

1989

John Wagner Associates v. Hercules, Inc. : Petition for Rehearing

Utah Court of Appeals

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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,)	
)	PETITION FOR REHEARING
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

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FILED

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I.

PRELIMINARY STATEMENT

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Respondent Hercules, Inc. ("Hercules") petitions this Court for a rehearing. In its August 31, 1990 Opinion, this Court misapprehended the Payment Bond Statute, Utah Code Ann. § 14-1-1 (1986), the Mechanic's Lien Statute, Utah Code Ann. § 38-1-3 (1988), and the cases cited in support of these statutes when it concluded as a matter of law the following three points:

(1) That the mobile office units constitute realty for purposes of the Payment Bond Statutes, Utah Code Ann. §§ 14-2-1, et seq. (1986) and the Mechanic's Lien Statutes, Utah Code Ann. §§ 38-1-1 et seq. (1988).

(2) That Hercules "enter[ed] into a contract" for the construction of these mobile office units, as required by the Payment Bond Statute, section 14-2-1.

(3) That the alienability of an owner's property interest is not a precondition to the attachment of a mechanic's lien.

Additionally, this Court misapprehended section 14-2-3 of the Payment Bond Statute and it overlooked a Utah Supreme Court decision directly addressing that section.

II.

ARGUMENT

- A. THE LEASED MOBILE OFFICE UNITS ARE PERSONALTY AND HAVE NOT BECOME PART OF THE LAND; THEREFORE, THE UNITS ARE OUTSIDE THE SCOPE OF THE PAYMENT BOND STATUTE AND THE MECHANIC'S LIEN STATUTE.

The Opinion concludes that the test set forth in Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279 (Utah 1982), does not apply to the present case because the issue addressed in Mueller is not the issue in this case. Opinion, at p. 8. The Court is incorrect for two reasons.

First, the Utah Supreme Court, in Mueller, clearly stated that the Mueller test was to be applied when determining whether property is realty or personalty: "In distinguishing between real and personal property for statutory lien purposes, this Court has adopted a tripartite test. . . ." Id. at 1283. The fundamental issue before this Court in this appeal was whether the mobile office units are realty or personalty. Contrary to this Court's conclusion, the Utah Supreme Court did not limit the applicability of the Mueller test to the issue of whether personal property had become an improvement upon land. When the Mueller test is applied to this case, the only result possible, as the trial court found based upon the evidence it heard, is that the mobile trailers are not realty. This Court

should reconsider its ruling which purports to turn a purely factual issue resolved by the trial court into an issue of law.

Second, this Court cited Waldorf v. Elliot, 214 Or. 437, 330 P.2d 355 (1958), in support of its argument that the units in question were "buildings" and therefore realty. Opinion, at p. 9. However, the Waldorf court actually used the same tripartite test set forth in Mueller to determine whether the property in question was realty or personalty. In Waldorf, the issue was whether certain grain tanks located on property being sold to Mr. and Mrs. Waldorf were personal property and not part of the sale, or whether the grain tanks were real property and included in the sale. Even though the court considered the tanks to be "buildings," that determination did not conclusively indicate the buildings were realty. The court said that determination simply shifted the burden of proof to the party claiming the property was personalty to show that it retained that character. Id. at 357. Hercules has met that burden of proof; the evidence adduced at trial established clearly that the mobile office units are personalty.

Since the Utah Supreme Court in Mueller did not limit application of the tripartite test to determine whether personal property had become an improvement upon land, and since the Waldorf court used the same tripartite test in determining whether buildings were realty or personalty, this Court should

allow to stand the trial court's ruling based on the evidence presented that the Mueller tripartite test was satisfied by Hercules and that the mobile office units are personalty.

Furthermore, the Waldorf court indicated that the most important element in the tripartite test was the intent of the parties. It stated: "The tendency found in modern decisions is to stress the third test -- that of intention -- making it controlling where there is doubt as to the effect of the two others [annexation and adaptation]." Id. at 357. The intention of Hercules and Modulaire was clearly to have these mobile office units remain personalty because they anticipated that Modulaire would someday remove them from the property. This intention is evidenced by the fact that Modular's written quote to Hercules for the mobile office unit complex included both setup and dismantling charges.¹ (R. 218). Based upon this intention, the mobile office units should remain personalty and therefore outside the scope of the payment bond and mechanic's lien statutes.

¹ In its Opinion, this Court stated that it "noted the significant expense that Hercules would incur in removing the buildings." There was no evidence in the record that Hercules would incur expense in removing the buildings and in fact the testimony indicated that there was very little to do on Hercules' part to remove the buildings and, as the record indicates, Modulaire would bear the expense of dismantling the units.

B. THE LEASE ARRANGEMENT BETWEEN HERCULES AND MODULAIRE DID NOT CONSTITUTE "A CONTRACT" FOR THE CONSTRUCTION OF THE MOBILE OFFICE UNITS, AS REQUIRED BY SECTION 14-2-1.

At footnote 4, page 7, of the Opinion, this Court stated: "[W]e conclude as a matter of law that the leasing arrangement [with Modulaire] was such a contract [for the construction of a building]." This Court's conclusion is erroneous and overreaching. Space Building Systems, not Hercules, contracted for the construction of the mobile office units. Hercules was not a party to that contract nor did it negotiate that contract with Wagner. Wagner was a subcontractor of Space Building Systems, Space Building Systems was a subcontractor of Modulaire, and Modulaire was the lessor of the units. The contract between Space Building Systems and Wagner involved Hercules only to the extent that Hercules would someday lease the mobile office units for which Wagner was providing materials. Hercules, therefore, did not contract with Wagner for the construction of the units, as required by the Payment Bond Statute.

The Court's use of the stipulation at trial as to the contractual chain as a basis for its conclusions of law are somewhat incredible in light of the fact that parties frequently stipulate at trial as to contractual chain to eliminate the need for extensive evidence. The mere fact that Hercules stipulated that it was in a contractual chain certainly was not meant to

demonstrate that it was part of a construction project. Hercules has always maintained that it is nothing more than a lessee of mobile trailers.

C. HERCULES' INTEREST, IF ANY, IN THE
PROPERTY IS NOT LIENABLE AND COULD NOT
BE FORECLOSED.

At page 18 of its Opinion, this Court concluded that "alienability of an owner's property interest is not a precondition to the attachment of a mechanic's lien." However, practically there is no interest in which Wagner could foreclose to satisfy its lien. As discussed in its Brief, the land on which the units rest is owned by the United States Navy and could not possibly be foreclosed. Furthermore, the mobile office units were temporarily placed on the land and are personalty because they are not integrated into, affixed to, annexed to, or adapted to the land. Consequently, there is no interest that could possibly be sold at a sheriff's sale or other judicial sale. While it is true that a leasehold interest in realty could certainly be liened, it is also certainly true that a leasehold interest in personalty could not be liened.

D. SECTION 14-2-3 OF THE PAYMENT BOND STATUTE AND UTAH CASE LAW DO NOT PROVIDE FOR AN AWARD OF ATTORNEYS' FEES IN AN ACTION FOR FAILURE TO OBTAIN A PAYMENT BOND.

This Court reversed the trial court's decision in favor of Hercules on Wagner's payment bond cause of action and remanded the case to the trial court. Specifically, the court stated:

Based on the uncontested facts, we remand and instruct the trial court to find for Wagner and to determine the reasonable value of the materials furnished in accordance with Section 14-2-2, Wagner's reasonable attorneys fees pursuant to Section 14-2-3, and any other remedy to which Wagner may be entitled under the Payment Bond Statute.

Opinion dated August 31, 1990, at page 18 (emphasis added). Section 14-2-3 of the Payment Bond Statute and a Utah Supreme Court decision addressing that statute do not provide for an award of attorneys' fees under the circumstances of this case.

Utah's Payment Bond Statute, Utah Code Ann. § 14-2-3 (1986)² provides:

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

² In the Court's Opinion, it properly applied the Payment Bond Statutes in effect in 1986, Utah Code Ann., §§ 14-2-1 et seq. (1986). The Utah Legislature repealed Utah Code Ann. § 14-2-3 in 1987, and amended § 14-2-2 to provide for an award of attorneys' fees in an action for failure to obtain a bond: "In an action for failure to obtain a bond, the court may award reasonable attorneys' fees to the prevailing party. These fees shall be taxed as costs in the action."

attorney's fee to be fixed by the court,
which shall be taxed as costs in the action.

The statute clearly provides for an award of attorneys' fees in an action "brought upon the bond provided for under this chapter." However, Hercules obtained no payment bond with respect to this project. Wagner's action against Hercules was an action to recover for failure to obtain a payment bond pursuant to Utah Code Ann. § 14-2-1 et seq. (1986). Since Wagner's action was not upon a bond, but was for failure to obtain a bond, the Court's award of attorneys' fees to Wagner pursuant to Utah Code Ann. § 14-2-3 was inappropriate.

In a case directly on point, the Utah Supreme Court upheld this reasoning in Roberts Investment Co. v. Gibbons & Reed Concrete Products Co., 22 Utah 2d 105, 449 P.2d 116 (1969). In that case, Gibbons & Reed supplied concrete to construct a building that was owned by Roberts. Gibbons & Reed was not paid for the full value of its services, so it filed a lien against the property and a lawsuit for failure to obtain a payment bond pursuant to § 14-2-1, et seq. Gibbons & Reed also claimed that it was entitled to attorneys' fees pursuant to § 14-2-3.

The Utah Supreme Court awarded Gibbons & Reed judgment for the amount of the reasonable value of its services provided to Roberts. However, it refused to award Gibbons & Reed attorneys' fees pursuant to § 14-2-3 because that statute only dealt with an action upon the payment bond. The court stated:

It should be noted that this section [§ 14-2-3] does not provide for an attorney's fee in the event that a bond is not supplied. The Legislature might well have provided for an attorney's fee in the event that one who was subject to the provisions of the statute having failed to supply a bond was obligated to pay a reasonable attorney's fee to one who was injured by reason of the failure to supply a bond. However, the Legislature did not so provide.

22 Utah 2d at 107, 449 P.2d at 118. As of 1986, the Legislature had not provided for an award of attorneys' fees in an action for failure to obtain a payment bond. Id. In Roberts, the Utah Supreme Court unequivocally stated that this section did not apply to an action for failure to obtain a payment bond.

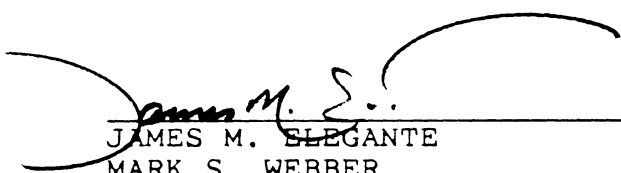
In short, Hercules did not obtain a payment bond for the work performed on the mobile office units owned by Modulaire. When Wagner did not get paid by Space Building Systems after providing labor and materials to finish the mobile office units, Wagner asserted a claim against Hercules for failure to obtain a payment bond as required by Utah Code Ann. § 14-2-1 et seq. (1986). This Court's award of attorneys' fees to Wagner pursuant to section 14-2-3 was inappropriate because that section clearly applies only to actions upon a bond; it does not apply to actions for failure to obtain a bond. Moreover, Roberts supports this position. This Court should therefore at a minimum amend its Opinion and avoid awarding to Wagner erroneously and illegally attorneys' fees.

III.

CONCLUSION

A Petition for Rehearing is appropriate when the appellate court has overlooked or misapprehended particular points of law. The Court's Opinion misapprehends the Payment Bond Statute, section 14-2-1 (1986), the Mechanic's Lien Statute, section 38-1-3 (1988), and the cases cited in support of these statutes. Additionally, the Opinion misapprehends the attorneys' fee provision of the Utah Payment Bond Statute, § 14-2-3 (1986), and it also overlooks a Utah Supreme Court decision interpreting that statute. The Court, therefore, should grant a rehearing to reconsider its conclusions set forth above.

DATED this 14th day of September, 1990.



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of and for
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MAILING CERTIFICATE

On this 14th day of September, 1990, I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the Petition for Rehearing to the following:

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

and further certify that this Petition is presented in good faith and not for delay.

A handwritten signature, appearing to be "James M. E.", is written over a horizontal line.

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