

1990

John Wagner Associates, Grabber Utah v. Hercules Inc. : Unknown

Utah Supreme Court

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BRIEF

900588

THE UTAH SUPREME COURT

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JOHN WAGNER ASSOCIATES, d/b/a)	HERCULES' REPLY TO WAGNER'S
GRABBER UTAH,)	BRIEF IN OPPOSITION TO
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Plaintiff-Respondent,)	
)	
vs.)	Supreme Court No. 900588
)	
HERCULES, INC.,)	
)	
Defendant-Petitioner.)	

Judges Bench, Davidson and Orme, Utah Court of Appeals

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Clerk, Supreme Court, I

IN THE UTAH SUPREME COURT

* * * * *

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HERCULES' REPLY TO WAGNER'S BRIEF

Pursuant to Rule 50, Utah R. App. Proc., Hercules hereby replies to Wagner's Brief in Opposition to Petition for Certiorari.

1. Wagner erroneously claims the trial court dismissed its cause of action for Hercules' failure to obtain a payment bond on the basis of the court's legal conclusion that the mobile office units did not constitute an improvement on the land. (Wagner's Brief in Opposition to Petition for Certiorari ("Brief") at 1). In reality, the trial court's conclusion regarding the legal status of the mobile office units was based upon its factual findings.¹ Furthermore, the trial court's judgment was also based upon the conclusion that because the Navy owned the land and Modulaire owned the trailers, Hercules is not a person subject to the provisions of the Payment Bond Statute. (R. 624, ¶¶ 2-3; 625, ¶ 5; 628, ¶ 2).

2. Wagner claims that the trial court's Findings excluded "undisputed facts which should have been and were in

¹ The trial court found the following facts: the office units (1) were mobile (R. 624, ¶ 3); (2) were in no way fixed to the ground (R. 626, ¶ 15); (3) were placed on the Navy's land temporarily and not integrated into, affixed to, annexed to, or adapted to the Navy's land (R. 627-28, ¶ 22); and (4) were not placed on the Navy's land permanently and intentionally by Hercules (R. 628, ¶ 23).

Wagner claims that Hercules has mischaracterized the nature of the trailers by referring to them as "mobile." (Wagner's Brief at 8 n.4). The trial court, however, which viewed the evidence, including numerous photographs of the office units, refers in its Findings of Fact and Conclusions of Law to the mobility of the units no less than fifteen times in five pages. (R. 624-628).

fact part of the factual analysis upon which the trial court based its legal conclusions." (Brief at 1). However, Wagner raised this issue with the trial court. The court, whose province it is to ascertain the facts, conscientiously rejected Wagner's proposed Findings of Fact and Conclusions of Law, because they did not comport with the evidence.

3. Wagner claims that Hercules' Statement of the Case contains inaccuracies and mischaracterizations, and therefore, sets forth its own statement of facts. (Brief at 2). Paradoxically, Wagner's first statement of "fact," i.e., that this action arises out of Wagner supplying materials for the construction of office space, is simply a legal conclusion. Whether placing the leased mobile office units on the Navy's property constitutes "construction" requires a legal conclusion because the statute applies to contracts "exceeding \$2,000 in amount for the construction. . . of any building, structure or improvement upon land." Utah Code Ann. § 14-2-1 (1986)(emphasis added). Therefore, Wagner errs in stating that, as a matter of fact, office space was constructed.

4. Wagner claims that the agreement between Space Building Systems and Modulaire refers to Hercules as the "owner." (Brief at 3, ¶ 5). The terms used in the subcontract between Space Building Systems and Modulaire to refer to Hercules, however, are not determinative of Hercules' legal status in this case. Hercules was not a party to that contract. Furthermore, the Navy, not Hercules, owned the land on which the mobile office units were placed, and Modulaire, not Hercules, owned the

trailers. Hercules only leased the units. The serious legal issues in this case and the facts which relate to them certainly should not be determined by the language of a contract which Hercules did not draft and to which it was not a party.

5. In attempting to overcome the "inadequacies" of Hercules' Statement of the Case, Wagner sites the affidavit of its own attorney for a description of the mobile office units. (Brief at 4, ¶ 10). The conclusory statements of the attorney are mere argument and contradict the findings of fact of the trial court.² The trial court heard the evidence at trial and viewed numerous photographs of the trailers and made findings based on that evidence.

6. Wagner asserts that the Award/Contract which allows Hercules to use the Navy's property gives Hercules "wide-ranging use and control" of all the property provided under the contract. (Brief at 4, ¶ 11). An examination of the "General Provisions for Facilities Use Contracts" of the Award/Contract (R. 270-94), however, reveals just the opposite.³

² For example, Wagner claims "that several units are joined to form expansive office complexes." (Brief at 4, ¶ 10). However, the trial court found that "each unit is entirely self-contained." (R. 626, ¶ 12). Wagner claims that the office units rest on a "permanent foundation of cinder block." (Brief at 4, ¶ 10). The trial court, however, found that the mobile office units rest upon cinder block stacks which are placed on wooden pallets which lay on a gravel foundation. (R. 625, ¶ 11).

³ For example, under the terms of the Award/Contract, none of the Navy's land may become "a fixture or lose its identity as personalty by reason of affixation to any realty." (R. 275, ¶ 8). Absent prior Navy approval, Hercules can use the property only in performance of its prime contract with the Navy. (R. 270, ¶ 2). Hercules is required to submit a schedule which

Footnote continued on next page.

7. Wagner claims that Hercules failed to identify a valid reason to justify a Writ of Certiorari. (Brief at 5). However, Hercules expressly identified three valid reasons for this Court to issue its Writ: (1) the decision of the Court of Appeals in this case conflicts with a prior Supreme Court decision;⁴ (2) the Court of Appeals decided an important question of state law which has not been but should be settled by this Court;⁵ and (3) the opinion of the Court of Appeals misapprehends the Payment Bond and Mechanic's Lien statutes. Any one of these reasons, alone, is a valid basis for this Court to issue a Writ of Certiorari.

8. Wagner claims that the decision of the Court of Appeals does not conflict with the Mueller case, arguing that the test in Mueller for determining whether property is real or personal is "limited specifically to relatively small individual items rather than to entire buildings or structures." (Brief at 10). Mueller makes no such limitation, but does adopt a

Footnote continued from previous page.

outlines its plan for maintenance of the property, and the Navy may order increases or decreases in that schedule at any time. (R. 273, ¶ 6). The facilities on the Navy's property are subject to government inspection at all times and places. (R. 274, ¶ 7). And finally, Hercules is not permitted to construct, alter or make any fixed improvements to the Navy's buildings or land without the Navy's prior written approval. (R. 284, ¶ 29).

⁴ Namely, Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279 (Utah 1982).

⁵ Namely, whether the use of the Navy's land and the lease with Modulaire constitute an attachable real property interest under the Mechanic's Lien statute.

tripartite test for distinguishing between real and personal property. To argue, as Wagner does, that the mobile office units are realty because they are buildings, begs the question. The issue is whether the mobile office units are realty or personalty, and Mueller provides the test for making that determination.⁶

9. Wagner claims that use of the Mueller test would establish that the units became part of the realty. (Brief at 7-8). To the contrary, the trial court applied the test and found: (1) the mobile office units were placed on the Navy's land temporarily and were not integrated into, affixed to, annexed to or adapted the Navy's land; (2) the Navy's land could be used for a variety of purposes; and (3) Hercules did not intend to place the units on the Navy's land permanently. (R. 627-28, ¶¶ 21-23).

CONCLUSION

For the reasons stated above and in its Petition, Hercules renews its request that this Court issue a Writ or Certiorari and reinstate the District Court's Order and Judgment.

⁶ The test consists of the following factors: (1) the manner in which the item is attached or annexed to the 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. Mueller, 657 P.2d at 1283. Given the first factor of the Mueller test, it is surprising that Wagner claims that the mobile office units should be regarded as part of the realty "regardless of the manner in which they are placed upon the land." (Wagner's Brief at 12).

DATED this 22^d day of February, 1991.

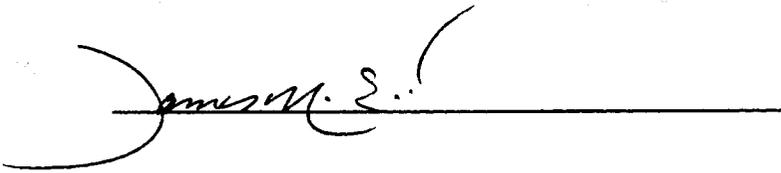

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MAILING CERTIFICATE

On this 22^d day of February, 1991, I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the HERCULES' REPLY TO WAGNER'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI to the following:

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


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