhold money until all lien rights have lapsed. Additionally, an owner may protect himself by obtaining a payment bond from the parties with whom he contracts. In fact, the Utah legislature has obligated owners to obtain payment bonds to assure the payment of laborers and materialmen. See Utah Code Annotated §§ 14-2-1 et seq. (1953 as amended in 1985). Thus owners can protect themselves simply by complying with the statutory requirement to obtain a payment bond. If an owner fails to comply with the bonding requirement, he becomes personally liable to those who would have been covered by such payment bond. See Utah Code Annotated § 14-2-2 (1953 as amended in 1985).

Such has been the law in Utah for many years, extending well before the current code. In establishing the constitutionality of the former code's version of the payment bond statute, the Utah Supreme Court stated this law and policy as follows:

The bond, as in this case is conditioned upon the faithful performance of the contract and securing the payment of laborers and materialmen. If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands.

Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P. 241, 246 (1917).

In the case at bar, Hercules could have chosen to protect itself by requiring a payment bond from its contractor, Modulaire. In the words of the Rio Grande Court, Hercules had its remedy in its own hands. However, it chose not to do so and now asks this Court to relieve it from its statutory obligation through a misuse of the doctrine of in pari materia.

The risk of loss and the obligation to obtain the payment bond is with the owner and when the owner chooses to go contrary to the statutory requirement, he must be held to the obligations imposed by the statute. In such a situation, any close question ought to be resolved in favor of the unpaid laborer or supplier since the problem would not have arisen had the owner done what the statute says he ought to have done (i.e., obtained a payment bond). This is especially true when the purpose of the statute is to assure payment to laborers and materialmen.

If for whatever reason, the mechanic's lien statute is incapable of achieving the purpose of ensuring payment to laborers and materialmen, that inability should not be used to thwart the payment bond statute from achieving the stated purpose of these statutes.

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT HERCULES INTEREST IS NOT ALIENABLE AND, EVEN IF SUCH INTEREST WERE NOT ALIENABLE, PLAINTIFF'S MECHANIC'S LIEN IS NOT DEFEATED AS A RESULT.

With regard to the dismissal of Plaintiff's mechanic's lien cause of action on summary judgment, the trial court erred in two

respects in ruling that Plaintiff's mechanic's lien could not attach to the interest of Hercules in and to the subject property. First, there is nothing in the Facilities Use Agreement between Hercules and the United States Government which is an absolute bar to the alienability of Hercules interest in the property. In fact, the Facilities Use Agreement contemplates the possibility of such liens. Second, there is nothing in the mechanic's lien statute which requires that an interest in real property must be alienable in order for a mechanic's lien to attach. The mechanic's lien statute simply states "This lien shall attach only to such interest as the owner may have in the property." Utah Code Annotated § 38-1-3 (1953 as amended).

Whether Hercules interest in the subject property is a lease is not essential to the attachment of Plaintiff's mechanic's lien as Hercules would lead this Court to believe. The clear facts presented before the trial court were that Hercules uses the subject property for its benefit and gain. While there is no doubt that there were certain restrictions placed upon Hercules' use of the property, there is also no doubt that to the extent allowed under the use agreement Hercules holds a possessory interest in the land. Further, the use contract contains no specific language against alienation of Hercules' interest. See Record at 247. The only evidence that Hercules' interest is not alienable is the self-serving parole testimony of Hercules' employees. The only competent evidence of as to the alienability of Hercules interest is the use agreement.

Further, the trial court did not make a specific finding as to the exact nature of Hercules interest in the subject property. In granting Hercules' motion for summary judgment on the issue of whether Plaintiff's mechanic's lien could attach to Hercules' interest, the trial court simply concluded that the interest was not alienable and, therefore, Plaintiff's mechanic's lien could not attach. The trial court also held that Hercules does hold an ownership interest in the subject property which could subject it to the provisions of the payment bond statute.

From the cases discussed in the briefs, it is clear that a mechanic's lien can attach to an ownership interest less than fee. For example, a leasehold may be attached. Additionally, an option interest may be attached. Further, a purchaser's interest may be attached, even though the sale has not been fully consummated. If non-possessory property interests, such as options and purchaser's interests, may be attached by a mechanic's lien, surely Hercules' possessory interest may be attached.

Such a conclusion has previously been specified by the Utah Supreme Court in the case of King Brothers, Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 440 P.2d 17 (1968). The Court stated:

This court has allowed a materialman's lien to attach to interests less than fee simple, such as a leasehold estate, an equitable interest, and a building separate and apart from the soil upon which it was erected. (citations omitted) (emphasis in original)

King Brothers at 440 P.2d 19.

It is clear that the nature of the ownership interest is not a critical factor in the attachment of a mechanic's lien since the

lien attaches "only to such interest as the owner may have in the property." It cannot be disputed that Hercules has some interest in the property and Plaintiff's valid mechanic's lien should be allowed to be foreclosed.

#### V. CONCLUSION.

Utah's mechanic's lien and bond laws are liberally construed to protect those who provide labor, materials and equipment for projects such as the office complexes built for Defendant-Appellee Hercules. Hercules holds an interest in the subject property which is sufficient for Plaintiff's mechanic's lien to attach. Plaintiff respectfully requests that this Court reverse the decision of the trial court at summary judgment by reinstating Plaintiff's mechanic's lien cause of action against the subject property and remand for further proceedings in the foreclosure of that mechanic's lien.

Further, based upon the policy underlying the mechanic's lien and payment bond statutes, and based upon the facts and circumstances presented at the motions for summary judgment and at the trial of the case, the office complexes became part of the subject real property. This is the only legal conclusion which can be properly drawn from the facts presented. Therefore, Plaintiff respectfully requests that this Court reverse the decision of the trial court following the trial of the case by ordering that the trial court enter judgment for Plaintiff on its failure to obtain a bond cause of action and remand the case for a determination as to the amount of the judgment.

DATED this 15th day of August, 1989.

WALSTAD & BABCOCK, P.C.

By:

A handwritten signature in cursive script, appearing to read "Darrel J. Bostwick", written over a horizontal line.

Darrel J. Bostwick  
Attorneys for Plaintiff

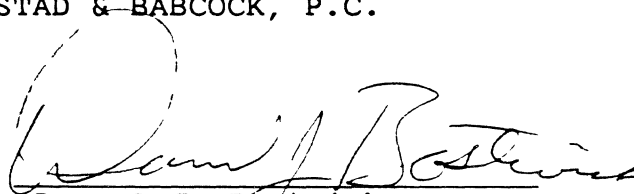
CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered a true and correct copy of the foregoing Appellant's Reply Brief on this 15<sup>th</sup> day of August, 1989 to the following:

James M. Elegante  
PARSONS, BEHLE & LATIMER  
185 South State Street, Suite 700  
P.O. Box 11898  
Salt Lake City, Utah 84147-0898

WALSTAD & BABCOCK, P.C.

By:

  
Darrel J. Bostwick  
Attorneys for Plaintiff

3-12-grabrply.brf

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WALSTAD & BABCOCK, P.C.  
254 West 400 South, #200  
Salt Lake City, UT 84101  
Telephone: (801) 531-7000

ATTORNEYS FOR APPELLANT

James M. Elegante  
PARSONS, BEHLE & LATIMER  
185 South State Street, Suite 700  
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COURT OF APPEALS



### SUMMARY OF THE ARGUMENT

Plaintiff's Reply Brief addresses primarily three issues. First, Hercules erroneously states that the parties are in agreement as to the law which should apply to the case. Hercules would have this Court apply the personal property/fixture test set forth in Paul Mueller Co. v. Cache Valley Dairy Ass'n., 657 P.2d 1279 (Utah 1982). The Mueller test is inappropriate for the present case since it involves buildings and structures of significant magnitude rather than handrails, catwalks, dairy equipment, or other such personal property as was involved in the Mueller case and other Utah payment bond cases.

When an Hercules, an owner of an interest in the subject real property, contracted with Modulaire to have buildings or structures placed upon that property, that is all that was required to obligate Hercules to obtain a payment bond pursuant to Utah Code Annotated § 14-2-1 (1953 as amended prior to 1987). All that is required by § 14-2-1 is that an "owner of any interest in land" enter into a contract involving \$2,000 or more for the "construction, addition to, alteration or repair" of any "building" or "structure" or "improvement." Clearly, the office complexes involved in this case are buildings and/or structures and are not subject to the personal property/fixture test stated in Mueller.

The second issue addressed in this Reply Brief is Hercules attempts to misuse the theory of in pari materia to defeat Plaintiff's claim. The theory of in pari materia is applied to situations dealing with statutes which relate to the same person or thing or have a common purpose. While in many circumstances,

the mechanic's lien and payment bond statutes can and should be read in pari materia, where such a reading would defeat the clear purpose of these statutes, such a reading is inappropriate. The clear purpose of the mechanic's lien and payment bond statutes is to assure that laborers and materialmen get paid. Where procedural or other problems frustrate that purpose for either the mechanic's lien statute or payment bond statute, such procedural or other problems should not be used to prevent the other statute from accomplishing the stated purpose. This Court should carry out the clear intent of these statutes.

The third issue addressed in this Reply Brief concerns the trial court's determination that the alienability of Hercules' interest in the subject property affects whether Plaintiff's mechanic's lien attaches to such interest. The alienability of Hercules' interest in the subject property is not relevant to a determination of whether Plaintiff's mechanic's lien can attach to such interest. While it may affect the marketability of the property at the foreclosure sale, it does not affect whether the lien can attach to Hercules' interest. To rule otherwise is to encourage lessees and others who hold less than fees simple title to structure their dealings to avoid the clear intent and language of the mechanic's lien statute which states that the lien "attach[es] only to such interest as the owner may have in the property." Utah Code Annotated § 38-1-3 (1953 as amended). This Court should reverse the trial court's determination that the Plaintiff's lien cannot attach to Hercules' interest in the subject property.

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