

1967

Minnie C. Frehner Dba Frehner Mountain West
Gardens, and Leon C. Frehner v. Margaret Morton,
D. A. Skeen, Bertha K. Skeen and Prudential
Federal Savings & Loan Association : Respondents
and Cross-Appellant's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Allen M. Swan; Attorney for Plaintiffs

Recommended Citation

Brief of Respondent, *Frehner v. Morton*, No. 10525 (1967).
https://digitalcommons.law.byu.edu/uofu_sc2/3766

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

MINNIE C. FREHNER dba
FREHNER MOUNTAIN WEST
GARDENS, and LEON C.
FREHNER,

Plaintiffs and Respondents,

vs.

MARGARET MORTON, D. A.
SKEEN, BERTHA K. SKEEN
and PRUDENTIAL FEDERAL
SAVINGS & LOAN ASSOCIA-
TION, a corporation,

Defendants and Appellants.

RESPONDENTS AND
CROSS-APPELLANTS' BRIEF

Appeal from the Judgment of the
Third Judicial District Court in and for
Summit County
Honorable Joseph G. Jeppson, Judge

ALLEN M. SWAN
Attorney for Plaintiffs
Respondents and Cross-
Appellants
428 American Oil Building
Salt Lake City, Utah

BENJAMIN SPENCE
Attorney for Defendants and
Appellants
1401 Walker Bank Building
Salt Lake City, Utah

FILED

APR 21 1964

Clerk, Supreme Court

No. 10525

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF NATURE OF CASE	1
DISPOSITION OF LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
ARGUMENT	9
POINT I. THE TYPE OF WORK PERFORMED AND IMPROVEMENTS MADE WERE LIENABLE UN- DER THE UTAH CODE	9
POINT II. THE COURT DID NOT ERR IN DIRECTING A VERDICT AGAINST THE DEFENDANTS D. A. SKEEN AND BERTHA K. SKEEN ON THE LIA- BILITY ISSUE	14
POINT III. THE COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A DIRECTED VER- DICT AT THE CONCLUSION OF RESPONDENTS' CASE	22
CROSS-APPEAL	23
POINT IV. THE COURT ERRED IN REDUCING THE ATTORNEY'S FEE AWARDED BY THE JURY.	23
POINT V. THE PLAINTIFFS ARE ENTITLED TO AN ADDITIONAL ATTORNEY'S FEE FOR THIS AP- PEAL	26
CONCLUSION	28

INDEX TO CASES AND AUTHORITIES

STATUTES:

UTAH CODE ANNOTATED, 1953, Title 38-1-3	9, 17
UTAH CODE ANNOTATED, 1953, Title 38-1-18	24

TEXTS:

3 Am. Jur. 2d Agency, Sec. 175, 178	19
3 Am. Jur. 2d Agency, Sec. 311	15
36 Am. Jur. Mechanic's Liens, Sec. 66	11, 12
36 Am. Jur. Mechanic's Liens, Sec. 39	17

ANNOTATIONS:

39 ALR 2d 861	13
56 ALR 2d 114	27
58 ALR 793	15
76 ALR 304	16
28 United States Code Annotated, Rule 50, Sec. 15, "Waiver"	23

CASES CITED:

Belnap v. Condon, 34 Utah 213, 97 Pac. 111	18
Buehner Block Company v. Glezos, 6 U. 2d 226, 310 P. 2d 517	21
Burrow v. Carley, 290 Pac. 577 (Calif.)	16
Davis v. Altose, 35 Wash. 2d 807, 215 P. 2d 705	25, 27
Donaldson v. Holmes, 23 111. 85	16
Green v. Reese, 261 P. 2d 596 (Okla.)	13
Grand Trunk Railway Company of Canada v. Oliver P. Cummings, 27 L. Ed. 266	23
Haskett v. Turner, 290 P. 2d 133 (Okla.)	27
Hopkins v. Ulvestad, 46 Wash. 2d, 514, 282 P. 2d 806	26
Howe v. Meyers, 162 Pac. 1000 (Wash.)	11
King Bros. Inc. v. Utah Dry Kiln Company, Inc. 13 U. 2d 339, 374 P. 2d 254	10
Morrison v. Clark, 20 Utah 432, 59 Pac. 235	20
Morrow v. Merritt, 16 Utah 412, 52 Pac. 667	17, 18
Newman v. Brengle, 250 F. 2d 660	23
Southwestern Electrical Company v. Hughes 30 P. 2d 114 (Kan.)	13
Welfare Federation Act Committee of 1000 v. Richardson, 281 P. 2d 428 (Okla.)	27

IN THE SUPREME COURT
of the
STATE OF UTAH

MINNIE C. FREHNER dba
FREHNER MOUNTAIN WEST
GARDENS, and LEON C.
FREHNER,

Plaintiffs and Respondents,

vs.

MARGARET MORTON, D. A.
SKEEN, BERTHA K. SKEEN
and PRUDENTIAL FEDERAL
SAVINGS & LOAN ASSOCIA-
TION, a corporation

Defendants and Appellants.

No. 10525

RESPONDENTS AND
CROSS-APPELLANTS' BRIEF

STATEMENT OF NATURE OF CASE

Plaintiffs sued the defendants for landscape architect's services and landscape construction performed by plaintiffs for the defendants Margaret Morton, D. A. Skeen and Bertha K. Skeen on certain property at Summit Park, Utah, asking that a lien be determined to exist on the improved property in favor of plaintiffs and praying for foreclosure of said lien. Defendants answered denying liability, disputing the charges and alleging the work was not complete and counter-claimed for \$4,000 for damages to their property. The court in its pretrial order of November 3, 1965, held that

under the pleadings as they then appeared the plaintiffs, upon proper proof, could obtain a personal judgment against D. A. Skeen and Bertha K. Skeen in addition to foreclosure of a mechanic's lien. (R-21) In the defendants' statement of the case they have entirely neglected the aspect of the personal judgment entered against the defendants and have proceeded in their brief on the sole question as to whether the claim of plaintiffs is secured by a valid mechanic's lien.

DISPOSITION OF LOWER COURT

The jury in the trial court brought in a verdict in favor of plaintiffs and against defendants determining that plaintiff Leon Frehner had performed work as a landscape architect for defendants reasonably worth the sum of \$156.25, and that all of said work was secured by a mechanic's lien; that plaintiff Minnie C. Frehner dba Frehner Mountain West Gardens had performed work for defendants of the reasonable value of \$1,105.94, that \$808.45 of said work was secured by a mechanic's lien, and that plaintiffs' counsel was entitled to \$750.00 attorney's fees. The court had directed a verdict in favor of plaintiffs on the question of the liability of the defendants, D. A. Skeen and Bertha K. Skeen, for the fair and reasonable value of the labor, materials and professional services leaving to the jury the question of the amount. It also directed a verdict determining that a valid lien existed in favor of plaintiffs against the property of D. A. Skeen and Bertha K. Skeen again

leaving the amount of the lien to be determined by the jury. It also directed a verdict determining the priority of plaintiffs' lien over the first trust deed of Prudential Federal Savings & Loan Association and against defendants, Skeens, on their counterclaim, no cause of action. See trial court's notation on plaintiffs' requested Instruction #3 (R. 51). At the hearing on defendants' motion for a new trial, the court required plaintiffs' counsel to reduce his attorney's fee from \$750.00 to \$509.32 (one-half the total claim supported by a lien.) (R. 87). Plaintiffs' counsel did so under objection by interlineation.

RELIEF SOUGHT ON APPEAL

The defendants seek reversal of the verdict and the judgment on the verdict, or a new trial. Plaintiffs seek affirmance of the judgment on the verdict and by cross-appeal seek reinstatement of the attorney's fee awarded by the jury of \$750.00 and an additional attorney's fee for this appeal in the sum of \$500.00.

STATEMENT OF FACTS

The statement of facts in defendants' brief entirely omits the facts on which the court found the agency of Margaret Morton to act for the Skeens and, therefore, considerable detail is added here. Defendants, D. A. Skeen and Bertha K. Skeen, purchased property at Summit Park, Utah, described as Lot 48, Summit Park, Plat "C" and prior to construction of any building thereon made arrangements with their daughter, Margaret Morton,

whereby she might live on the premises with her two children until such time as the Skeens desired occupancy or felt to sell (Tr. 243). Margaret Morton desired to be the purchaser at any such sale. (Tr. 238). The arrangements contemplated that Margaret would pay the \$185.00 per month mortgage payment to Prudential Federal Savings & Loan Association (Tr. 244), and that if the Skeens determined to occupy the property or to sell to someone else, and Margaret had built up an equity, she would be credited with such equity and reimbursed (Tr. 256).

Margaret had obtained a set of plans from Better Homes and Gardens which were closely followed in the construction of the home, utilizing a general contractor, Jess Brewer, of Salt Lake City (Tr. 238). Margaret was told by defendant, D. A. Skeen, "to take complete charge and follow the plans," (Tr. 243) as modified by any requests of the general contractor, which modifications were subject to Mr. Skeen's approval. Margaret was to be called in to see "if she would be willing to make the change in the plans" (Tr. 240). Prior to commencement of construction, discussion was had between Mr. Skeen and Mrs. Morton regarding landscape gardening (Tr. 246). Mr. Skeen stated that he attempted to discourage his daughter from dealing with the plaintiffs since he had had "a very unfortunate experience with him (Frehner) at one time" (Tr. 246). Margaret, nevertheless, told her father that "she wanted the job done right and wanted to talk

with Frehner" (Tr. 248). Margaret went ahead and made arrangements with the Frehners (Tr. 249) for detailed studies of the mountain home and the landscape construction which was to be done by Mrs. Frehner's firm "Frehner Mountain West Gardens." Mr. Skeen learned that his daughter had contacted Frehner, (Tr. 248, 249) but did not interfere with her choice of the landscaper, stating "If that is your decision, Margaret, I want to have you happy" (Tr. 248). Skeen agreed that he would provide money for the building and "if the landscaping is not included in that (the construction loan) I will have to get the money on the side" (Tr. 249, 262, 263).

Mr. Skeen was on the property on several occasions during construction (Tr. 240) but denied that he observed the progress of the landscape work (Tr. 241-A) (Tr. 249). He admitted that he "knew she was doing something," but had never been on the ground to inspect it (Tr. 253). He was told by the general contractor, Brewer, about the time Mr. Frehner started the job (Tr. 138) that "Frehner has been up that way, and he is going to make this cost you three times what it should cost" (Tr. 259). He also was told by Brewer that the pond "will cost some money. I don't know how much" (Tr. 259). Skeen indicated the landscaping was not frequently discussed in the Skeen home because "Margaret intended to complete the thing and give me a surprise" (Tr. 260). Brewer had told Skeen "Margaret is enthusiastic over it, but don't let her know that I

told this to you" (Tr. 262). Eleanor, another daughter, is represented by Skeen as saying, "I am afraid that fellow Frehner has imposed upon Margaret and you have to pay for it" (Tr. 263). Despite all these "warnings" Mr. Skeen did nothing, not even voicing an objection (Tr. 138), explaining his inaction by stating that "he recognized how sensitive Margaret was and didn't want to hurt her feelings by criticizing her judgment" (Tr. 264). There was some discussion between Margaret and her father with reference to her father drawing a written contract for the landscaping. Skeen knew at the time that Frehners were the landscapers involved (Tr. 264). Such a contract was never prepared and Mr. Frehner proceeded under the oral arrangement assuming the property was Margaret's and that she had the right to order the improvements.

The landscape work was completed in early December of 1964 and plaintiffs' bills under date of December 1, 1964, and January 1, 1965 (See plaintiffs' Exhibits #1, #8 and #9) were submitted to Mrs. Morton. Mr. Brewer received the bills from Mrs. Morton and presented them to Mr. Skeen who made no attempt to pay them. It was evident at this time that the money had run out and that the construction of the mountain home had far exceeded the estimates of the parties. The final cost was "close to \$40,000" (Tr. 109). A loan for \$22,000 had been taken with Prudential Federal Savings & Loan which had been increased to \$24,200 (Tr. 105) and Mr. Skeen had determined to pay the balance

(approximately \$15,800) from his own funds (Tr. 117.)

Mr. Skeen stated that he considered his daughter extravagant (Tr. 250, 251) and that he intended, after covering the added expenses incurred in connection with the construction that Margaret would pay him back when her situation permitted. (Tr. 265) The exchange between plaintiff's counsel and Skeen occurred as follows:

Q (Mr. Swan) Can you establish the approximate date of this conversation?

THE COURT: The time you said you would analyze it. (The contract).

A It was before—well, I can't say a definite date. I think it was when she—I told her about the time—I told her that if she wanted to take the responsibility, she would have to pay the penalty for doing it, if she went on her own judgment.

Q (Mr. Swan) Now you didn't say that, though, Mr. Skeen. You said that if you couldn't cover it out of the loan you would have to get the money elsewhere.

A To meet this, but I would expect her to pay me back. I wasn't making a gift of it.

Q You mean eventually, when her situation permitted, she would reimburse you?

A That is right.

After no action had been taken on the payment of plaintiffs' bills, Mrs. Frehner made an appoint-

ment for her husband to see Mr. Skeen at his law office in March, 1965, at which time according to Mr. Frehner's version, (Tr. 45) Mr. Skeen refused responsibility for the bill and instructed Mr. Frehner he would have to look to Margaret for payment. In Mr. Skeen's version of the conversation, he told Mr. Frehner that his bill far exceeded a reasonable amount (Tr. 250) and that he would not pay for it and also cautioned Mr. Frehner that no effort should be made to press Margaret for payment since she might lose her job at the University of Utah. (Tr. 251, 252) The cross-examination of Skeen on this conversation is illuminating: (Tr. 272):

Q That was the first time—please respond to my question—that was the first time you ever told Mr. Frehner you would not be bound?

A I have told you that three or four times.

Q Until the presentation of these bills, you did not know what the details of this work was, I believe was the word you used?

A That is right.

Q You knew Frehner landscape gardening work was going on, on your premises?

A I wouldn't say the landscaping—the tearing down the hill and doing more damage than good.

Q Whatever it was, he was doing it?

A Well, he wouldn't have done it if I had control of it. I would have thrown him off.

Q The only reason you didn't, you didn't want to hurt Margaret?

A Well, I have explained that two or three times.

Q All right. I will accept your answer.

The day following the conversation between Mr. Frehner and Mr. Skeen in Skeen's office a lien was placed on the Summit Park property and shortly thereafter proceedings started to foreclose it. Mrs. Morton was killed August 27, 1965, (Tr. 244) during the pendency of this action and at a pretrial conference the plaintiffs elected not to proceed against any possible estate of Mrs. Morton and consented to the dismissal of the action as against her.

The mountain home was traded during the pendency of the action for property as 2067 Pheasant Circle in Salt Lake County, valued at \$45,000 (Tr. 275) Skeen paying to the other party, Arthur Overlade, Jr., the sum of \$3,000.00 in cash (Tr. 274).

ARGUMENT

POINT I

THE TYPE OF WORK PERFORMED AND IMPROVEMENTS MADE WERE LIENABLE UNDER THE UTAH CODE.

Title 38-1-3 U. C. A. 1953 gives a lien to "Contractors, sub-contractors, and all persons performing labor upon, or furnishing materials to be used in, the construction or alteration of, or addition to, or

repair of, any building, structure, or improvement upon land. . . .”

The test that would seem to govern under Utah law is that stated in the case of *King Bros., Inc. vs. Utah Dry Kiln Company, Inc.* 13 U. 2d 339, 374 P. 2d 254, a case involving the application of the Utah Bond law. The court noted that the bond statute is closely related in purpose and the language used therein practically identical to that of the mechanics lien statute and observed that “the mechanics lien statutes were designed to prevent the landowner from taking the benefit of improvements placed on his property without paying for the labor and materials that went into it.” The court sent back for trial a case that had been dismissed on defendant’s Motion for Summary Judgment in the trial court for determination to be made whether furnaces, furnace casings, motorized fans, pipes and hoods furnished a dry kiln plant were, in fact, covered by the lien statute. This court gave a guide to the trial judge by stating:

“The facts must be ascertained so that under the guidance of applicable principles of law, the correct determination can be made. In order to qualify under these statutes, it is necessary that there be an annexation to the land, or to some permanent structure upon it, so that the materials in question can properly be regarded as having become a part of the realty, or a fixture appurtenant to it, and this must have been done with the intention of making it a permanent part thereof. That the addition

is consistent with the use to which the property is put is often helpful in making the determination."

In the instant case, the trial court quoted verbatim from this Supreme Court decision in Instruction No. 9c. The jury has determined that part of the improvements which the Frehners made were "annexed to the land so that the materials in question might properly be regarded as having become a part of the realty with the intent of making it a permanent part thereof." Such determination was made with respect to the hauling in of top soil, the sodding of the lawn area and the construction of a pool and waterfall. These were the major items of improvement. The jury found that part of the work performed by Mrs. Frehner was not lienable, and by reference to the worksheets of Mrs. Frehner the jury delineated between the items specified above and the cleaning up, the cutting of firewood and the hauling of trash.

Defendants cite in their brief the case of *Howe v. Meyers*, 162 Pac. 1000 (Wash.). It may be seen from the footnote at 36 Am. Jur., *Mechanic's Liens*, Sec. 66 that the Supreme Court of Washington distinguished the facts in that case which involved the caring of an orchard from other cases which had sustained liens for "planting a vineyard," "planting trees, shrubs and flowers," "planting an apple orchard," or "breaking and reducing wild lands to cultivation" for the reason that in such cases the

labor amounts "to a connected and completed operation, while work in cultivating and caring for an orchard is more or less intermittent, disconnected and seasonal." Clearly the items found by the jury in the instant case to be lienable were not intermittent in character but were permanent improvements to the real estate.

The language at 36 Am. Jur., Mechanic's Liens, Sec. 66 indicates that courts have been divided on the question of mechanic's liens for filling, grading, terracing, sodding, fencing, and other like improvements. A great deal depends upon the language used in the statute. There is respectable authority for plaintiffs view that the landscape construction in the instant case was lienable. As stated in 36 Am. Jur., Mechanic's Liens, Sec. 66, "It has been held that a lien for terracing and sodding a building lot is authorized under a statute providing that anyone has a lien who shall perform labor or furnish materials to be used in altering or repairing 'any building or building lot including fences, sidewalks, paving, fountains, fish pond, fruit and ornamental trees.' " Further, "According to the one view, grading which is reasonably necessary to the proper construction and occupation of a house may fairly be considered as part of the 'erection' within the meaning of the statute, and terracing and sodding as well as grading are within a statute giving a lien to any person who shall perform labor or service in altering or repairing any 'building or building lot.' " The same section goes on to state, "The furnishing

and planting of trees and shrubs, and the caring for the same for such a period of time as will insure that the seeds have become well started and that the plants and trees were thoroughly settled in the ground has been held to be an 'improvement' to the real estate within the meaning of a statute providing that 'any person who at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, has a lien upon said lot for his work done and materials furnished'."

An annotation on this subject is found at 39 ALR 2d 861 wherein the case of *Green vs. Reese*, 261 P. 2d 596 (Okla., 1953) is noted. That case held that "the leveling and building up of certain vacant lots with tractor, bulldozer, and scraper, for the purpose of improving the land so that buildings could subsequently be erected thereon," was sufficient to constitute a lienable item under the statute, the court apparently being of the opinion that such labor came within the meaning of the word "improvement" appearing therein.

Likewise in *Southwestern Electrical Company vs. Hughes*, 30 P. 2d 114 (Kan., 1934) that court held that grading around a house and garage were lienable items.

It would seem that under the broad language of the Utah code, to-wit; "improvement on land" such permanent improvements as landscape construction were clearly within the intent of the legislature.

POINT II

THE COURT DID NOT ERR IN DIRECTING A VERDICT AGAINST THE DEFENDANTS D. A. SKEEN AND BERTHA K. SKEEN ON THE LIABILITY ISSUE.

The defendants seem to have abandoned any argument that the defendants D. A. and Bertha K. Skeen were not personally liable as directed by the court for the reasonable value of the improvements made. Their brief argues only the lien question. The facts indicate an agency on the part of Mrs. Morton to proceed with the landscaping of the mountain home. Mr. Skeen knew that Margaret was negotiating for landscaping to be done, he knew that she had consulted Frehner and, further, Skeen had agreed to provide the funds necessary to pay for the landscaping. It is difficult to imagine what additional authorization Margaret needed to proceed in behalf of the owners to complete the landscaping. By their pleadings in this case, the Skeens contended they knew nothing about the Frehners being on the property until after the entire landscape construction was completed and bills submitted. They denied that they gave any authorization for the work to be done. D. A. Skeen's testimony at the trial established the contrary. He knew that Margaret was going to talk to Frehner about the improvements; he wanted her to be happy in her choice; he did not interfere because it would amount to criticism of her judgment; he knew she was extravagant but didn't want to hurt her feelings. It is no wonder that Margaret

obviously thought she had authorization from her father to proceed with the landscaping. The Skeens had it within their power from the commencement of the landscape construction to contact Frehners and tell them to get off their property. They made no contact with the Frehners until after the work was completed and then the meeting was at the instance of Mrs. Frehner.

It appears in this case that Mr. and Mrs. Frehner thought they were dealing with the agent of an undisclosed principal. This does not relieve the principal, however, from responsibility for the agent's contract. Once having determined the identity of the principal, the plaintiffs had a legal right to pursue that principal for the reasonable value of the improvements made. See 3 Am. Jur. 2d., Agency, Sec. 311.

In defendants' brief so much is made of the "estoppel and ratification theories" of plaintiffs recovery that defendants have failed to comment on the reasons for the non-existence of an express or implied agency. It would seem that even under the estoppel or ratification theories, plaintiff should prevail. At 58 ALR 793 appears an annotation entitled "Estoppel-failure to disclose title." At Sec. 35 it is stated:

"It is the general rule in equity that where a person having rights and knowing those rights, sees another person take a mortgage upon property without disclosing his title, he

shall not be allowed afterwards to set up his title to defeat the mortgage.

An analogous doctrine is applicable to cases involving the execution of deeds of trust; to cases in which a leasehold interest is created, and to cases in which contracts which may furnish a basis for claims under the mechanic's lien laws are entered into." (emphasis added.)

In *Donaldson vs. Holmes*, 23 Ill. 85 (1859) the holder of legal title was estopped from asserting it where he stood by and suffered the purchaser to enter into a contract for erection of a building, without disclosing the fact that the latter did not own the lot and had made no payment on it.

At 76 ALR 304 is found an annotation entitled "Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest." It is there stated:

"It is said to be a very familiar rule of the law of estoppel that if the owner of an estate stands by and sees another erect improvements on the estate in the belief that he has a right to do so, and does not interpose to prevent the work, he will not be permitted to claim such improvements after they are erected."

In the case of *Burrow vs. Carley*, 290 Pac. 577 (Calif., 1930) the court stated, "An owner of property may not stand by and see another erect improvements thereon in the belief that he has title to or interest in it and remain silent under circum-

stances calling upon him to speak without thereby being estopped from claiming title to the property, at least without making compensation."

Again quoting from our lien statute, Title 38-1-3, the lien is given for "the value of the service rendered, labor performed, or materials furnished . . . whether at the instance of the owner or of *any other person acting by his authority as his agent, contractor, or otherwise.*" It is submitted that the authority of such other person should be subject to proof the same as in non-lien situations; that is, by showing estoppel, ratification or any other circumstance which would bind the principal. At 36 Am. Jur., Mechanics Lien, Sec. 39 entitled "Estoppel of owner or mortgagee as against lien claimant," it is stated:

"The owner or party liable for the improvement may, on his part, be estopped from asserting a defense against the lien claimant. Thus, one having rights in the property, who, with knowledge of those rights sees persons entering into contracts which may furnish a basis for claims under the mechanic's lien law may be estopped to assert such rights."

The cases cited by defendants in their brief can be distinguished from the facts here. *Morrow vs. Merritt*, 16 Utah 412, 52 Pac. 667 (1898) involved a landlord-tenant situation in which the trial court had imposed a lien on the landlord's interest where he had not contracted for the materials or labor, *the only evidence of authority being a provision in a*

lease that the lessee would expend \$2,500 in the erection of permanent improvements on the premises. In that case the Supreme Court did not have facts from which an estoppel or ratification could be found. In *Belnap vs. Condon*, 34 Utah 213, 97 Pac. 111 (1903) the court had a vendor-vendee situation and cited the *Morrow vs. Merritt* case with approval. The court stated at page 113 of Pacific:

“From the foregoing it would seem that the person who can bind the owner’s land for the things for which a lien is given must in some way obtain his authority to do so from the owner. Without such authority, express or implied, in the first instance, *or subsequent ratification by the owner*, the owner’s property is not bound, although the improvements may benefit his land.” (emphasis added).

The Court went on to state at page 114:

“In this connection it is also insisted that the appellant is not limited by the terms of a written agreement which may bind the parties to it only, but that he may show any parol agreement between Mrs. Condon (vendor) and Mr. Becker (vendee) from which the authority from her to him to purchase materials to improve the property may directly appear or be inferred. This contention in our judgment is sound. The real question involved in such case is to establish the relationship of principal and agent between the vendor and purchaser. If, therefore, the person furnishing material which is purchased for the improvement of certain property can show that the

purchaser of the material was the agent of the real owner of the property, the agency may be established in such a case, precisely, as it may be in any other case. But the evidence in such a case must establish agency. Without this there can be no authority in the person purchasing the material to bind the owner of the property, who is the principal."

In the Belnap case such facts as would constitute a ratification did not exist. In the present case Mr. Skeen himself testified that he authorized Margaret to go ahead with landscaping, that he knew she was going to contact Frehner, but did nothing to discourage her since it would impute her judgment. He had full knowledge of the facts when he was informed by Brewer, the general contractor, that Frehner was on the property making improvements. His acceptance of those improvements and retention of benefits constitute a ratification of the agency. As stated at 3 Am. Jr. 2d. Agency, Sec 175:

"It is an established principle of the law of agency that where a person acts for another who accepts or retains the benefits or proceeds of his efforts with knowledge of the material facts surrounding the transaction, such other must be deemed to have ratified the methods employed, as he may not, even though innocent, receive or retain the benefits of, and at the same time disclaim responsibility for, the measures by which they were acquired."

Sec. 178 states regarding acquiescence:

"Whether there has been a ratification in a

particular case is ultimately and ordinarily a question of fact. Strictly speaking, therefore, a failure to repudiate, or silence or acquiescence, after learning of an unauthorized act and in a case where the principal has an opportunity to repudiate or object to the act, does not of itself constitute ratification. Yet it is, if the one purporting to act as agent is not a mere stranger or intermeddler, cogent or prima facie evidence from which ratification may be inferred in the light of surrounding circumstances."

Morrison vs. Clark, 20 Utah 432, 59 Pac. 235 (1899) involved a married woman's interest in real estate sought to be charged with a lien for improvements contracted solely by her husband. The fact situation can easily be distinguished from that in the instant case since in the Morrison case the wife disagreed with her husband about constructing the house on the lot and wanted it erected on land in California and objected and protested against the building of the house on her land; he built the house against her objection and over her protest, and she never consented thereto. During all this time, and up to the completion of the house, she believed he was, and he was in fact, financially able to pay for the labor and materials so furnished. In that case the court at page 237 of Pacific states that the wife might ratify the husband's contract or by conniving to conceal her ownership fraudulently mislead the contractor into the belief that her husband owns the land. The Morrison case had no such facts. In the instant case it can be determined that the failure

of the Skeens to inform Mr. Frehner that his improvements were not desired on their property amounted to a concealment of their ownership and misled Frehner into the belief that Margaret Morton owned the land.

It is submitted that the instant case is more nearly like *Buehner Block Company vs. Glezos*, 6 U. 2d 226, 310 P. 2d 517 where this court determined that a lessee's interest in certain property was subject to a lien for improvements where the improvements were ordered made by one who was not the lessee, but an alleged partner of the lessee. In that case the court had to find a partnership (agency) which agency was found on the basis of Glezos consenting to another's representing him to third parties as a partner and those third parties had on the faith thereof advanced materials, money or credit to the partnership. The court stated that Glezos was liable "even though as between them (the alleged partners) no real partnership exists." This was a finding of partnership (agency) by estoppel. In the instant case Mr. Skeen allowed his daughter to proceed as though she were authorized to order the materials and labor which resulted in improvements to the Skeen property. By inference he consented to Margaret's representing herself as having authority to contract for the improvements. Skeen did, in fact, pay for the construction costs on the mountain home until the money ran out, at which time he refused to make payment on the landscape construction bill. In the instant case an agency

existed, either express or implied. At the very least an agency by estoppel or ratification, existed which subjected the Skeens' interest in the real estate to a lien for improvements for which they did not directly contract.

POINT III

THE COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AT THE CONCLUSION OF RESPONDENTS' CASE.

At the close of plaintiffs' case the evidence concerning Mr. Skeen's knowledge of Mr. Frehner's being upon the premises and of proceeding with work which Margaret had contracted for was limited to the testimony of the general contractor, Brewer, who stated that he had talked with Mr. Skeen shortly after Frehner commenced the landscape work and told him that Frehner was on the property and that he (Skeen) should be concerned because he might have to pay more than he should for the improvements. When Mr. Skeen, took the stand in his own behalf, he added to this testimony substantially. It was his own testimony which established the conversations between Margaret and him on which Margaret's authority to proceed with this work can be based. It should be remembered that Margaret was dead at the time of the trial and it was impossible to introduce any evidence as to the exact relationship between them except through Mr. Skeen. It is submitted that there was some evi-

dence of an agency, or at least an estoppel or ratification, at the close of plaintiffs' case and when defendant Skeen, took the stand he removed all doubt.

Where the defendants' motion for directed verdict at the close of the plaintiffs' case is denied and defendant thereupon presents his own evidence, the defendant has been held to have waived any error in the denial of the motion for directed verdict. *Grand Trunk Railway Company of Canada vs. Oliver P. Cummings*, 27 L. Ed. 266; see also *Newman vs. Brengle*, 250 F. 2d 660 and numerous other cases annotated at 28 U.S.C.A. Rule 50, Section 15 "Waiver."

CROSS-APPEAL

Plaintiffs hereby cross-appeal from the trial court's order that the attorney's fee as awarded by the jury be modified downward. Plaintiffs further ask for an attorney's fee to reimburse them for fees incurred by them on this appeal.

POINT IV

THE COURT ERRED IN REDUCING THE ATTORNEY'S FEE AWARDED BY THE JURY.

Testimony of plaintiffs' counsel given on the second day of a three day trial was to the effect that a reasonable fee based upon time expended, pleadings drafted, memoranda to the court prepared, motions and pretrials attended and days in actual

trial up to that time was the sum of \$970.00, but that in view of the total amount involved in the controversy counsel felt that he would only ask for \$750.00. Another full day of trial ensued after this testimony of plaintiffs' counsel. The jury, upon instruction as to what they might consider in determining the reasonableness of plaintiffs' attorney's fees (see Instruction No. 9-D) returned a verdict of \$750.00.

On the hearing of defendants' motion for a new trial and defendants' motion to set aside the verdict and judgment thereon and for a directed verdict, the trial court required plaintiff to submit to a reduction of the attorney's fee to one-half of the total amount of recovery determined as being subject to a lien. The trial court apparently determined that under no conditions could an attorney's fee exceed 50 per cent of the claim upon which recovery was based.

Title 38-1-18 UCA 1953 states as follows:

"In any action brought to enforce any lien under this chapter the successful parties shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in this action.

It may be argued that the matter of attorney's fees was improperly submitted to the jury in this case and that it is the sole prerogative of the court to fix fees. The statute could be interpreted, however, as giving to the "finder of fact" the right to

fix the attorney's fee, in which case it would properly be a jury function in a jury case. Plaintiffs are not as much concerned with who fixes the fee as the general proposition that they are limited to 50 per cent of the recovery.

At the first pretrial hearing counsel actually stipulated as to what would be reasonable (R. 16) and agreed on the bar fee schedule (which would be \$311.12 on \$1,018.61) plus \$150.00 for each day of trial after the first. Since the trial lasted three full days the total fee under this formula would be \$611.12. But at a subsequent pretrial the trial court allowed plaintiffs' counsel to withdraw from the stipulation (R.30) and framed an issue for trial on "what is a reasonable attorney's fee." It was apparent to plaintiffs' counsel at this stage of the proceedings that the actual fee which would be incurred in this trial would far exceed the amount set forth in the stipulation.

The question of attorney's fees in lien matters has produced about as many results as there are cases. What was a reasonable fee in 1950 may not be reasonable in 1966, due to the reduced buying power of the dollar. Courts have sought some middle ground in the matter as is evidenced by the following from *Davis vs. Altose*, 35 Wash. 2d. 807, 215 P. 2d. 705 (1950):

"It is of the utmost importance to litigants that a reasonable attorney's fee be fixed by the court which will, as nearly as can be done,

adequately compensate the lien claimant's counsel for services necessarily rendered in the case and at the same time not unduly burden the property owner with the payment which he must make, in addition to the amount of the lien in order to discharge his property from the judgment."

It is submitted that if one element of this formula should be given greater weight, it would be the adequate compensation of the lien claimant's counsel, if successful, for his theory of the case has won the approval of the court or jury. Each party runs the risk of paying the other party's attorney's fees. The statute is worded so that if plaintiffs had lost, they would have been subjected to payment of defendants' attorney fees.

In *Hopkins vs. Ulvestad* 46 Wash. 2d. 514, 282 P. 2d. 806 (1955) the trial court awarded \$150.00 attorney's fees in an action where \$173.70 was recovered. On appeal the lien claim was increased to \$721.28 and the court increased the trial court fee to \$300.00. The Supreme Court refused to fix the amount of the attorney's fees earned on the appeal, but indicated that the trial court might do so at any time.

POINT V

THE PLAINTIFFS ARE ENTITLED TO AN ADDITIONAL ATTORNEY'S FEE FOR THIS APPEAL.

Our statute provides for an attorney's fee "in any action brought to enforce any lien under this chapter." Obviously the judgment of the trial court cannot result in enforcement of the lien, when, as here, an appeal is taken and supersedeas bond filed to prevent execution. The resistance of the appeal, therefore, in the most real sense, is part of "enforcing the lien."

Many courts have awarded attorney's fees incurred on appeals in lien cases. See 56 ALR 2d 114. In *Haskett vs. Turner*, 290 P. 2d. 133 (Okla., 1955) the reviewing court awarded an additional attorney's fee on an appeal of \$250.00. In *Welfare Federation Act Committee of 1,000 vs. Richardson*, 281 P. 2d. 428 (Okla.) the judgment for an increased fee of \$425.00 on appeal was rendered on the supersedeas bond. This case was one for wages under the Fair Labor Standards Act but the precedent was followed in the *Haskett* case, a lien action previously cited.

In *Davis vs. Altose*, *op. cit.*, a principal recovery of \$938.77 was effected and the Supreme Court ordered a reduction of the attorney's fee from \$800.00 to \$650.00. In that case the total allowed by the trial court was in anticipation of an appeal and would have been 80 per cent of the total recovery (\$400.00 for the trial and \$400.00 for the appeal.) The appellate court approved a combined fee for the trial and the appeal totaling 69.2 per cent.

The advisory Handbook on Fees of the Utah State Bar proposes a fee of \$500.00 for representing

either appellant or respondent in the Supreme Court of Utah (p. 23). Such is a reasonable fee to be awarded plaintiffs on this appeal, whether fixed by the Supreme Court, or after remittitur, by the District Court.

CONCLUSION

The trial court correctly directed a verdict on both the liability of the Skeens and the validity of the lien. The jury determined the amounts under proper instructions. This court should affirm the judgment on the verdict and indicate the disposition of the attorney's fee question.

Respectfully submitted,

Allen M. Swan

Attorney for Plaintiffs
428 American Oil Bldg.
Salt Lake City, Utah