

1990

# John Wagner Associates, Grabber Utah v. Hercules Inc. : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF

900588

IN THE UTAH SUPREME COURT

\* \* \* \* \*

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

Plaintiff-Respondent,

vs.

HERCULES, INC.,

Defendant-Petitioner.

WAGNER'S BRIEF IN  
OPPOSITION TO PETITION  
FOR CERTIORARI

Supreme Court No. 900588

Petition for Writ of Certiorari from the  
Utah Court of Appeals, State of Utah

Judges Bench, Davidson and Orme, Utah Court of Appeals

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**FILED**

JAN 28 1991

Clerk, Supreme Court, Utah

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Defendant-Petitioner.

Supreme Court No. 900588

Judges Bench, Davidson and Orme, Utah Court of Appeals

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## STATEMENT OF THE CASE

This action arises out of Wagner's supplying construction materials for the construction of approximately 25,000 square feet of office space configured in two complexes for Hercules. Two causes of action were brought against Hercules. On motion for summary judgment, the trial court dismissed Wagner's cause of action for foreclosure of its mechanic's lien against Hercules interest in the subject property. This dismissal was based upon the trial court's legal conclusion that Hercules' interest in the subject property was not alienable and, therefore, was not subject to attachment by a mechanic's lien. Following trial, the court dismissed Wagner's cause of action against Hercules for failure to obtain a payment bond. This dismissal was based upon the trial court's legal conclusion that the office complexes did not constitute an improvement upon land.

Wagner vigorously objected to the findings of fact and conclusions of law and a final judgment prepared by Hercules based, in part, upon the exclusion of undisputed facts which should have been and were in fact part of the factual analysis upon which the trial court based its legal conclusions. Despite these objections by Wagner to the findings of fact and conclusions of law and to the final judgment, the trial court signed and entered the findings of fact and conclusions of law and the final judgment in substantially the same form as prepared by Hercules.

On appeal, the Utah Court of Appeals reversed both the dismissal of Wagner's mechanic's lien cause of action and the dismissal of Wagner's cause of action for failure to obtain a payment bond against Hercules.

The facts in this case are mostly undisputed. However, the facts

as stated by Hercules, while mostly accurate, do contain some inaccuracies and mischaracterizations. Furthermore, facts helpful to this Court's understanding of the case were omitted by Hercules. Therefore, Wagner sets forth facts hereafter which attempt to overcome the inadequacies in Hercules' statement of the case.

1. This action arises out of the Wagner supplying construction materials for the construction of approximately 25,000 square feet of office space in two complexes for Defendant-Appellee Hercules. Trial Transcript -- R. at 640, pp. 50 & 51.

2. The office space was constructed in two office complexes with 30 modular office units, 14 feet by 60 feet each. One complex contains 19 units, Annex 15, and the other complex contains 11 units, Annex 16. Affidavit of Chilton Leach, Exhibit 3 -- R. at 217.

3. Hercules entered into a contract with Defendant Modulaire for the construction of the office complexes on property located approximately at 4100 South 8400 West (Affidavit of Ryder Christian Waring, Exhibit 2 -- R. at 247); Modulaire entered into a subcontract with Space Building Systems for the completion to "complete interior rough & finish walls & ceiling complete" (Affidavit of Chilton Leach, Exhibit 4, Cover Sheet and Article 1. 1 -- R. at 226);<sup>1</sup>

4. From July 8, 1985, through September 26, 1985, Wagner supplied certain construction supplies and materials to Space Building Systems, which were installed, integrated and incorporated into the office complexes (Trial Transcript at p. 7. Trial Transcript, Testimony of Robert Spencer, Ben Gabaldon and Larry Bills) and Wagner

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<sup>1</sup> On October 10, 1985, Space Building Systems filed for relief under Chapter 11 of the United States Bankruptcy Code.



was not paid by Space Building Systems in full for the materials it furnished to the project (Trial Transcript at pp. 11-13). Defendants refused to make payment therefor.

5. The construction contract between Space Building and Modulaire is an Associated General Contractors of America Standard Subcontract Agreement for Building Construction (hereinafter "subcontract"), with Modulaire's name and logo attached to the title page, signed as subcontractor and contractor, respectively. Affidavit of Chilton Leach, Exhibit 4, Subcontract Cover Sheet and pp. 1, 7 -- R. at 226. The subcontract refers to Hercules as the Owner. Affidavit of Chilton Leach, Exhibit 4, subcontract Cover Sheet -- R. at 226.

6. The subcontract of Space Building Systems encompassed complete "electrical rough & finish interior." Affidavit of Chilton Leach, Exhibit 4, section 1.1 -- R. at 226.

7. The subcontract entitled Modulaire to lien waivers from Space Building, allowed deduction of payments to Space Building from Modulaire due to any claim of lien, required Space Building to keep the building reasonably clean from debris, permitted Modulaire to require a performance bond and labor and material payment bond if it so chose, and stated that any disputes arising from the subcontract shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. Affidavit of Chilton Leach, Exhibit 4, articles 2.1, 2.4, 2.5, 3.6, 6 and 10.1 (Emphasis Supplied) -- R. at 226.

8. The Purchase Order between Modulaire and Hercules for procurement of the office complexes refers to them as "complexes" and "office complexes." Affidavit of Chilton Leach, Exhibit 3, pp. 1, 4 -

- R. at 217.

9. The Purchase Order states that Hercules is "responsible for site preparation, sewer, water and electrical service hookups." Id. at 2.

10. Complete water, sewer, telephone and electrical lines have been constructed and affixed to the office complexes; the wheels and hitches are removed; concrete sidewalks and stairs with steel railings lead to the office complexes; grading was performed in preparation for the office complexes; significant amounts of asphalt were placed to create extensive parking areas with the asphalt fitting snugly within the serrated skirting and extending halfway up the skirting in certain areas; several units are joined to form expansive office complexes; Annex 15 is "L" shaped, joined by an enclosed, suspended walkway; Annex 16 is terraced and joined by interior stairwells; rain gutters and air conditioning units are attached; the interior is completely finished with carpet and drywall overlapping the joints of the connected, prefabricated shells; the office complexes, costing nearly one half million dollars, rest on a permanent foundation of cinder block; and the proposal for expansion of the parking lot for Annex 16 refers to the annex as "Building." Affidavit of Kurt C. Faux; Exhibit "1" -- R. at 405.

11. The Use Agreement with the United States Government grants Hercules wide-ranging use and control of all the "facilities" (the term "facilities" under the Use Agreement means "all property provided under the contract"). Affidavit of Ryder Christian Waring, Exhibit 2, General Provisions For Facilities Use Contracts, Clause Numbers 1, 2, 6, 8, 10, 13, 14, 15 and 29 -- R. at 247.

12. The photographic exhibits presented at the trial clearly

show that the removal of a modular office complex near the subject complexes left large holes in the asphalt, conduit and utility stub-outs protruding from the ground, etc.

13. The interior walls of the office complexes were finished with traditionally finished drywall partition walls rather than "demountable" partitions as stated by Hercules. The document at Record 170, Exhibit 4, does not specify demountable partitions as Hercules would lead this Court to believe. The testimony at the trial was that while demountable partitions were common in the Modulaire office units, the Hercules units were of traditional interior wall finish.

#### ARGUMENT

The best argument for Wagner's position in opposing Hercules' petition is in the Court of Appeals' Opinion. It is a well reasoned legal approach to the factual circumstances presented in this case. Wagner encourages this Court to read the Opinion of the Court of Appeals.

I. HERCULES HAS FAILED TO IDENTIFY FOR THE COURT ANY VALID "SPECIAL AND IMPORTANT REASONS" WHICH WOULD JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI.

As a preliminary matter, Wagner does not believe that Hercules has complied with the Utah Rules of Appellate Procedure which govern petitions for certiorari from the Utah Court of Appeals to the Utah Supreme Court. Rule 49(e) states that "The failure of the petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready understanding of the points requiring consideration will be sufficient grounds for denying the petition." There is a reason for this rule. A petition for certiorari is not the means of arguing the merits of the case, but is to provide the Court with enough

information to determine whether to actually issue a writ of certiorari and hear the merits of the case.

Rather than presenting a brief, concise and clear petition, Hercules has chosen to burden the Court with a lengthy discussion of the details of the case which do not assist the Court in determining whether to issue a writ of certiorari. Therefore, Wagner requests that the Court deny the Hercules' petition for lack of brevity and clarity.

Hercules has requested that this Court review the Utah Court of Appeals decision in this case which was filed on August 31, 1990.<sup>2</sup> However, Hercules has failed to present this Court with valid reasons upon which to grant a review. Furthermore, there are no valid reasons for such a petition in this case. The rules governing petitions of certiorari from the Utah Court of Appeals to this Court are set forth in the Utah Rules of Appellate Procedure, Rules 45 through 51.

"Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons." Rule 46 (emphasis added). Rule 46 further states four specific reasons which may form a valid basis for consideration of issuance of a writ of certiorari. Although they are groundless,

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<sup>2</sup> Hercules petitioned the Court of appeals for rehearing of the case based upon several reasons, including those upon which Hercules now petitions this Court for a writ of certiorari. After briefing by the parties, the Court of Appeals granted the petition for rehearing only on the issue of attorneys fees which had been awarded under Utah Code Annotated § 14-2-3. See, Opinion, Page 20. Since the attorneys' fees provisions in Section 14-2-3 had been enacted during the pendency of the appeal to the Utah Court of Appeals, the Court of Appeals modified its decision by way of an order filed on November 26, 1990, and deleted the award of attorneys' fees under Section 14-2-3.

Hercules has cited only two of these as the basis for its petition. The reasons cited by Hercules are quoted from the rule as follows:

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

\* \* \*

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

Utah Rules of Appellate Procedure, Rule 46(b) and (d). Hercules has offered no other "special and important reasons" for consideration of its petition.

With regard to subsection (b) of Rule 46, the decision of the Court of Appeals does decide issues of Utah State law but none of these holdings is in conflict with any decision of the Utah Supreme Court. In particular, Hercules claims the decision in Paul Mueller Co. v. Cache Valley Dairy Association, 657 P.2d 1279 (Utah 1982) is in conflict with the Utah Court of Appeals decision herein. However, the Court of Appeals clearly, and correctly, distinguished Mueller from the case at bar and held that "buildings" are not to be treated the same as personal property/fixtures, to which Mueller applies in determining what constitutes a fixture or "improvement" to real property. See, Opinion, Pages 8 and 9.<sup>3</sup>

Further, even if Mueller were to be applied to determine the legal nature of the modular office complexes, the property in question clearly meets the Mueller tests and establishes that the modular

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<sup>3</sup> While the Opinion of the Utah Court of Appeals is published at 797 P.2d 1123 (Utah App. 1990), Hercules has provided a copy of the original Opinion as part of its Addendum and all references in its petition for certiorari are to the original. Therefore, in order to assure consistency, Wagner's references herein will be to the original Opinion.

office complexes are part of the property interest of Hercules in the subject realty.<sup>4</sup> Therefore, Hercules' petition based upon subsection (b) of Rule 46 is without merit and should be denied.<sup>5</sup>

With regard to subsection (d) of Rule 46, Hercules petition is even less persuasive. This Court has already determined that the issues presented herein are not of the type that need to be settled by the Utah Supreme Court. This Court had exclusive appellate jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(j). However, by Order of Transfer dated January 10, 1989 and pursuant to Utah Code Annotated § 78-2-2(4) and Rule 4A of the former Utah Rules of the Supreme Court, this Court transferred the case to the Utah Court of Appeals for determination.

The issues presented by Hercules petition for certiorari are

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<sup>4</sup> Throughout its petition herein, as in the appeal to the Utah Court of Appeals, Hercules attempts to mischaracterize the nature of the office complexes by continually referring to them as "mobile". The complexes are no more mobile than any other building manufactured in "modular" units. The Court of Appeals recognized this literary deception and exposed it for what it is -- "inaccurate". See, Opinion, Page 10 and 11.

<sup>5</sup> In claiming that the Court of Appeals decision is in conflict with the Mueller case, Hercules completely ignores the interface and interplay that Mueller must have with several other Utah Supreme Court cases. See, Opinion, Pages 8-14; Sanford v. Kunkel, 30 Utah 379, 85 P.2d 363, modified in part, 85 P.2d 1012 (1906); Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1959); Metals Manufacturing Co. v. Bank of Commerce, 16 Utah 2d 74, 395 P.2d 914 (1964); and King Bros., Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 440 P.2d 17 (1968). When taken as a whole, the Court of Appeals decision herein is in harmony with all of the cases decided by the Utah Supreme Court. Further, the Court of Appeals' decision is supported by other state courts in the Western United States. See, Waldorf v. Elliott, 214 Or. 437, 330 P.2d 355 (1958); and Rinaldi v. Goller, 48 Cal. 2d 276, 309 P.2d 451 (1957). These cases are discussed more fully in the sections that follow.

precisely the issues which this Court reviewed in deciding to transfer the case to the Court of Appeals. Therefore, the issues presented by Hercules do not fall within the scope of Rule 46(d).

Thus, Hercules has failed to identify for the Court any valid "special and important reasons" which would justify the issuance of a writ of certiorari or any further delay in the fulfillment of Wagner's remedies under the Utah mechanic's lien and payment bond statutes.

II. THE COURT OF APPEALS' OPINION IN THE PRESENT CASE IS NOT IN CONFLICT WITH PAUL MUELLER CO. V. CACHE VALLEY DAIRY ASSOCIATION, 657 P.2D 1279 (UTAH 1982) AND IS IN HARMONY WITH ALL OF THE UTAH SUPREME COURT CASES WHICH HAVE BEEN IDENTIFIED.

The Court of Appeals held that the Mueller case does not apply to the present case. It reached this conclusion from a reasoned review of the language of the payment bond statute and the mechanic's lien statute. With regard to the type of work covered, the language of the two statutes is very similar.

Utah Code Annotated § 14-2-1 (1953 as amended in 1985), states that the payment bond provisions apply to "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 . . . ." (emphasis added). Further, Utah Code Annotated § 38-1-3 (1953 as amended in 1981), states that "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, structure or improvement to any premises in any manner . . . shall have a lien upon the property . . . ." (emphasis added).

The personal property/fixture distinction as discussed in Mueller deals with items which are attached to a building (i.e., equipment)



rather than to the actual building itself. The Mueller case is limited specifically to relatively small individual items rather than to entire buildings or structures. Given the statutory language, the Court of Appeals concluded that the Mueller test does not apply to two buildings containing more than 25,000 square feet of office space.

On the other hand, to carry Hercules' argument to its full extension, one would have to conclude that the metal building in the Mueller case to which the equipment was attached would not give rise to a mechanic's lien or to payment bond liability since such metal buildings are removable without too much difficulty and would be conducive to various uses of the property. However, such was not the case in Mueller. The manwalks were considered to be lienable items, and, therefore, presumably the building would be a lienable item also.

With regard to this issue, the operative language of the mechanic's lien statute is "the construction, alteration, or improvement of any building, structure or improvement to the premises in any manner." Utah Code Annotated § 38-1-3 (1953). The operative language of the payment bond statute is "the construction, addition to, alteration, or repair of any building, structure or improvement upon land." Utah Code Annotated § 14-2-1 (1953 as amended in 1985). These phrases indicate the type of work which is covered by the statutes and the objects of such work. First, there must be construction, addition to, alteration, or repair work. This work must relate to (1) a "building," (2) a "structure," or (3) an "improvement upon land." There are three distinct categories in the statute and Muller applies only to the last (e.g., improvement upon land). The Court of Appeals recognized this distinction and correctly held that Mueller does not apply to this case.



In Utah, there has never been any question that buildings or structures are covered by these statutes, even though they could be moved from the land. See, Sanford v. Kunkel, 30 Utah 379, 85 P. 363, modified in part, 85 P. 1012 (1906) (mechanic's lien attached to both old and new real property when a house was improved at the old property and subsequently moved to the new property). See also, Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1959) (mechanic's lien allowed for the transportation of a temporary structure to the lien property). It is only in connection with "improvements upon land" that the issue of personal property v. fixtures became critical. There is no reason to depart from that distinction now. Clearly the office complexes comprise buildings or structures upon the subject property. Blacks Law Dictionary defines "building" as a:

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

Black's Law Dictionary 1979, p. 176. Further, Blacks Law Dictionary defines "structure" as

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

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

Black's Law Dictionary 1979, p. 1276. See also, 12 C.J.S. Building (1980).

It is important to note that there is no requirement for affixation or attachment to the land upon which it is placed. In fact

the definition of structure specifically allows for installation above the land.

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

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

(emphasis in original)

King Brothers at 440 P.2d 19.

It is clear that the Utah Supreme Court views "buildings" as separate and distinct from "fixtures." A building does not have to be attached to the soil in the same manner as a fixture must be attached in order to give rights to mechanic's lien and bond rights. It is sufficient that the "buildings" or "structures" of this magnitude be placed upon the land. Thus, buildings or structures of the magnitude in this case should be deemed to be part of the realty upon which they are placed regardless of the manner in which they are placed upon the land.

This is particularly true given the ability of man to move even traditionally constructed buildings with relative ease and the advance

of technology in the area of pre-manufactured or existing buildings which are transported to the site and placed upon the land or transported from one site to another. The case of Sanford v. Kunkel, 30 Utah 379, 85 P. 363 (1906) provides an example of such a situation. In that case, the Utah Supreme Court held that where a building is moved from one parcel of land to another after improvements to the building were made, that a mechanic's lien could attach to both parcels of land.

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

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

realty.

Similarly, in the case at bar, it was appropriate for the Court of Appeals to not rely too heavily on the agreements to which Wagner was not privy. As between Hercules and Wagner, the office complexes should be deemed to be part of the realty. Such a holding makes good common sense.

Such a holding not only make good common sense, it is in accord with other Utah case law. In Metals Manufacturing Co. v. Bank of Commerce, 16 Utah 2d 74, 395 P.2d 914 (1964), the Utah Supreme Court confronted a situation similar to the one presented in the present case. In Metals Manufacturing, the Bank of Commerce held a 10-year lease which provided that the Bank could "make alterations, attach fixtures, and erect additions \* \* \*" which would remain the property of the bank and be removed upon the expiration of the lease. A second-tier supplier and installer of metal hand rails and grates made a claim for failure to obtain a bond and the Bank defended on the basis that the goods did not become fixtures due to the provisions in the lease specifying that they remain the personal property of the Bank. The trial court ruled in favor of the Bank and dismissed the supplier's cause of action. In reversing the trial court, the Utah Supreme Court held that:

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

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

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

We held that irrespective of the agreement of the parties inter se, as to third-party suppliers, the installation should be regarded as part of the realty. It was pointed out that it would be unfair to bind such suppliers to the terms of agreements to which they were not parties and of whose contents they had no knowledge.

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

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

In fact, Wagner did everything in its power to protect its rights granted under the Utah statutes. On the other hand, Hercules chose to ignore its obligations to those working on or supplying materials to construction project. This Court has stated that:

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

Rio Grande Lumber Co. v. Darke. 50 Utah 114, 127, 167 P. 241, 246 (1917) (emphasis added). Thus, Hercules had its remedy in its own hands but chose to flout the statutory requirement to obtain a payment bond.

III. NEITHER THE UTAH PAYMENT BOND STATUTE, UTAH CODE ANNOTATED § 14-2-1 ET SEQ. (1953 AS AMENDED IN 1985), NOR THE UTAH MECHANIC'S LIEN STATUTE, UTAH CODE ANNOTATED § 38-1-1 ET SEQ. (1953 AS AMENDED PRIOR TO 1985), REQUIRE FEE OWNERSHIP FOR THEIR APPLICATION TO THE CASE AT BAR.

Utah Code Annotated § 14-2-1 (1953 as amended in 1985) states, in pertinent part:

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 . . . obtain from the contractor a bond . . . .

(emphasis added).

Utah Code Annotated § 38-1-3 (1953 as amended in 1981) states, in pertinent part that "Such [mechanic's] liens shall attach to only such interest as the owner may have in the property . . . .

(emphasis added).

The subject real property is owned by the United States Government and controlled by the Navy. Hercules uses this real property to produce missiles for the Government. In exchange for the use of the subject real property, Hercules sells the missiles to the Government than it otherwise would.

While neither the trial court nor the Court of Appeals felt it necessary to identify the exact nature of Hercules' interest in the real property upon which the modular office complexes were placed, there is no doubt that both viewed Hercules' interest as being

sufficient to invoke the payment bond statute provisions.<sup>6</sup>

The trial court did, however, determine, as a matter of law, that Hercules' interest in the real property pursuant to the Use Contract was not alienable, even though that Use Contract contained a provision under which Hercules covenanted that it would keep the property free from encumbrances. On the basis of this perceived inalienability, the trial court held that a mechanic's lien could not attach to Hercules' interest and dismissed Wagner's mechanic's lien cause of action on summary judgment prior to trial.

The trial court erred in that the statute does not place any restrictions on the nature of the property interest attached. The mechanic's lien attaches to "such interest as the owner may have in the property." As a practical matter, some real property interests may not bring a very high price at a foreclosure sale, but that does not mean that the encumbrance foreclosed does not attach.

Further, while Hercules and the Navy may have placed some conditions upon the use of the property, that does not necessarily bind Wagner. The Court of Appeals, in reversing the trial court on this issue, stated:

Materialmen and laborers, who have "no practical way" of knowing the legal status of the property they improve, [King Bros., Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 440 P.2d 17, 19 (1968)], would not know in advance whether the property they are improving is tainted by a restraint on alienability . . . .

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<sup>6</sup> The trial court's ruling was not that Hercules interest in the property was insufficient to invoke the payment bond statute. To the contrary, the trial court had already ruled on that threshold issue and had determined Hercules' interest in the real property sufficient. Thus, the trial court refused to dismiss the payment bond cause of action on Hercules' motion for summary judgment prior to trial.



Ultimately, recognizing alienability as a precondition to the attachment of a mechanic's lien would destroy the Mechanic's Lien Statute. Owners could easily circumvent the Mechanic's Lien Statute by simply creating an alienable interest in land or in the building. We will not adopt a rule permitting such ready circumvention of the Mechanic's Lien Statute. [Metals Manufacturing Co. v. Bank of Commerce, 16 Utah 74, 395 P.2d 914, 915 (1964)].

Opinion at p.15.

Thus, the Court of Appeals correctly ruled that the alienability of a particular property should not be considered in determining whether a mechanic's lien could attach.

IV. THE STANDARD OF REVIEW EMPLOYED BY THE COURT OF APPEALS WAS CORRECT.

In its opinion herein, the Court of Appeals stated:

Inasmuch as the issues before us are limited to questions of law, namely, questions of statutory interpretation, no deference need to be given to the trial court's conclusions. Forbes v. St. Mark's Hospital, 754 P.2d 933, 934 (Utah 1988). We therefore, we review the trial Court's statutory interpretations for correctness. Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987).

Opinion at p.6. Thus, the Court of Appeals employed the "correctness" standard in reviewing the issues presented in Wagner's appeal.

The issues presented in Wagner's appeal were presented as legal issues and Hercules defended them as such. Hercules now seeks to have this Court impose a standard of review established for factual issues.<sup>7</sup> The facts in this case were largely undisputed. Thus, the Court of Appeals did not disturb any of the factual issues on which the trial court had made findings. The Court of Appeals reviewed the

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<sup>7</sup> Again, even if a factual standard of review were more appropriate, which it is not, that would not constitute a "special and important reason" for considering the issuance of a writ of certiorari. Further, Hercules has waived any such argument.



record for all of the undisputed facts relevant to the legal issues it was called upon to decide and relevant to the statutory interpretations it was called upon to make.

Even the authorities that Hercules cites in its petition supports the standard of review employed by the Court of Appeals.

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.

State v. Walker, 743 P.2d 191, 193 (Utah 1987)(citing Wright & Miller, Federal Practice & Procedure, § 2585 (1971))(emphasis added).

This same approach was used by the Court in Waldorf v. Elliott, 214 Or. 437, 330 P.2d 355 (1958), upon which the Court of Appeals relied, in part. The Oregon Supreme Court stated that:

[T]he problem of whether an article is or is not a fixture is by nature a mixed question of law and fact and as such is susceptible to review . . . . [W]e can in any case correct any misapplication of the law to the facts.

Id. at 330 P.2d 357.

Even more telling is the fact that Hercules has petitioned this Court to review two legal issues, not factual issues. Both issues presented by Hercules are clearly legal in nature. While influenced by the facts of the case, the legal nature of the modular office complexes and the statutory interpretations required in this case are legal issues. Thus, the "clearly erroneous" standard urged by Hercules is inappropriate and the "correctness" standard used by the Court of Appeals is correct.

V. CONCLUSION.

Hercules has failed to identify any valid reasons for this Court to consider the issuance of a writ of certiorari. The Opinion of the Court of Appeals is not in conflict with any decisions of the Utah Supreme Court. To the contrary, the Court of Appeals' Opinion is in harmony with the full body of case law interpreting the Utah mechanic's lien and payment bond statutes. Further, Hercules holds a property interest in the subject real property as well as an interest in the office complexes which is sufficient for Wagner's mechanic's lien to attach. The Court of Appeals applied the proper standard of review to the legal issues presented in the appeal. Hercules other arguments contained in its petition are equally without merit.

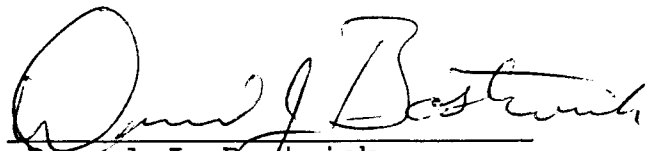
Utah's mechanic's lien and bond laws are liberally construed to protect those who provide labor, materials and equipment for projects such as the modular office complexes built for Hercules. Hercules had its "remedy in its own hands" and chose to ignore its statutory obligations. This Court should not punish Wagner for Hercules' failure to obtain a payment bond.

Wagner respectfully requests that this Court deny Hercules' petition for a writ of certiorari and allow the case to be remanded in accordance with the Court of Appeals' decision.

DATED this 28th day of January, 1991.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief in Opposition to Petition for Certiorari on this 28th day of January, 1991 to the following:

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