

1989

John Wagner Associates v. Hercules, Inc. : Brief of Respondent

Utah Court of Appeals

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Darrel J. Bostwick; Walstad & Babcock; Attorneys for Appellant.

James M. Elegante; Mark S. Webber; Parsons, Behle & Latimer; Attorneys for Respondent.

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BRIEF

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DOCKET NO. 890017-CA IN THE COURT OF APPEALS

STATE OF UTAH

* * * * *

JOHN WAGNER ASSOCIATES, d/b/a)	
GRABBER UTAH,)	BRIEF OF RESPONDENT
)	HERCULES, INC.
Plaintiff-Appellant,)	
)	
vs.)	Case No. 890017-CA
)	
HERCULES, INC.,)	
)	Category No. 14b
Defendant-Respondent.)	

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah

Honorable Frank G. Noel, District Court Judge

Darrel J. Bostwick
WALSTAD & BABCOCK, P.C.
254 West 400 South, #200
Salt Lake City, Utah 84101
Attorneys for Appellant

James M. Elegante
Mark S. Webber
PARSONS, BEHLE & LATIMER
185 So. State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Attorneys for Respondent

FILED

JUN 16 1989

COURT OF APPEALS

IN THE COURT OF APPEALS

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* * * * *

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Salt Lake City, Utah 84101
Attorneys for Appellant

James M. Elegante
Mark S. Webber
PARSONS, BEHLE & LATIMER
185 So. State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Attorneys for Respondent

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PARTIES TO THE PROCEEDING

The initial parties to this action included plaintiff John Wagner Associates, dba Grabber Utah, and defendants Hercules, Inc. and Modulaire Industries, Inc. Prior to trial, defendant Modulaire Industries Inc. and plaintiff John Wagner Associates, dba Grabber Utah settled their disputes. Defendant Modulaire Industries Inc. is therefore not a party to this appeal.

JURISDICTION AND NATURE OF THE PROCEEDINGS

This Court has jurisdiction pursuant to the Utah Supreme Court's Order of Transfer to the Court of Appeals, dated January 10, 1989. The Utah Supreme Court had appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j), and has discretion to transfer this appeal pursuant to Rule 4A of the Rules of the Utah Supreme Court and Utah Code Ann. § 78-2-2(4).

This appeal is from an Order granting a Motion for Summary Judgment filed by defendant-respondent Hercules wherein plaintiff-appellants John Wagner Associates' First Claim for Relief for mechanic's lien foreclosure was dismissed, and from a final Judgment following trial dismissing plaintiff-appellant John Wagner Associates' Second Claim for Relief for failure to obtain a payment bond. Both the Order and the final Judgment were issued by Judge Noel of the Third Judicial District Court of Salt Lake County, State of Utah.

STATEMENT OF THE ISSUES

1. Whether the district court correctly found that the placing of leased mobile office units constituting Annexes 15 and 16 on the Navy's land by Hercules pursuant to its lease with Modulaire does not constitute the construction, addition to, alteration or repair of a building, structure, or improvement upon land as required by the Utah Contractors' Bond statute, Utah Code Ann. § 14-2-1 et seq. (1986).

2. Whether the district court correctly found that Hercules, by virtue of its placing of leased mobile office units constituting Annexes 15 and 16 on the Navy's land pursuant to its lease with Modulaire, is not subject to the provisions of the Utah Contractors' Bond statute, Utah Code Ann. § 14-2-1 et seq. (1986).

3. Whether the district court correctly found that Hercules' use of the Navy's land constitutes an interest which is not sufficient to be attached under the Utah Mechanics' Lien statute, Utah Code Ann. § 38-1-1 et seq. (1974 and Supp. 1986)

DETERMINATIVE STATUTORY PROVISIONS

The two determinative statutory provisions are set forth in Addendum A hereto. They are Utah's Mechanics' Lien statute, Utah Code Ann. ¶ 14-2-1 et seq. (1986) and Utah's Contractors' Bond statute, Utah Code Ann. § 38-1-3 (1974 and Supp. 1986).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On December 5, 1985, plaintiff-appellant John Wagner Associates, d/b/a Grabber Utah (hereinafter referred to as "Wagner") recorded a Notice of Lien against an alleged interest of Hercules in the Navy's property with the Salt Lake County Recorder's Office pursuant to Utah Code Ann. § 38-1-1, et seq. (R. 15-17). The lien arose out of the failure of a non-party subcontractor to pay Wagner for the supplying of materials used in completing the interiors of mobile office units owned by defendant Modulaire Inc. (hereinafter referred to as "Modulaire") and used by defendant-respondent Hercules, Inc. (hereinafter referred to as "Hercules") pursuant to a lease and placed on land owned by the United States Government. (R. 15-17). Wagner subsequently filed this action for breach of a joint-check agreement against defendant Modulaire, and for failure to obtain a payment bond under Utah Code Ann. § 14-2-1 et seq. and for foreclosure of the mechanic's lien against Hercules. (R. 2-11). (The contractual relationships are depicted in Addendum B hereto.)

The parties submitted various motions for summary judgment and memoranda in support thereof. On March 22, 1988, Judge Noel granted Hercules' Renewed Motion for Summary Judgment with respect to Wagner's First Claim for Relief for mechanic's lien foreclosure. (R. 509-512). Judge Noel found that, since the interest of Hercules in the Navy's property was not alienable,

Hercules' interest was therefore insufficient to allow for attachment under the Utah Mechanics' Lien statute, Utah Code Ann. § 38-1-1 et seq. (R. 509-512). In the same order Judge Noel denied Hercules' Motion for Summary Judgment and Hercules' Renewed Motion for Summary Judgment concerning the Second Claim for Relief for failure to obtain a payment bond, concluding that the factual issues relating to the kind and nature of the improvements were reserved for trial. (R. 509-512). Judge Noel concluded that there existed genuine issues of material fact bearing on Wagner's Third Claim for Relief, joint-check agreement, against defendant Modulaire. (R. 509-512).

Prior to trial, Wagner and Modulaire entered into a Stipulation of Dismissal and an Order of Dismissal, settling all causes of action between them. (R. 619-621).

Trial took place on July 12, 1988. The only cause of action remaining at trial was against Hercules for failure to obtain a payment bond pursuant to Utah Code Ann. § 14-2-1 et seq. (R. 640, p. 9). At the conclusion of the trial, the trial court found that Wagner had no cause of action against Hercules under Utah Code Ann. § 14-2-1 (1986) for goods supplied by Wagner to a subcontractor of Modulaire for use in finishing the interiors of these leased mobile office units constituting Annexes 15 and 16. (R. 630-631). The trial court determined that the placing of these mobile office units leased from Modulaire on the Navy's land by Hercules did not constitute the construction, addition

to, alteration or repair of a building, structure or improvement upon land as required by § 14-2-1, Utah Code Ann. (1986). (R. 628). The trial court also determined that Hercules, by virtue of its placing these leased mobile office units on the Navy's land, was not subject to the provisions of § 14-2-1 (1986) and that Hercules therefore had no obligation to obtain a bond for the benefit of Wagner. (R. 628). Findings of Fact and Conclusions of Law were entered by the trial court on August 24, 1988. (R. 623-629).

B. STATEMENT OF THE FACTS

Hercules is unwilling to accept Wagner's version of the Statement of the Facts because of their argumentative nature and because of the lack of cites to the Record. Hercules sets forth its Statement of the Facts as follows:

1. Hercules produces missiles on land called the Bacchus Works, part of which is comprised of land owned by the United State Government and over which the Navy has jurisdiction, (R. 234, Exhibit 2; R. 248-249; R. 640, p. 104).

2. The Navy land is used by Hercules pursuant to an Award/Contract which allows Hercules to use the land without making payment for its use so long as Hercules uses the land for work on government contracts. (R. 639, p. 31).

3. Modulaire's Salt Lake City office has, either in storage at its facilities or placed at various locations in the

western United States, 461 mobile office units for lease as temporary facilities for its customers. (R. 640, p. 90).

4. On June 7, 1985, Hercules gave a Purchase Order to Modulaire under which Modulaire agreed to lease mobile office units to comprise two mobile office complexes, known as Annex 15 and Annex 16, for Hercules' use for a period of 24 months. (R. 640, p. 53, Exhibit 64).

4. The Purchase Order included charges for dismantling and returning the leased mobile office units. (R. 218).

5. Each mobile office unit is 14' x 60'; Annex 15 consists of 19 units; Annex 16 consists of 11 units. (R. 640, p. 69-70, Exhibit 71).

6. The 30 units which comprise the mobile office complexes were delivered by Modulaire to land owned by the United States Navy and used by Hercules pursuant to its Award/Contract with the Navy. (R. 234).

7. When delivered by Modulaire to Hercules, the mobile units were finished exteriorly but did not have finished interiors. (R. 640, p. 75-76).

8. Modulaire contracted with Space Building Systems to perform the interior finishing of the units using demountable partitioning. (R. 170, Exhibit 4).

9. Space Building Systems awarded a contract to Wagner for materials used in completing the interiors of the units. (R. 443).

10. Hercules never contracted with Space Building Systems or with Wagner to perform work on the units. (R. 640, p. 105-106).

11. On October 10, 1985, Space Building Systems filed for relief under Chapter 11 of the United States Bankruptcy Code. (R. 443).

12. Wagner was not paid in full by Space Building Systems before Space Building Systems was granted protection under the United States bankruptcy laws. (R. 443).

13. Modulaire paid in full all sums due and owing to Space Building Systems for the work performed on the interiors of the trailers. (R. 171; R. 640, p. 12).

14. Wagner made demand for payment from Modulaire and Hercules, and upon their refusal to make payment for the materials, Wagner filed a Notice of Lien against an alleged interest of Hercules in the Navy's property with the Salt Lake County Recorder, pursuant to Utah Code Ann. § 31-8-1 et seq. (R. 443).

15. Hercules began using Annex 15 and Annex 16 in September, 1985. (R. 640, p. 57).

16. Hercules extended its lease of the two mobile office complexes to April, 1989. (R. 640, p. 57).

17. The units are delivered by being towed on the open highway and, when at the site, are stabilized on gravel upon which a wooden pallet is placed and upon that several cinder

blocks to create a dry stack; channel beams which form the floor of the unit rest on the dry stack. (R. 235; R. 640, p. 113).

18. Each unit has its own heating, ventilation, and air conditioning unit and its own individual electrical panel which is fed from a main panel setup for the annex; each unit is entirely self contained. (R. 640, p. 70).

19. Once stabilized on the cinder block piers, the wheels are removed and stored for future use in removing the mobile units from the site. (R. 235).

20. The ceiling trusses and floor beams of units adjoined to form the annex are bolted together, but not welded together. (R. 640, p. 77). At the lines where units are joined together, commonly known as mod lines, a piece of metal is placed to hide the mod line on the exterior. (R. 640, p. 73, Exhibit 71). Skirting is placed around the base of the annex to hide the cinder block piers. (R. 640, p. 113, Exhibit 86). Wooden steps are placed at the door of each unit to provide access. (R. 640, p. 112, Exhibit 84). The wooden steps are not attached or fixed to the ground. Id.

21. The mobile units are in no way fixed to the ground. (R. 640, p. 112-115).

22. When one of the units is manufactured at Modulaire's facilities, a Manufacturer's Statement of Origin is provided to the sales office which then applies to the State of Utah to license the mobile unit as a mobile home. The unit is

thereafter taxed to Modulaire as personal property. Each year when personal property taxes are paid to the county in which the trailer is located, the State of Utah issues a mobile home sticker. Modulaire obtains a license plate for each unit which is used when the unit is transported across the open highways. (R. 640, p. 82-87, Exhibits 118-122, 127-128).

23. Modulaire pays personal property tax on each of the leased units to the State of Utah through the Department of Motor Vehicles. (R. 640, p. 84, Exhibits 118, 119).

24. Hercules, either through its own crews or by the use of contractors other than Wagner, prepared the sites for Annexes 15 and 16 by bringing in electrical lines and sewer lines, and by preparing the earth, but without laying cement foundations. (R. 639, p. 11; R. 640, p. 119).

25. Located near Annexes 15 and 16 were Annexes 9 and 10 which also consisted of a complex of mobile office units bolted together, one supplied by Modulaire and the other supplied by another supplier. These annexes were removed from the Navy's property at the close of the lease on them. (R. 640, p. 114-120, Exhibits 69, 95-117).

26. For removal, the skirting was removed, the metal strip along the mod line was removed, the bolts through the ceiling trusses and between the floors of the various units were removed, each unit was jacked up, the cinder block dry stacks were removed, the wheels were placed back on the unit, a towing

tongue was placed on the unit, and the unit was removed to the central parking lot by a small tractor for pickup and removal from the site by a semi-tractor. (R. 640, p. 114-120, Exhibits 95-117).

27. Removal of the mobile office units comprising Annexes 15 and 16 at the close of the lease term would be done in substantially the same manner as the removal of Annexes 9 and 10. (R. 640, p. 120).

28. The Navy's land could be used for a variety of purposes. (R. 640, p. 120-121).

29. The Modulaire office units comprising Annexes 15 and 16 are placed on the Navy's land temporarily. (R. 640, p. 54, 106-107).

30. Hercules did not intend to place the buildings on the Navy's land permanently. (R. 640, p. 106-107).

Hercules makes the following observations with respect to the facts as set forth by Wagner. The paragraphs numbered here correspond to Wagner's numbered paragraphs under the heading "Statement of Facts."

1. Wagner did not supply "construction materials for the construction of approximately 25,000 square feet of office space". Wagner only supplied materials to finish the interior of mobile office units. (R. 443).

2. No office space was "constructed" with 30 modular office units. There was in fact no construction at all.

Hercules chose temporary mobile office units, as opposed to erecting a building, to satisfy its temporary needs for space. (R. 640, p. 107, 177).

12. Hercules never entered into a contract with Modulaire "for the construction of certain office complexes on property". The contract between Hercules and Modulaire was for the lease of mobile office units. (R. 640, p. 69-70, Exhibit 71).

13. Modulaire never entered into a contract with Space Building Systems to provide labor and materials "in the construction and improvement of the office complexes." Modulaire contracted with Space Building Systems to perform interior finishing in the mobile office units. (R. 170, Exhibit 4).

24. Mr. Waring never testified regarding "the tenor" of Specification No. 9106.

29. It is bizarre, to say the least, that Wagner would rely on the testimony of its attorney for the factual underpinning for its claim. The only legitimate use made of the affidavit of Kurt Faux was to authenticate the photographs taken by him for use at trial to which Hercules did not object.

33. The Award/Contract under which Hercules uses the property does not grant Hercules "wide-range use and control of all the 'facilities'". This statement is merely argumentative.

34. Hercules did not spend "one-half million dollars for the office complexes". Hercules spent money to lease the

mobile office units from Modulaire for a limited duration of time; Hercules never paid for improvements to the property. (R. 640, p. 53, Exhibit 64).

SUMMARY OF THE ARGUMENT

The district court correctly found as a matter of fact after trial that the placing of leased mobile office units constituting Annexes 15 and 16 on the Navy's land by Hercules pursuant to its lease with Modulaire did not constitute the construction, addition to, alteration or repair of a building, structure, or improvement upon land as required by Utah's Bond statute, Utah Code Ann. § 14-2-1 et seq. (1986), and, thus, as a matter of law that Hercules is not within the class of persons subject to the provisions of Utah's Bond statute, § 14-2-1 et seq. (1986).

Modulaire's trailers have not become part of the Navy's land by virtue of Hercules' contract with Modulaire. Materials become an integrated part of real property only when annexed to the land or made a part of some permanent structure on the land. In Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279 (Utah 1982), the Utah Supreme Court discussed a tripartite test to be used in distinguishing between real and personal property for the purposes of establishing whether a conversion has occurred. The three factors articulated by the Court are: (1) The manner in which the item is annexed to realty; (2) Whether the item is adaptable to the particular use of the realty; and

(3) The intention of the annexor to make an item a permanent part of the realty.

In the instant case, the mobile office units have not been "annexed" to the realty. The removability of the units was contemplated by the parties in the express terms of the lease. In fact, the evidence showed that trailers almost identical to the trailers in this litigation had already been removed from the premises. The subject trailers were easily removable by disconnecting the pipes, reinstalling the wheels, and pulling them away, just as had been done previously with other trailers. They are, after all, nothing more than trailers.

The Mueller court determined that an item is "adaptable" to the particular use of the realty when it is integrated into real property to further a specific purpose for which the real property has been devoted. The court stated, however, that personal property located on real property that is adaptable to multiple uses does not become "adapted" simply because the presence of the personal property determines the use of the real property at a particular time. In the instant case, the property was vacant and highly adaptable to multiple uses. Placing these trailers on the property did nothing to further any specific purpose for which the property could be devoted. The trailers are used as temporary offices and do not have any special integration with the real property. The adaptation prong of the Mueller test has therefore not been met.

Another important prong of the Mueller test is whether the parties intended the property to be personal property or real property. In this case, the "intention" of the parties to retain the personal property characteristics of the units is strongly supported by the transaction documents. The written quote from Modulaire to Hercules was for mobile office units, specifying both setup and dismantling charges. In addition, each trailer is required to have a Manufacturer's Statement of Origin and to have a Motor Vehicle License under Utah law. Since each trailer is classified as a motor vehicle by the Department of Motor Vehicles, each unit is issued a license plate and a certificate of title, and is thereafter taxed as personal property. None of the three requirements set forth by the Mueller court have been met in this case.

The district court also correctly found that Hercules is not subject to Utah's Mechanics' Lien statute. The remedy in a mechanic's lien action is for the court to sell the owner's interest in the property in order to satisfy the liens and the cost incurred by the lienholder. The threshold issue with respect to the lien statute is, therefore, the availability of an interest in land which can be judicially sold. Hercules has no interest in the Navy's land which could possibly be sold at a sheriff's sale or other judicial sale. Hercules uses the land without any lease, but pursuant to an Award/Contract. Hercules is allowed to use the land so long as it uses the land for work

on government contracts. Hercules does not own the land and it has no interest in the land to which a mechanic's lien could attach. Consequently, the district court correctly found as a matter of law that Hercules' interest in the land is not alienable and that it is not sufficient to be attached under the Utah Mechanics' Lien statute, Utah Code Ann. § 38-1-1 et seq.

Even if Hercules were subject to the mechanics' lien statute as a matter of law, as a matter of fact the mobile office units were not annexed to the land and thus the requirements of the statute are not satisfied. This Court should therefore affirm both the district court's Order and its Judgment.

ARGUMENT

I

THE RELIEF SOUGHT BY WAGNER IN THIS APPEAL IS NOT AVAILABLE.

The trial court's findings of fact were not clearly erroneous and its conclusions of law were completely correct. The lack of foundation for this appeal becomes apparent when the relief sought by Wagner from this Court is studied.

The only issues pertaining to the bond statute relate to the legal determination made by the trial court that Hercules' having placed leased mobile office units comprising Annexes 15 and 16 on the Navy's land did not constitute the construction, addition to, alteration or repair of a building, structure, or improvement upon land, and that Hercules is not a person subject

to the provisions of the bond statute. The trial court wanted to hear evidence regarding the placement of the mobile office units on the Navy's land so that it could make both the appropriate factual determination and the appropriate legal determination.

There are two issues to be considered under the mechanics' lien statute. The first issue under the mechanics' lien statute is one of law. Even if the facts were sufficient to support annexation of the mobile trailers onto the Navy's land, nonetheless, as a matter of law the summary judgment must stand because Hercules has no interest in the property which can be foreclosed upon. The second issue is of a factual nature. Wagner would have this Court reverse the summary judgment granted Hercules by the trial court and "remand for further proceedings in the foreclosure of the Mechanic's Lien." (Brief, p.35). If the case were remanded, the only factual issues that could be determined would be those that have already been fully determined by the trial court after trial on the issues presented under the bond statute. Thus, if this Court sustains the trial court's factual findings with respect to the annexation issue under the bond statute, there would be absolutely no reason to remand this case on the mechanic's lien issue because the facts will automatically have been found against Wagner's position. In other words, there is no remedy for Wagner under the mechanics' lien statute, as is discussed herein.

II

THE STANDARDS OF LAW APPLICABLE TO THIS CASE ARE NOT IN DISPUTE.

Utah's Mechanics' Lien statute and Contractors' Bond statute are similar in nature, similar in language and identical in purpose. The mechanics' lien statute provides that persons furnishing materials used in the construction or improvement of any building, structure, or improvement to any premises shall have a lien on the property for which they furnish materials. A lien granted under this statute can only attach to such interest as the owner may have in the property. Utah Code Ann. § 38-1-3 et seq. (1974 and Supp. 1986). Similarly, the Contractors' Bond statute provides that the owner of any interest in land entering into a contract for the construction or improvement of any building, structure or improvement upon land shall obtain from the contractor a bond conditioned for the faithful performance of the contract and prompt payment for materials furnished and labor performed under the contract. Utah Code Ann. § 14-2-1 et seq. (1986).

The parties agree that the statutes are read in pari materia and are applied equally and consistently to the same fact situation. The similarity between the mechanics' lien statute and the contractors' bond statute was noted long ago by the Utah Supreme Court in Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P.241 (1917), in which the court upheld the constitutionality of

Utah's Bond statute. Id. at 128, 167 P. at 246. Both of these statutes apply to (1) owners of an interest in land (2) for construction, additions, alterations, or repairs to any building, structure, or improvement on the land. In Rio Grande Lumber Co., the Supreme Court noted that the Utah Bond statute "is auxiliary to our mechanic's lien law, and just as much in aid of it as if it had been made a part of it and incorporated in the same chapter." Id. at 124, 167 P. at 245.

The standard for review of the trial court's Findings of Fact is set forth in Utah Rule of Civil Procedure 52(a). It provides, in pertinent part:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

This Court has recently upheld this standard in Butler v. Lee, 108 Utah Adv. Rep. 49, 50 (Utah Ct. App. 1989). See also State v. Walker, 743 P.2d 191, 192-193 (Utah 1987). In Walker, the Utah Supreme Court quoted Wright & Miller in defining that standard:

The appellate court . . . does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

Id. at 193 (citing Wright & Miller, Federal Practice & Procedure § 2585 (1971)). Thus, under the "clearly erroneous" standard of Rule 52(a), this Court will uphold the Findings of Fact entered by the trial court unless this Court determines that the findings are against the clear weight of the evidence, or unless this Court otherwise reaches a definite and firm conviction that a mistake has been made. Walker, 743 P.2d at 193.

While Wagner correctly cites Utah law for the proposition that, in the appeal of an order granting summary judgment, the facts must be viewed in the light most favorable to the party against whom the summary judgment is granted, nonetheless Wagner's appeal will not succeed for that reason alone.

III

THE LEASED MOBILE OFFICE UNITS USED BY HERCULES ON THE NAVY'S LAND HAVE NOT BECOME INTEGRATED INTO THE NAVY'S LAND.

The issue of whether Hercules is an "owner" of any interest in land so as to be subject to the bond statute was decided by the trial court on a summary judgment motion brought by Wagner. However, the trial court found as a matter of law that Hercules is not subject to the bond statute because the trial court found that, as a matter of fact, Hercules did not contract for the construction, addition to, alteration or repair of any building, structure, or improvement upon land. There are no cases defining what constitutes the construction, addition to,

alteration or repair of any building, structure, or improvement upon land under the bond statute. But the bond statutes and the mechanics' lien statutes are read in pari materia. Therefore, good guidelines exist in determining whether personal property has become annexed to real property. The trial court reserved the issue for trial so that, by reference to the statute, the court could determine whether Hercules was a person contracting for the construction, addition to, alteration or repair of any building, structure, or improvement upon land.

Wagner suggests that Hercules should somehow be bound by the agreement between Modulaire and Space Building Systems. However, no party to this appeal was in fact a party to that contract and it is not at issue in this case. Furthermore, the fact that Modulaire's agreement with Space Building Systems refers to Hercules as an "owner" is not sufficient to support a legal conclusion that Hercules is subject to the bond statute.

Hercules is not subject to the statute, because the mobile office units have not been annexed to the Navy's land. In making that finding, the trial court dealt with the purely factual issue of whether the mobile office units had been annexed to the land.

The trial court's finding that the mobile office units were never made part of the Navy's land is not clearly erroneous. In order to be within the class of persons included within the scope of the Utah Mechanics' Lien statute, materials supplied for

a project must have become a part of the realty. See Paul Mueller Co. v. Cache Valley Dairy Association, 657 P.2d 1279, 1283 (Utah 1982); Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 190, 341 P.2d 207, 211 (1959). A mechanic's lien can be acquired only on land, and that land is subject to the lien only if the supplier's materials have been integrated into it. Eccles Lumber Co. v. Martin, 31 Utah 241, 87 P. 713 (1906). The same considerations apply when considering the integration question in connection with the bond statute. No liability could be imposed on Hercules because Wagner failed to show that the materials supplied by it to the project became integrated into the Navy's land.

Materials become an integrated part of real property only when annexed to the land or made a part of some permanent structure on the land. In Mueller, Cache Valley Dairy Association contracted with Maxum Corp. for the installation of a whey drying system on Cache Valley's premises. Maxum subcontracted with Mueller to construct parts of the system and with Dahle to assemble and install the system. Cache Valley contracted with a separate contractor to pour a cement foundation and to assemble a four-story prefabricated metal building. After Cache Valley had paid Maxum in full, Maxum declared bankruptcy, leaving unpaid balances owing to Dahle and to Mueller. Dahle and Mueller filed a notice of lien on the whey drying equipment and sued to foreclose. The Utah Supreme Court upheld the lower court decision

and found that the equipment manufactured by Mueller and much of the equipment installed by Dahle constituted personal property rather than improvements to realty as required by the Utah Contractors' Bond statute, Section 14-2-1, and the Utah Mechanics' Lien statute, Section 38-1-4, and that Mueller and Dahle therefore held no statutory liens upon the equipment. In making its decision, the Mueller court discussed the tripartite test established in Heiselt Const. Co. v. Garff, 225 P.2d 720, 721 (Utah 1950), in distinguishing between real and personal property for the purposes of establishing whether a conversion has occurred.

The Mueller court accepted the Heiselt test, making the same real/personal property distinction for statutory lien purposes. 657 P.2d at 1283. The three factors articulated by the Utah Supreme Court are: "(1) [the] manner in which the item is annexed to realty; (2) whether the item is adaptable to the particular use of the realty; and (3) the intention of the annexor to make an item a permanent part of the realty." Id. at 1283. Each factor, as well as other considerations, is discussed in more detail below.

A. Manner Of Annexation.

Addressing the annexation issue, the Mueller court found that, although the whey drying equipment was attached to the real property with ducts, wires, welding, and bolts, mere physical attachment did not necessarily mean that an item of

personal property had become part of the realty. Instead, the court looked at whether the equipment could be removed from the real property without extreme difficulty.

Wagner's reliance upon the "testimony" of its attorney, both by affidavit and in the Brief, is at best unusual. Wagner suggests that the paving of the parking lot in front of Annex 15 and Annex 16 was molded to the skirting that covered the cinder block stands for the trailers. (Brief p. 25.) The intention apparently is to show that somehow the pavement made the office complex more permanent. However, as the photographs, and particularly Exhibit 70 show, when these mobile office units are removed, neither the skirting nor the paving that abuts the skirting stands in the way. Furthermore, the comments at page 26 of the Brief with respect to the stairways with steel railings are misleading. In fact, the steel stairs and railings were placed at the front of the office complexes. They are few in number. On the other hand, at the rear of the office complexes, as shown in photographs Exhibits 84 and 85, all of the doors have wooden stairways leading to them which are easily demounted. In fact, however, once again the stairways are easily removed and in fact were removed when the mobile office units in Annexes 9 and 10 were hauled away from the Navy's land. (R. 640, p. 114-120).

Of course, neither the trial court nor this Court is called upon to decide whether "those installing the underground

utilities for the offices complexes (i.e., sewer, water, power) and those installing the concrete walkways and asphalt parking surface would likely have [a cause of action for] failure to obtain a bond and mechanic's lien claims." (Brief, p. 26). Indeed, given the facts of this case, there is no reason to believe that work by a contracting company would support such claims at all. In any event, whether those persons can make claims or not is of no importance in deciding the case before this Court.

In the case at bar, the trailers are removable without extreme difficulty. Indeed, their removability was contemplated by the parties in the express terms of the lease. (R. 640, p. 53). Furthermore, trailers identical to the trailers in this litigation were removed from the premises not long before the trial. (R. 640, p. 120). The units were not placed on permanent foundations, but rather, they were placed on cinder blocks covered by a removable skirting. (R. 640, p. 113). Access to the units is provided through detached concrete stairs. (R. 640, p. 119, Exhibit 112). The utility hook-ups were provided by the lessee, were connected after delivery of the units, and are easily disconnected upon removal of the units. (R. 640, p. 119, Exhibit 113). The subject trailers can be removed quite easily by disconnecting the pipes, reinstalling the wheels, and pulling them away, just as has been done previously with other trailers. (R. 640, p. 113). It certainly cannot be said that the trailers

became part of the realty and no evidence presented by Wagner gave any indication of the contrary. The trial court's ruling was thus legally and factually sound in this regard alone.

B. Adaptation.

Discussing the adaptation prong of the test, the Mueller court adopted a limited definition of adaptation. The court stated that the personal property is "adapted" when it is integrated into real property to further a specific purpose for which the real property has been devoted. The court explicitly noted, however, that personal property located on real property adaptable to multiple uses does not become "adapted" simply because the presence of the personal property determines the use of the real property at that particular time. In Mueller, a system comprised of largely whey drying equipment enclosed in a four-story, prefabricated metal building was placed upon a cement foundation on land. The equipment was attached to the building and bolted to the concrete floor. The court found the equipment to be personal property since it was fabricated and designed for removal by detaching lifting lugs. The court further found that the land and building could be used for multiple purposes since the equipment was designed for removal without significant damage to the building.

In the instant case, the property was vacant and highly adaptable to multiple uses. (R. 640, p. 120-121). Placing these trailers on the property did nothing to further any specific

purpose for which the property could be devoted. The trailers were used as temporary offices and did not have any special integration with the real property. (R. 640, p. 54, 106-107). No damage is caused to the real property when the trailers are towed away. (R. 640, p. 119, Exhibit 113). Wagner suggests that removal of the office complexes damages the Navy's land, thereby suggesting that the land is useful for only one purpose. (Brief p. 31.) When the office complexes are removed, however, the Hercules parking lot simply is no longer bordered by the office complex but again is bordered by an open field which Hercules or the Navy will use as it sees fit. (R. 640, p. 114-120, Exhibits 95-117). Thus, the supreme court's definition of adaptation has not been met, because the materials supplied by Wagner have neither become an integrated part of the real property nor a part of some permanent structure upon the land. The factual basis of the trial court's ruling in this regard thus certainly cannot be assailed.

C. Intent.

Another important factor to consider in determining whether the property is personal or real is the intention of the parties. According to the Mueller court:

In order to qualify under these [mechanic's lien] statutes it is necessary that there must be an annexation to the land . . . and this must have been done with the intention of making [the personal property] a permanent part thereof.

Mueller, 657 P.2d at 1284 (emphasis in original). Wagner bore the burden of proof of showing that Hercules intended these mobile office units to become a permanent part of the Navy's land. Wagner understandably failed to meet this burden.

First, there was no evidence of course that Hercules could even presume to make these mobile office units a part of the Navy's land without the Navy's express permission to do so. There was further no evidence that Hercules ever sought such permission or received such permission from the Navy. In fact, the evidence was that Hercules sought and obtained permission to place the mobile units on the land for 24 months only. (R. 640, p. 53, Exhibit 64). Without the critical evidence of the Navy's granting Hercules permission to place the trailers on the Navy's land permanently, no finding of the requisite intent by Hercules could have been found by the trial court. On this basis alone, his ruling was legally sufficient.

The Mueller court noted that annexation and adaptation were factors which could be considered in determining intent. Id. at 1284. As discussed above, the trailers were not annexed to the real property nor adapted to any specific use of the real property. Therefore, no intent to incorporate the trailers could be inferred by adaptation or annexation. The trial court's ruling is supported on this basis alone.

The Mueller court also indicated that, although a lease agreement characterizing property as personal could not be

conclusive evidence of the nature of the property, the lease could be "one of many items of evidence presented on the issue of respondent's intent." Id. at 1285. In the instant case, the transaction documents are strong evidence of the parties' intent to retain the personal property characteristic of the units. Initially, Modulaire presented a written quote to Hercules for a modular office unit complex. The quote specified both setup and dismantling charges, evidencing an intent to remove the units at the expiration of the leases. (R. 218). The subsequent purchase order similarly included dismantling and return delivery charges. (R. 218).

Wagner suggests that the mere fact that Hercules may choose to un-affix the office complexes in the future is somehow irrelevant in determining whether those units have been annexed to the land. (Brief p. 29.) In fact, that intention of Hercules, clearly expressed at the trial and totally uncontroverted at the trial, is a major element that the trial court had to and did consider in reaching its decision.

The intent to retain the personal property characteristic of the units is also evidenced by the temporary manner in which the trailers were actually placed on the property. To create the temporary annex, a series of trailers was placed on cinder blocks and then held together only by bolts. (R. 640, p. 77). The trailers created the kind of structure that could hardly evince a desire for permanency.

In addition, however, Modulaire, as the manufacturer of the trailers, had to issue a Manufacture's Statement of Origin ("MSO") for each unit manufactured and was then required to obtain a Motor Vehicle License under Utah law. (R. 640, p. 82-87, Exhibits 118-122, 127-128). MSOs are processed by the Department of Motor Vehicles, which issues a certificate of title for each unit. Id. Classified as motor vehicles by the Department of Motor Vehicles, each trailer is then issued a license plate and a certificate of title just like any recreational mobile trailer. Id. Finally, the trailer is thereafter taxed as personal property. Id. On this basis, too, the trial court's decision was well supported by the facts presented to him.

Applying the Mueller tripartite test in its entirety to the facts in the instant case, it becomes evident that the district court correctly concluded that the trailers were personal property and that they never became a permanent part of the Navy's land.

D. Other Indications Of Temporariness.

Valuable insight also is obtained from the tax provisions of Utah law. Utah Code Ann. § 59-2-601(1) (Supp. 1987), defines the trailers as mobile homes, since they are inter alia transportable in one or more sections with the plumbing, heating, and electrical systems contained within the structure and used for commercial purposes when erected on-site on a foundation. The tax provisions further provide that a mobile home is

permanently affixed when anchored to, and supported by, a permanent foundation. Utah Code Ann. § 59-2-601(2) (Supp. 1987). Mobile homes are taxed as real property if (1) the mobile home is permanently affixed; (2) the owner of the mobile home and the real property to which the mobile home is affixed files an affidavit of affixture; and (3) the certificate of title or manufacturer's certificate of origin of the mobile home is surrendered. Utah Code Ann. §§ 59-2-602(1) - (3) and 59-2-603 (Supp. 1987). Liens against a mobile home that has been converted to real property must then be perfected in the manner provided for liens on real property. Utah Code Ann. § 59-2-602(5) (Supp. 1987). The trailers in the instant case, however, are still vehicles or mobile homes. They have not been converted to real property by the process set forth by statute.

Wagner has relied on Thorp Finance Corp. v. F.M. Wright, 16 Utah 2d 267, 399 P.2d 206 (Utah 1965), claiming that wheel-less, motorless trailers are not motor vehicles under Utah law. This reliance is misplaced, since the nature of the structures in Thorp is distinguishable from that of the trailers in the instant case. The trailers in Thorp were transported by "independent wheeled dollies" Id. at 268, 399 P.2d at 207, and were "planted" for use as permanent duplex residences upon arriving at their destination. Id. at 268, 399 P.2d at 207. Furthermore, the Thorp court held that the dealer transporting the structures was not required to register under Utah motor vehicle

laws. In contrast, Modulaire is required to comply with Utah motor vehicle laws, and each trailer involved in this transaction was identified by a serial number and a license plate number. (R. 640, 82-87, Exhibits 118-122, 127-128).

Wagner has also relied on 35 Am. Jur. 2d, Fixtures, § 78 (1974), as support for its argument that a building is generally considered to be part of the land and that a building need not be physically anchored to the land to be part of the realty. Wagner failed to mention, however, that the treatise makes a special exception for trailer-type structures, stating:

. . . whether a building is a fixture depends on all the circumstances of the case and it is clear that the parties may agree or may so place a structure on land that it retains its character as personalty. Thus, a structure designed to be moved from one location to another, such as a refreshment stand or a house trailer, does not become a fixture by mere reason of its introduction upon the realty.

Id. The treatise further states:

As a general proposition, a building erected by one under a license or with the express consent of the landowner does not become a fixture but remains the personal property of the annexor. Such an agreement may be oral and is not within the statute of frauds since it involves no sale of an interest in land. Thus, where a building is erected pursuant to an understanding with the landowner that it is to be a mere temporary structure and to be used only for certain purposes, or where there is an understanding that the annexor may remove the structure when and where he pleases without being accountable to anyone, the building remains a chattel and does not become a fixture.

Id. at § 80. Hercules obtained permission from the Navy to place the trailers on the Navy's property for 24 months. (R. 639, p. 31). Thus, the trial court was certainly correct in finding that the trailers did not become part of the Navy's property.

Utah law is consistent with the general principle stated in the treatise. In Workman v. Henrie, 266 P. 1033 (Utah 1928), the court held that a three-room frame house on a cement foundation that extended approximately six inches above ground was the personal property of the builder, despite the fact that the deed conveying the real property to the adverse party did not reserve the house and that the adverse party "denied that he had any knowledge of the builder's interest in the house." Id. at 1036. According to the court:

The rule seems to be well settled that, in the case of buildings or other improvements erected on another's land, if built with the consent of the landowner that they should remain the personal property of the builder, the agreement may be oral, for in such case the character of the building as personalty is fixed before attachment to the realty, and the agreement involved no sale of an interest in the land. . . . Under such circumstances, the building remains the property of the person annexing it, and may be removed by him.

Id. at 1035.

The Workman facts are analogous to the facts in the instant case. Since the trailers were placed on the land with the consent of the landowner and under a specific agreement that

they were to be removed, the trailers constituted personal property and were not affixed to or integrated into the land.

Wagner has cited Coyle Assessment, 17 Pa. D & D 2d 149 (1958), for its assertion that the Pennsylvania court permitted a mobile home to be taxed as real property. Coyle, however, was reversed on September 13, 1962, by the Superior Court of Pennsylvania. In Lantz Appeal, 199 Pa. Super. 310, 184 A.2d 127 (1962), the court stated that even under a taxing statute designed specifically to tax trailers, "some, but not all, house trailers [may be classified] as real estate." The Lantz court also cited approvingly Streyle v. Board of Property Assessment, Appeals and Review, 173 Pa. Superior Ct. 345, 98 A.2d 410 (1953), stating, "We held that the house trailers there in question, which were attached to utilities and to the land in substantially the same manner as those here in question, were not taxable as real estate." Lantz, 199 Pa. Super. 310, 184 A.2d 127. Thus, Lantz and Streyle, when applied to the facts at bar, provide no support whatsoever for Wagner's assertion that the trial court erred in finding that the trailers supplied by Modulaire were not fixtures attached permanently to the Navy's land, but rather that they had retained their character as personal property.

Wagner's argument that the trailers in the instant case were comparable to the metal storage building studied by the court in Mueller is ill-founded. In Mueller, the metal storage building was built on a concrete foundation. The parties

intended the building to be permanent and only considered its "flexibility" in the context of opening up parts of the building to accommodate different uses of the building on the property. 657 P.2d at 1282, 1284. The parties never considered moving the building to another site. The trailers in the case at bar, however, were placed on cinder blocks, which placement was intended to be temporary. (R. 235; R. 640, p. 113). Indeed, the testimony at trial showed that identical trailers, placed on the same type of temporary cinder block bases, had recently been removed from the property and that the trailers in question forming Annexes 15 and 16 were soon to be prepared for removal as well. (R. 640, p. 114-120, Exhibits 69, 95-117). Thus, the characteristics of the trailers and the metal building, as well as the intentions of the parties, differ significantly from Mueller to the instant case.

Thus, the trial court properly found that under Utah law the mobile units were not fixtures but retained their character as personal property. Even if Wagner supplied goods which were incorporated into these items of personal property, Hercules is not within the class of persons covered by Utah's Bond statute. The purpose and application of the bond statute are not jeopardized by the trial court's findings. The mechanics' lien statute and the bond statute will still protect laborers and materialmen and will still prevent the unjust enrichment of

unscrupulous property owners. See, Summary of Utah Real Property Law, Vol. II, at 484 (1978).

Since the materials supplied by Wagner were not incorporated into permanent structures on real property in which Hercules could realize any benefit, for example from a sale, there is no unjust enrichment to Hercules. The trailers were intended to be removed from the Navy's property at the end of the use period and added no value to the real property whatsoever. Wagner thus has no remedy under the bond statute. Any other conclusion would stretch that statute beyond the bounds intended by the legislature.

IV

THE DISTRICT COURT CORRECTLY RULED THAT HERCULES IS NOT SUBJECT TO UTAH'S MECHANICS' LIEN STATUTES, UTAH CODE ANN. § 38-1-1 ET SEQ.

This appeal raises two issues under the mechanics' lien statute. The first is an issue of law, i.e., whether Hercules has a sufficient interest in the land to be attached. The second is an issue of fact, i.e., whether the mobile office units have become a part of the Navy's land.

- A. There Is No Interest In The Land On Which The Court Could Foreclose To Satisfy Wagner's Lien.

The purpose of Utah's Mechanics' Lien statute is to prevent the owners of land from having their lands improved without having to pay the reasonable value for the materials and

labor provided. Crane Co. v. Utah Motor Park, Inc., 8 Utah 2d 413, 416, 335 P.2d 837, 839 (1959); Rio Grande Lumber Co., 50 Utah at 127, 167 P. at 246. A mechanic's lien is a judicial mechanism to obtain for suppliers of goods or services payment for their labors and wares. The statute is not designed to provide an unpaid contractor with "leverage" to obtain payment through a threatened or actual suit for foreclosure. The ultimate issue then with respect to the lien statute is the availability of judicial foreclosure on an interest in real property, because the remedy in a mechanic's lien action is for the court to sell the owner's interest in the property in order to satisfy the lien and the costs incurred by the lienholder. When a lien is claimed on property, Utah Code Ann. § 38-1-15 provides that "[t]he court shall cause the property to be sold in satisfaction of the liens and costs as in the case of foreclosure of mortgages. . . ."

1. Hercules has no alienable interest in the land.

The land on which the mobile office units are located is owned by the United States Government and is under the jurisdiction of the Navy. (R. 234, Exhibit 2; R. 248-249; R. 640, p. 104). However, the United States Navy did not contract for the lease, placement, or finishing of the units. The government is not a party to the contract involved in this action, and Hercules is not acting on behalf of the United States. Furthermore, the mobile office units for which Wagner supplied materials

are not public buildings or public works within the scope of the Miller Act and therefore the Navy's land cannot be the subject of a lien and a subsequent sheriff's sale, or judicial sale.¹

Hercules uses the land without any lease, but pursuant to an Award/Contract. (R. 639, p. 31). Hercules is allowed to use the land so long as it uses the land for work on government contracts. Id. Hercules is not the owner of the land and it has no interest to which a mechanic's lien could attach. Nor does it have an interest which could possibly be sold at a sheriff's sale or other judicial sale.

Wagner asserts that, because Hercules in some unspecified agreement promised to keep the Navy's property free from encumbrances, it was thus proven that Hercules had an alienable interest in the property. (Brief, p. 17.) First, Wagner mistakes fact for inference. While reasonable inferences can be made from the facts presented, the inference suggested by Wagner is of no avail in this action. The reference is apparently to the agreement between Hercules and the Navy. Hercules' promise

¹ In a related case, United States For The Use Of Idaho Western, Inc. v. Modulaire Manufacturing and Hercules, Inc., filed in the United States District Court for the District of Utah, Central Division, the plaintiff was a party in the same position as Wagner, having contracted with Space Building Systems to supply materials for the same mobile office units, and having not been paid. In that case, Judge Bruce S. Jenkins dismissed the action with prejudice pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, since the plaintiff's claim was barred by the Miller Act, 40 U.S.C. § 270(a) et seq.

to avoid encumbrances on the Navy's land could more easily be understood to prohibit mortgages and other hypothecations than it could to be an admonition to avoid artesian's and mechanic's liens, since the Navy is well protected in regard to the latter by the Miller act.

Wagner also seems to assert that Hercules has unlimited use of the land, as if it had a rental agreement or lease. (Brief p. 17.) Nothing could be farther from the truth. The trial testimony shows with that Hercules is allowed to use the land only as long as it uses the land for work on government contracts. (R. 639, p. 31).

Wagner asserts that, because there is no explicit reference to alienability expressed in the Award/Contract between Hercules and the Navy, Utah law must thus treat Hercules' use of the land as an alienable interest in the land. It should be noted first that Wagner bears the burden of proof in this case. Rather than providing evidence to the lower court that there was no bar to alienability, which it might have done through an expert government witness, it has asked this Court to rely on the lack of evidence to support a proposition which needs affirmation. Secondly, it attempts to use the failure of Hercules to disprove a negative as a positive for his own case. Since Wagner has failed to provide the necessary showing of affirmative facts disputing the trial court's Finding of Fact, the trial court's Findings of Fact should be upheld.

All of Wagner's arguments miss the mark. The issue here is whether Hercules has an interest which can be alienated through judicial sale. The answer is that it has no such interest in the Navy's land.

Wagner argues that Judge Noel's ruling would contravene the purpose of the mechanics' lien and contractors' bond statutes and would encourage owners of property to structure their dealings in such a way as to avoid the applicability of the statutes. But Wagner fails to consider the remote possibility of any such widespread machinations occurring in the business world. First, making missiles for the United States government is an infrequent, even rare, business enterprise. Second, few of the companies making missiles for the United States government likely operate on government land. Third, of those missile-making companies operating on United States government land, very few likely operate in mobile office units. Finally, even fewer of those companies are likely to have situations involving subcontractors who do not get paid for their work by a bankrupt contractor and thus attempt to assert a mechanic's lien on the property. The argument is without merit.

2. Hercules' Interest In The Land Can In No Way Be Considered A Lease.

It is clear from Utah law that Hercules' interest can in no way be considered a lease. In its Brief, Wagner asserts that although neither Hercules nor the trial court term Hercules'

interest in the subject land as a lease under the Use Agreement, the law clearly does. Wagner states four factors that must exist for a valid lease: (1) A binding contract in compliance with the statute of fraud; (2) Possession by the tenant; (3) Legal title in the landlord; and (4) A leasehold that is capable of being granted. Summary of Utah Real Property Law, Vol. II at 565-66 (1978). Wagner asserts that all of these elements for a lease are satisfied in the present case. But Wagner fails to explain how they are satisfied. The record is clear, however, that at least the second factor, possession by the tenant, has not been satisfied. Hercules is using the Navy's land pursuant to its Award/Contract, and has the right to use the land only so long as it uses it to work on government contracts. However, Hercules does not have legal possession of the land, which is necessary for a valid lease to exist. "The concept of where legal title remains is important in distinguishing a lease from other legal relationships. Likewise it is important in determining who has possession rights. For example, the landlord/tenant relationship is distinguished from the licensor-licensee relationship in that the licensee never gains exclusive possession of the land; he receives only permission to use it." Id. at 565, note 2. Hercules' Use Agreement is just that, a use agreement, and Hercules clearly does not have "exclusive possession of the land."

The district court correctly found that Hercules' interest in the land is not alienable and that it is not sufficient to be attached under the Utah Mechanics' Lien statutes, Utah Code Ann. § 38-1-1, et seq. No flood-gate scenario argues in favor of overturning the ruling.

B. A Remand For Trial Under The Mechanics' Lien Statute Would Avail Wagner Nothing.

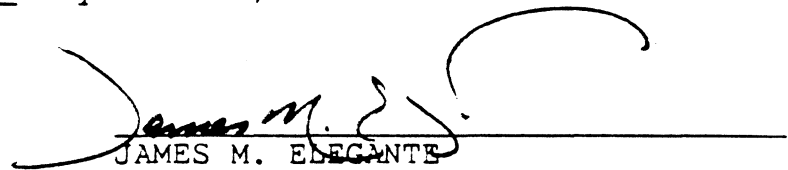
Wagner asks this Court to reverse its summary judgment order and remand for further proceedings in the foreclosure of the mechanic's lien. (Brief, p. 35.) However, if this issue were remanded, before Wagner could move forward with its foreclosure action, it would have to show that the trailers were annexed to the land. The factual issues relating to the annexation of the trailers have already been fully determined by the trial court after trial on the issues presented under the bond statute. The trial court clearly determined that the trailers "are placed on the Navy's land temporarily and are not integrated into, affixed to, annexed to, or adapted to the Navy's land by Hercules." (R. 627-628). Therefore, if this Court affirms the trial court's Finding of Fact with respect to the annexation issue under the bond statute, there would be no reason to remand the issues dealing with the mechanic's lien because the facts will have already been determined against Wagner's position.

CONCLUSION

The Modulaire trailers leased to Hercules were personal property and did not become part of the Navy's land by virtue of Hercules' contract with Modulaire. Therefore, this Court should affirm the trial court's conclusion that the placing of these leased mobile office units constituting Annexes 15 and 16 on the Navy's land by Hercules pursuant to its lease with Modulaire did not constitute the construction, addition to, alteration or repair of a building, structure, or improvement upon land as required by Utah's Contractors' Bond statute, Section 14-2-1, Utah Code Ann. (1986), and that it did not place Hercules within the class of persons subject to the provisions of Section 14-2-1. And this Court should affirm the trial court's Judgment dismissing with prejudice Wagner's Complaint.

Hercules has no interest in the land to which a mechanic's lien would attach. Consequently, there is in this case no remedy under the mechanics' lien statute because there is no interest in the land which could possibly be sold at a sheriff's sale or other judicial sale. This Court should therefore affirm the district court's finding that Hercules' interest in the land is not alienable and that it is not sufficient to be attached under Utah's Mechanics' Lien statute, Utah Code Ann. § 38-1-1, et seq., and this Court should affirm the district court's Order dismissing with prejudice Wagner's First Claim for Relief in its Complaint.

DATED this 15th day of June, 1989.

A handwritten signature in dark ink, appearing to read "James M. Elegante", is written over a horizontal line.

JAMES M. ELEGANTE
MARK S. WEBBER
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Respondent
Hercules, Inc.

ADDENDUM A

Utah Code Annotated § 14-2-1 et seq. (1986)

14-2-1. Bond to protect mechanics and materialmen.

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration or repair of any building, structure, or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished, equipment and materials rented, and labor performed under the contract. This bond runs to the owner and to all other persons as their interest may appear. Any person who has furnished or rented any equipment or materials, or performed labor for or upon any such building, structure, or improvement, for which payment has not been made, has a direct right of action against the sureties upon such bond for the reasonable value of the rented materials or equipment furnished, for the reasonable value of the materials furnished, or for labor performed, not exceeding the prices agreed upon. This right of action accrues 40 days after the completion, abandonment, or default in the performance of the work provided for in the contract.

This bond shall be exhibited to any person interested, upon request.

14-2-2. Failure to require bond - Direct liability - Limitation of actions.

Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed.

14-2-3. Action on bond to protect mechanics and materialmen - Attorney's fee.

In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action.

14-2-4. Exceptions - Mortgagees, beneficiaries, trustees.

Nothing in this chapter requires a mortgagee under a mortgage or a beneficiary or trustee under a deed of trust to obtain the bond described in § 14-2-1, or imposes any liability upon a mortgagee, beneficiary, or trustee who has not obtained such a bond.

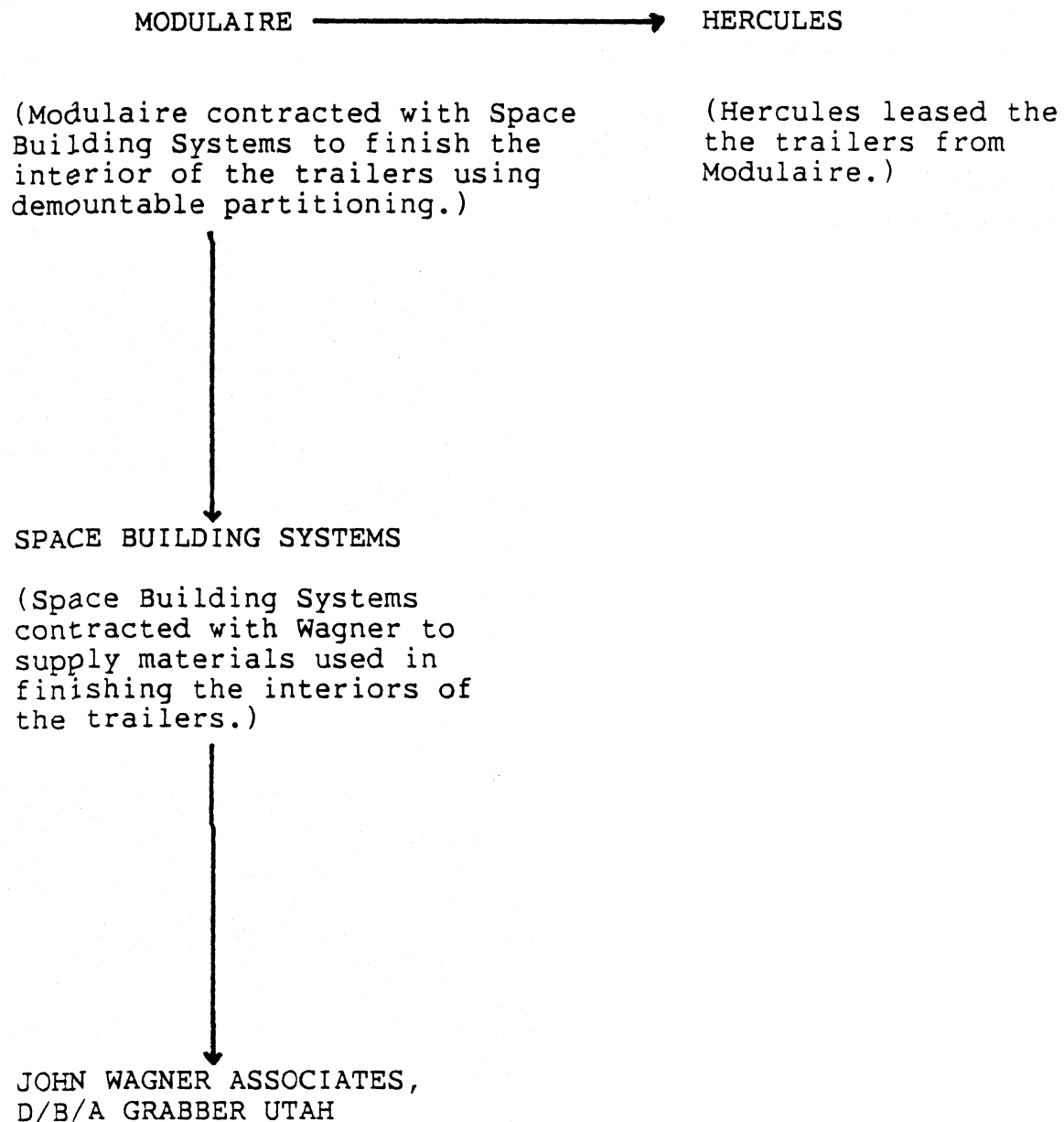
Utah Code Annotated § 38-1-3 (1974 and Supp. 1986)

38-1-3. Those entitled to lien - What may be attached - Lien on ores mined.

Contractors, subcontractors and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished or rented materials or equipment for the value of the service rendered, labor performed or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as an agent, contractor or otherwise. Such liens shall attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease.

ADDENDUM B

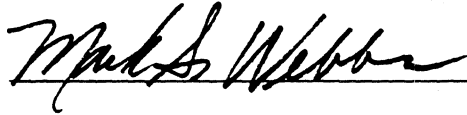
Contractual Relationships Between The Parties Involved In This Action



MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid,
a true and correct copy of the foregoing BRIEF OF RESPONDENT
HERCULES, INC. to the following on this 16th day of June, 1989:

Darrel J. Bostwick
Walstad & Babcock, P.C.
254 West 400 South, #200
Salt Lake City, Utah 84101



242:052489A