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ALLEN STEEL COMPANY v. DESERET TITLE HOLDING CORPORATION : Petition for Rehearing

Utah Supreme Court

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bruce A. Maak; Clark Waddoups; Larsen, Kimball, Parr and Crockett; Wilford A. Beesley; Jack Fairclough; Beesley and Fairclough; Attorneys for Appellants.
Joseph J. Palmer; H. Dennis Piercey; Moyle and Draper; Attorneys for Respondent.

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UTAH SUPREME COURT
BRIEF
UTAH DOCUMENT KFU 45.9 .S9
DOCKET NO: 20532

IN THE SUPREME COURT OF THE STATE OF UTAH

ALLEN STEEL COMPANY, a Utah corporation, Plaintiff, Respondent, and Cross-Appellant vs. DESERET TITLE HOLDING CORPORATION, a Utah corporation, SALT LAKE CITY CORPORATION, a body corporate and politic, [Continued on next page]	Case No. 20532

PETITION FOR REHEARING OF CROSS-APPELLANT ALLEN STEEL COMPANY

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE SCOTT DANIELS, PRESIDING

Bruce A. Maak, of Counsel
Clark Waddoups
LARSEN, KIMBALL, PARR & CROCKETT
185 South State Street
Suite 1300
Salt Lake City, Utah 84111
Attorneys for Appellants
Crossroads Plaza Associates
and Equitable and Cross-
Respondent Landowners

Joseph J. Palmer
H. Dennis Piercey
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111
Attorneys for Respondent
and Cross-Appellant
Allen Steel Co.

Wilford A. Beesley
Jack Fairclough
BEESLEY & FAIRCLOUGH
1200 Beneficial Life Tower
40 East South Temple
Salt Lake City, Utah 84111
Attorneys for Appellant
Okland-Foulger Co. and others
interested in Okland-Foulger

FILED
OCT 26 1989
Clerk, Supreme Court

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DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation organized under the laws of the United States of America, ORIGINAL UTAH WOOLEN MILLS, a Utah corporation, CHRISTIANSEN ENTERPRISES, a general partnership, REVA L. CHRISTIANSEN, an individual general partner of Christiansen Enterprises, DARLENE C. JACKSON, an individual general partner of Christiansen Enterprises, ROYAL L. TRIBE, an individual, RICHARD A. ISAACSON, an individual, JULIA M. SMOOT, an individual, JACK L. MECHAM, an individual, THELMA M. HINTZE, an individual, VERNER H. ZINIK, an individual, DONNA R. ZINIK, an individual, VERNER H. ZINIK, as Trustee,

Defendants and Cross-Respondents,

and

CROSS ROADS PLAZA ASSOCIATES, a Utah limited partnership, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA, a New York corporation, OKLAND-FOULGER COMPANY, a Maryland general partnership, SID FOULGER, INC., a Maryland corporation, JACK OKLAND INC., a Utah corporation, FOULGER PROPERTIES LIMITED, a Maryland limited partnership, OKLAND PROPERTIES LIMITED, a Utah limited partnership, MARY FLINT FOULGER, and individual general partner of FOULGER PROPERTIES LIMITED, JAMES L. DAVIS and ANNE F. DAVIS, both individual general partners of Foulger Properties Limited,

Defendants, Appellants and Cross-Respondents.

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALLEN STEEL COMPANY, a Utah corporation, Plaintiff, Respondent, and Cross-Appellant vs. DESERET TITLE HOLDING CORPORATION, a Utah corporation, SALT LAKE CITY CORPORATION, a body corporate and politic, [Continued on next page]	Case No. 20532

PETITION FOR REHEARING OF CROSS-APPELLANT
ALLEN STEEL COMPANY

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE SCOTT DANIELS, PRESIDING

Bruce A. Maak, of Counsel
Clark Waddoups
LARSEN, KIMBALL, PARR & CROCKETT
185 South State Street
Suite 1300
Salt Lake City, Utah 84111
Attorneys for Appellants
Crossroads Plaza Associates
and Equitable and Cross-
Respondent Landowners

Joseph J. Palmer
H. Dennis Piercey
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111
Attorneys for Respondent
and Cross-Appellant
Allen Steel Co.

Wilford A. Beesley
Jack Fairclough
BEESLEY & FAIRCLOUGH
1200 Beneficial Life Tower
40 East South Temple
Salt Lake City, Utah 84111
Attorneys for Appellant
Okland-Foulger Co. and others
interested in Okland-Foulger

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DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation organized under the laws of the United States of America, ORIGINAL UTAH WOOLEN MILLS, a Utah corporation, CHRISTIANSEN ENTERPRISES, a general partnership, REVA L. CHRISTIANSEN, an individual general partner of Christiansen Enterprises, DARLENE C. JACKSON, an individual general partner of Christiansen Enterprises, ROYAL L. TRIBE, an individual, RICHARD A. ISAACSON, an individual, JULIA M. SMOOT, an individual, JACK L. MECHAM, an individual, THELMA M. HINTZE, an individual, VERNER H. ZINIK, an individual, DONNA R. ZINIK, an individual, VERNER H. ZINIK, as Trustee,

Defendants and Cross-Respondents,

and

CROSS ROADS PLAZA ASSOCIATES, a Utah limited partnership, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA, a New York corporation, OKLAND-FOULGER COMPANY, a Maryland general partnership, SID FOULGER, INC., a Maryland corporation, JACK OKLAND INC., a Utah corporation, FOULGER PROPERTIES LIMITED, a Maryland limited partnership, OKLAND PROPERTIES LIMITED, a Utah limited partnership, MARY FLINT FOULGER, and individual general partner of FOULGER PROPERTIES LIMITED, JAMES L. DAVIS and ANNE F. DAVIS, both individual general partners of Foulger Properties Limited,

Defendants, Appellants and Cross-Respondents.

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LIST OF ALL PARTIES TO PROCEEDING BELOW

Plaintiff, Respondent and Cross-Appellant:

ALLEN STEEL COMPANY

Defendant "Landowners" and Cross-Respondents:

DESERET TITLE HOLDING CORPORATION, a Utah corporation
SALT LAKE CITY CORPORATION, a body corporate and politic
DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation organized under the laws of the United States of America
ORIGINAL UTAH WOOLEN MILLS, a Utah corporation
CHRISTIANSEN ENTERPRISES, a general partnership
REVA L. CHRISTIANSON, an individual general partner of Christiansen Enterprises
DARLENE C. JACKSON, an individual general partner of Christiansen Enterprises
ROYAL L. TRIBE, an individual
RICHARD A. ISAACSON, an individual
JULIA M. SMOOT, an individual
JACK L. MECHAM, an individual
THELMA M. HINTZE, an individual
VERNER H. ZINIK, an individual
DONNA R. ZINIK, an individual
VERNER H. ZINIK, as Trustee,

Defendant "Developers," Appellants and Cross-Respondents:

a. The joint venture:

CROSSROADS PLAZA ASSOCIATES, a Utah limited partnership

b. Its partners:

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA, a New York corporation
OKLAND-FOULGER COMPANY, a Maryland general partnership

c. Parties interested in Okland-Foulger:

FOULGER PROPERTIES LIMITED, a Maryland limited partnership
OKLAND PROPERTIES LIMITED, a Utah limited partnership
SID FOULGER, INC., a Maryland corporation
JACK OKLAND, INC., a Utah corporation
MARY FLINT FOULGER, an individual general partner of Foulger Properties Limited
JAMES L. DAVIS and ANNE F. DAVIS, both individual general partners of Foulger Properties Limited

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Defendant Lienholders:

COMMERCIAL TOWER ASSOCIATES, a Utah limited partnership
NORTHERN UTAH DRYWALL EQUIPMENT & SUPPLY, INC., a Utah corporation
MERVIN YOUNG, an individual
HOWARD NELSON, d/b/a HOWARD NELSON DRYWALL
TIMMERMAN STEPAN ASSOCIATES, a Utah professional corporation, d/b/a TIMMERMAN STEPAN ASSOCIATES
KERBS CONSTRUCTION CORPORATION, A UTAH CORPORATION
VALLEY GYPSUM, INC., a Utah corporation
MARK REFRIGERATION, INC., a Utah corporation
FLINTBATEMAN CONSTRUCTION, INC., a Utah corporation
WON-DOOR CORPORATION, a Utah corporation
MAX LIEDKE, an individual
SOULE STEEL COMPANY, a California corporation
CECO CORPORATION, a Delaware corporation
CLARON D. BAILEY, an individual
JERALD M. TAYLOR, d/b/a TAYLOR ELECTRIC, INC.
DAHN BROTHERS, INC., a Utah corporation
UNIVERSAL ACCOUSTICS COMPANY, d/b/a UNIVERSAL ACCOUSTICS OF SALT LAKE CITY, UTAH, a Utah corporation
MONROC, a general partnership, consisting of M. K. HOLDING CORP., a Delaware corporation, and WELLCOM FINANCIAL SERVICES, a foreign corporation

Third Party Defendant:

JOSEPH F. PATRICK

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALLEN STEEL COMPANY, a Utah corporation,

Plaintiff, Respondent, and Cross-Appellant

vs.

DESERET TITLE HOLDING CORPORATION, a Utah corporation, SALT LAKE CITY CORPORATION, a body corporate and politic, DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation organized under the laws of the United States of America, ORIGINAL UTAH WOOLEN MILLS, a Utah corporation, CHRISTIANSEN ENTERPRISES, a general partnership, REVA L. CHRISTIANSEN, an individual general partner of Christiansen Enterprises, DARLENE C. JACKSON, an individual general partner of Christiansen Enterprises, ROYAL L. TRIBE, an individual, RICHARD A. ISAACSON, an individual, JULIA M. SMOOT, an individual, JACK L. MECHAM, an individual, THELMA M. HINTZE, an individual, VERNER H. ZINIK, an individual, DONNA R. ZINIK, an individual, VERNER H. ZINIK, as Trustee,

Defendants and Cross-Respondents,

and

CROSS ROADS PLAZA ASSOCIATES, a Utah limited partnership, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA, a New York corporation, OKLAND-FOULGER COMPANY, a

Case No. 20532

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Maryland general partnership, SID FOULGER, INC., a Maryland corporation, JACK OKLAND INC., a Utah corporation, FOULGER PROPERTIES LIMITED, a Maryland limited partnership, OKLAND PROPERTIES LIMITED, a Utah limited partnership, MARY FLINT FOULGER, and individual general partner of FOULGER PROPERTIES LIMITED, JAMES L. DAVIS and ANNE F. DAVIS, both individual general partners of Foulger Properties Limited,

Defendants, Appellants and Cross-Respondents.

PETITION FOR REHEARING OF CROSS-APPELLANT ALLEN STEEL COMPANY

Pursuant to Rule 35 of the Rules of the Utah Supreme Court, Allen Steel Company, Cross-Appellant, respectfully petitions for rehearing on the point regarding liability of the "landowners."[1] Counsel certifies that this petition is presented in good faith and not for delay.

The issue of the "Landowners' Liability" is addressed in part VII of the Court's opinion.[2] There the opinion states

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[1] The landowners are listed on page i, supra.

[2] At the outset, the opinion notes: "Allen Steel cross-appeals the trial court's refusal to enforce its mechanic's lien against the landowners . . . . Allen Steel does not appeal the trial court's award of attorney fees to the landowners and against Allen Steel." Opinion at 2. This overlooks: (1) this appeal went to the correctness of the trial court's denial of the lien, the issue of attorney's fees not having been finally determined by the trial court, Opinion at 7-9, and (2) if the (continued...)

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that "Allen Steel challenges the conclusion that there is no evidence that the landowners would benefit from the construction of the Crossroads project at the end of the leases." Opinion at 21-22. Noting no direct evidence was presented of the value of the improvements beyond the stated lease period of 62 years plus three 10-year option periods, the opinion concluded that "[i]t follows . . . that there is no lien against the landowners' fee estate." Opinion at 23. In discussing the issue, the Court also stated "there [is no] indication or evidence that Crossroads or Equitable were agents of the landowners." Opinion at 22.

Our primary point on appeal was not that there was direct evidence of increased value at the end of the sixty-two year lease; any such evidence would just have been expert speculation.[3] Our point was and is that when the landowners

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[2](...continued)
landowners' interests are determined to be liable for the lien, then Allen Steel would be the prevailing party to be awarded attorney's fees against the landowners, rather than the reverse. See Brief of Respondent (Cross-Appellant) at 34. The purpose of the cross-appeal was to reverse the award of attorney's fees to the landowners and so the contrary sentence should be stricken from the opinion.

[3] This is not to diminish that the landowners bargained for and received the right to, at least, the potential benefit of the improvements at the end of the lease term. Particularly where the Crossroads Mall and Tower replaced "a very sad state of condition, old buildings, broken down buildings, abandoned buildings . . . pretty much like a deserted city," R 2493, the value to the lessor of such significant improvements worth in excess of $40 million, see, e.g., R 2508 & R 3340, is presumed even in the case of a long lease. See Mid-West Engineering & Construction Co. v. Campagna, 397 S.W.2d 616, 628 (Mo. 1965) (99-year ground lease requiring only "a commercial building or buildings costing not less than One Hundred Thousand Dollars ($100,000) . . . paid and discharged by Lessee," id. at 619).
(continued...)

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required in the leases that the mall and office building be constructed, they did so in order to receive benefits. Those benefits were, not merely those they anticipated after the lease terminated, but were those they bargained to receive during the leasehold period,[4] including the benefit of percentage rents from operations in the improvements they required the lessee to construct.[5] By contracting to receive those benefits, they made Crossroads their "agent, contractor, or otherwise," within the meaning of the statute, Utah Code Ann. § 38-1-3, to accomplish the construction.

That is the point that we ask the Court to rule on, but it is not addressed in the opinion. In no other state is residual value at the end of the lease the only way that the

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[3](...continued)
What technological changes will make the mall and office building obsolete? If not presumed from the enormous cost of the improvements, the value of improvements in the middle of the 21st Century is inherently speculative and impossible to show in any meaningful way.

[4] Benefits, in addition to value at the end of the stated lease term, include: (1) value of improvements as security for rent and other lessee obligations; (2) value of improvements in the event of early termination of lease; and (3) value of percentage rentals and development of property. A landlord may have other benefits in mind in requiring the improvements. In a long term lease, value at the end of the stated lease term is probably the least significant factor of value to the freehold interest because after discounting for present value it is worth a tiny fraction of the future amount today.

[5] Liens against the lessor's interest are proper in light of percentage rentals. Los Banos Gravel Company v. Freeman, 58 Cal. App. 3d 785, 130 Cal. Rptr. 180 (1976); Media Five Limited v. Yakimetz, 631 P.2d 1211 (Hawaii App. 1981).

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landowner may be held liable. Such a rule is too easily drafted around by lease language requiring expensive improvements that are surrendered to the lessor, but expressly not requiring (only permitting) that they have projected residual value. Making residual value an absolute requirement is not required by the language of the mechanic's lien statute and is not good policy. What if the construction is not finished? This Court has already determined that actual construction of improvements is not necessary for the lien to attach to the interest of a long-term lessor. Zions First National Bank v. Carlson, 23 Utah 2d 395, 397, 464 P.2d 387, 388 (1970). The broad view of benefit to the landowner in Zions First National, notwithstanding an 85-year lease, was evidenced by the Court's observation: "The sixteen-page lease agreement . . . contains numerous provisions which, if any structure or improvement be erected, grant substantial benefits which will inure to the lessor's reversionary interest." Id. at 399, 464 P.2d at 389 (emphasis added). Other states also follow the rule that if the owner requires the lessee to do the construction, he thereby makes the lessee his "statutory agent" for purposes of mechanic's liens. The Court's holding, as written, makes Utah a minority of one.

One problem with a rule that focuses on economic value at the end of the stated lease term is highlighted by the long established rule regarding a vendor's interest. Thus "[w]here the contract between the vendor and vendee requires the latter to build, it constitutes him the agent of the vendor for the purpose

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of subjecting the whole title to the liens . . . ," 58 A.L.R. 911, 943 (1929); see, e.g., Idaho Lumber v. Buck, 109 Idaho 737, 710 P.2d 647, 651-52 (App. 1985) ("the lessee (or vendee) is said to become the agent of the owner, and in those cases the interest of the owner . . . will become subject to the lien.") Utah law similarly has noted the lack of any such contract requirement for improvements in both cases involving a vendor's interest and in no way held that vendors requiring improvements were immune from liens. See Burton Lumber Co. v. Howard, 92 Utah 92, 98, 66 P.2d 134, 136 (1937); Belnap v. Condon, 34 Utah 213, 218-22, 97 P. 111, 113-114 (1908). Now, however, this generally accepted principle that a vendee may be a statutory agent of the vendor collides with the opinion in this case, which overlooks all benefits to the freehold during the lease term and insists that there be economic benefit proven beyond the stated term of the lease. When vendees and lessees required to make improvements are treated in other jurisdictions as such statutory agents, proper construction of the Utah statute should provide lien claimants with at least that level of protection commonly enjoyed by lien claimants in other states.

Interiors Contracting Inc. v. Navalco, 648 P.2d 1382 (Utah 1982), as the opinion observes, stated "'a lessor is subject to a lien for improvements by a tenant if the lease "requires or obligates the tenant to construct improvements which

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substantially enhance the value of the freehold[6] . . . ."' Interiors Contracting, 648 P.2d at 1387 (Utley v. Wear, 333 S.W.2d 787 (Mo. Ct. App. 1960) (emphasis in original)." Opinion at 22 (footnote added). Utley primarily involved the issue of whether, absent an express requirement so to do, an implied requirement to make the improvements existed under the circumstances. In such a case, the projected value of the improvements at the end of the lease may be an important factor depending on the circumstances. However, Utley also stated, as quoted in Interiors Contracting, 648 P.2d at 1387, and Zions First National, 23 Utah 2d at 400, 464 P.2d at 390, that when the tenant is required to make the improvements, "[h]e has no other option, and hence he is the landlord's (implied) agent to the extent of subjecting the property to a lien . . . ." 333 S.W.2d at 793. See also, Mid-West Engineering & Construction Co. v. Campagna, 397 S.W.2d 616, 625 (Mo. 1965)(lessee agent as a matter of law).

The statute provides that a lien arises with respect to labor or materials furnished "whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise." Utah Code Ann. § 38-1-3 (emphasis added). Thus, when the owner enters into a contract under which

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[6] "Freehold" is simply a synonym for the landowner's interest. See, e.g., Branch v. Western Petroleum, Inc., 657 P.2d 267, 272 (Utah 1982); Black's Law Dictionary 793 (rev. 4th ed. 1968).

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"any other person" is required to build specific improvements from which the landowner might receive income, the determination of whether a lien arises should not be so random as to hinge on whether the "other person" is "a contractor," in which case indisputably a lien arises, or "a lessee," in which case, according to the opinion, a lien may fail. There is no difference in the situations where the landowner requires a contractor to build an unprofitable store and where he requires a tenant to build a store and pay percentage rents. Whatever the label, the owner caused the improvements to be erected and is fairly responsible for them to the extent of his interest in the property.

Why should the unpaid subcontractor have to prove that the owner made a good long term deal? That he made the deal should be enough to require him to pay for it. "That his judgment was bad, or that he was disappointed by later events, is of no moment." Utley v. Wear, 333 S.W.2d 787, 792 (Mo. App. 1960). The landowners' argument "after the fact, disclaiming any benefit from the improvements is not timely and is self-serving." Markely v. General Fine Equipment Co., 17 Wash. App. 480, 563 P.2d 1316, 1319 (1977).

The opinion's conclusion that Crossroads was not the landowners' agent for purposes of the mechanic's lien statute is inconsistent with the stipulated fact that the landowners required Crossroads to construct the project improvements. Agency for purposes of a mechanic's lien is a broader principle

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than ordinary agency for contract purposes.[7] Thus, other jurisdictions apply one simple, consistent rule. It is that the lessor's interest is subject to a lien when the lessee is required to make the improvements because the lessee then is, as a matter of law for purposes of the mechanic's lien statute, the lessor's agent. See, e.g., Bobo v. John W. Lattimore, Contractor, 12 Ariz. App. 137, 468 P.2d 404 (1970); Robert L. Weed, Architect v. Horning, 33 So. 2d 648 (Fla. 1947); Robb v. Lott Paving Co., 289 So. 2d 776 (Fla. App. 1974); Media Five Limited v. Yakimetz, 2 Hawaii App. 339, 631 P.2d 1211 (1981); Christianson v. Idaho Land Developers, Inc., 104 Idaho 458, 660 P.2d 70 (App. 1983); Stroh Corp. v. K&S Development Corp., 247

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[7] An "agent, at least to some extent, within the contemplation of the mechanics' lien statute," Interiors Contracting, 648 P.2d at 1387, may create a lien on the landowner's interest without having the power to impose "personal liability" for the debt on the landowner. The difference between situations of ordinary agency, in which the principal is generally the only party personally liable on the contract, and of statutory agency for purposes of a mechanic's lien, in which the only party personally liable is likely to be the "agent" is well-recognized. See, e.g., Interiors Contracting, 648 P.2d at 1386-87 (lease provisions making lessee responsible "cannot override the effect of the mechanic's lien law" as to nonparties); Utah Code Ann. § 38-1-16; Opinion at 23-24 (Part VIII). See also Daniel v. M.J. Development, Inc., 603 P.2d 947, 950 (Colo. App. 1979) (even in case of lien against lessor's interest, no personal judgment against lessors); Keefer v. Lavender, 74 Ariz. 24, 243 P.2d 457, 459 (1952) (general contractor is "statutory agent of the property owner for the sole purpose of securing the lien rights of the workmen, etc. The agency does not extend further."); see generally, 53 Am. Jur. 2d Mechanics' Liens § 122 ("In regard to the creation of mechanics' liens, regard must be had not only for common-law agents, but also for statutory agents."); § 127 (vendee as statutory agent of vendor); § 132 (lessee as statutory agent of lessor); and § 151 (contractor as statutory agent of owner).

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N.W.2d 750 (Iowa 1976); Mid-West Engineering & Construction Co. v. Campagna, 397 S.W.2d 616 (Mo. 1965); Markley v. General Fire Equipment, 17 Wash. App. 480, 563 P.2d 1316 (1977); Dunlap v. Hinkle, 317 S.E.2d 508 (W. Va. 1984).[8] This Court should rehear this issue in order to determine whether the rule stated in the opinion properly applies the concept of "statutory agency" to give mechanic's lien claimants the protection they are due under an appropriately broad and liberal construction of the mechanic's lien statute.

DATED: October 26, 1989.

MOYLE & DRAPER, P.C.

By /s/ H. Dennis Piercey
Joseph J. Palmer
H. Dennis Piercey
Attorneys for Respondent and Cross-Appellant Allen Steel Co.

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[8] Morrow v. Merritt, 16 Utah 412, 52 P. 667 (1898), read as requiring the improvements, arguably is contrary, but then it would also be contrary to the opinion in this case as Morrow did not look at all to the value conferred by the improvements at any time. The statement of the law and the holding in Morrow shows that the court there treated the case not as one involving a lessor's requirement of the improvement, but only as one involving "permission of the lessor," id. at 417, 52 P. at 668, "his consent," id., 52 P. at 669, or "knowledge," id., 52 P. at 668. It is undisputed that knowledge or consent alone is not enough. Interiors Contracting, 648 P.2d at 1386; Zions First National, 464 P.2d at 390. Morrow should be read no more broadly than that. Gorman v. Birrell, 41 Utah 274, 125 P. 685 (1912), although cited at page 22 in the opinion here as a "requirement" case, merely involved circumstances in which the owner "permitted the alterations to be made and was present and about the apartments and saw them being made." Id. at 279, 125 P. at 687. Gorman contains no statement to the effect that the lessee was obligated to the lessor to make the alterations.

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CERTIFICATE OF SERVICE

I certify that on October 26, 1989, four copies each of the foregoing Petition for Rehearing of Cross-Appellant were hand-delivered to:

Bruce A. Maak, of Counsel
Clark Waddoups
LARSEN, KIMBALL, PARR & CROCKETT
185 South State Street
Suite 1300
Salt Lake City, Utah 84111
Attorneys for Appellants
Crossroads Plaza Associates
and Equitable and Cross-
Respondent Landowners

Wilford A. Beesley
Jack Fairclough
BEESLEY & FAIRCLOUGH
40 East South Temple
Salt Lake City, Utah 84111
Attorneys for Appellant
Okland-Foulger Co. and others
interested in Okland-Foulger

/s/ Angela Lopez

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