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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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| SETH FAGERLIE,<br><br>Plaintiff/Appellee,<br>v.<br><br>MARKHAM CONTRACTING CO., INC., an Arizona corporation,<br><br>Defendant/Appellant.<br><br>MARKHAM CONTRACTING CO., INC., an Arizona corporation,<br><br>Third-Party Plaintiff/ Counter-Defendant Appellant,<br>v.<br><br>AMOL RAKKER, Trustee of the Rakkar Family Trust dated August 4, 2004; et al.,<br><br>Third Party Defendants/ Counter-Claimants/Appellees,<br><br>HAPPY VALLEY ESTATES HOME OWNERS ASSOCIATION, INC., an Arizona corporation,<br><br>Third Party Defendant/Appellee. | Court of Appeals<br>Division One<br>No. 1 CA-CV 10-0051<br><br>Maricopa County Superior Court<br>No. CV2008-007731 |

# APPELLANT'S OPENING BRIEF

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## INTRODUCTION AND OVERVIEW

This is an appeal from a summary judgment ruling in which the trial court determined that a contractor, Appellant Markham Contracting Co., Inc. ("**Markham**"), who performed over $3 million of work to improve vacant lots, did not have a valid lien on the lots. The developer/owner of the property, the Estates at Happy Valley, LLC ("**EHV**"), sold "site-improved lots" to speculators during the height of Arizona's real estate boom in 2005 and 2006. The sales began, however, when the lots were still raw dirt – well before Markham's planned site-improvement work had been completed. And, EHV neglected to inform Markham that it had started selling the lots, notwithstanding a legal obligation to do so.

The developer then failed to pay Markham for over $500,000 of its work. This left Markham with its lien remedy – the remedy intended to protect laborers in situations like this. But those purchasing the lots and their lenders, the Plaintiff/Counter-Defendant and Third Party Defendants/Counter-Claimants/Appellees (collectively the "**Lot Owners**"), had already paid the developer for the site-improved lots. The Lot Owners argued that they did not have a contract with Markham, and thus it would be unfair for them to have to "pay" twice.

This case raises, then, who between these two innocent parties – the laborers or the investors – must bear this loss – a loss caused by an unscrupulous developer

against whom there is no meaningful legal remedy. The Legislature has already answered this question. It "intended that laborers and materialmen, who contribute of their labor and means to enhance the value of the property of another, should be jealously protected." *Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8 P.2d 256, 258 (1932). Indeed, a lien foreclosure action does not require any contract between the contractor and the property owner, and the only exception to this – an exception governing owner-occupied "dwelling[s]" has no application to investors buying vacant lots. *See* A.R.S. § 33-1002(B) ("No lien provided for in this article shall be allowed or recorded by the person claiming a lien against the dwelling of a person who became an owner-occupant prior to the construction, alteration, repair or improvement, except by a person having executed in writing a contract directly with the owner-occupant."). Accordingly, the lien statutes may "require[] the owner to pay twice for the same work." Thomas C. Horne, *Arizona Construction Law*, § 401 at 153 (2d ed. 1994).

The trial court, however, sided with the Lot Owners, and ultimately bought into their theory that myriad alleged technical defects rendered the lien invalid. Among other such "defects," they contended (1) that it somehow mattered that they did not hire Markham (ignoring that the developer from whom they purchased the lots did so), (2) that Markham was required to also serve them with the requisite preliminary lien notice (ignoring that Markham served the notice on EHV

who qualified as the "reputed owner" for purposes of this preliminary notice), and (3) that an alleged work stoppage rendered the project "complete," rendering the ultimate recording of Markham's lien untimely (even though the evidence on the alleged work stoppage was disputed).

In resolving these issues, the trial court both misconstrued the pertinent statutes, and construed disputed questions of fact against the non-moving party, Markham. Even worse, the trial court assessed Markham with substantial penalties under Arizona's groundless lien statute, A.R.S. § 33-420, when it was doing nothing more than seeking to protect its legitimate lien rights. In making these rulings, the trial court erred.

## STATEMENT OF FACTS AND CASE

Because this is an appeal from a summary judgment, the facts and inferences should be viewed in Markham's favor.

### I. The Estates at Happy Valley and Markham's Work for Owner/Developer EHV

In January 2004, EHV purchased land, which it subdivided into a twenty-eight lot residential subdivision under the name "The Estates At Happy Valley" (the "**Property**").[1] EHV recorded a plat of the subdivision, approved on

[1] *See* App. Tab 8 (Warranty Deed to EHV); App. Tab 2 (Final Plat) (EHV "as legal owner . . . has subdivided" the Property).

November 16, 2004,[2] which listed the "Owner/Developer" as EHV.[3] Except for some APS utility lines, the land was vacant.[4]

On April 25, 2005, Markham submitted a bid to Owner/Developer EHV to perform substantial site improvements, including earthwork, street paving, drainage, and other work necessary for the entire subdivision.[5] Although the parties did not reduce their agreement to writing until August 12, 2005, consistent with industry practice the initial work, such as the "blue-staking," began months earlier pursuant to their agreement.[6] Markham's other initial work included marking the limits of the Property with survey stakes, and dust-control.[7]

Ultimately, Markham's contract called for substantial improvements to make the vacant land suitable for residential living. Numerous change orders expanded the work,[8] with Markham ultimately overseeing over $3 Million in improvements.[9]

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[2] *See* App. Tab 2 (Final Plat).

[3] *Id.*

[4] *See* App. Tab 24 (Markham Deposition) at 49:14 (in May 2005 "APS had power lines in the area").

[5] *See* App. Tab 1 (Bid Proposal).

[6] *See* App. Tab 24 (Markham Deposition) at 48:16-49:5 (discussing bluestaking) and 52:19-23 (it "is pretty common in construction" to perform work before there is a signed contract and explaining that "[s]ome people sign contracts later, and some people work off of the proposal the whole time").

[7] *See* App. Tab 24 (Markham Deposition) at 31:7-32:9.

[8] App. Tab 5 (First Lien) at 019 (showing invoices and change orders).

Markham's multi-million dollar project was thus large, involved significant labor from Markham's employees, and required Markham to manage the work of numerous subcontractors and suppliers.

## II. Markham's Preliminary Twenty-Day Notice

Because, unfortunately, developers often stop paying those who do their development work, Arizona law provide a means, via the mechanics' lien statutes, to ensure that contractors get paid. *See, e.g.,* A.R.S. §§ 33-981-1008; *Wylie*, 39 Ariz. at 515, 8 P.2d at 258 (noting that the "Legislature intended that laborers and materialmen, who contribute of their labor and means to enhance the value of the property of another, should be jealously protected"). The first step in perfecting a mechanics' lien involves service of a "preliminary twenty day notice" by those "furnish[ing] labor, professional services, materials, machinery, fixtures or tools for which a lien otherwise may be claimed." *See* A.R.S. § 33-992.01(B). Consistent with the protections afforded laborers, the law specifies who must be served, and does not require service on the actual owner. *Id.* Instead, a laborer may serve the "owner ***or reputed owner***" – "one who, from all ***appearances*** or from ***supposition***, is the owner of the thing." *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 431, 561 P.2d 750, 755 (App. 1977) (emphasis added).

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[9] *See* App. Tab 24 (Markham Deposition) at 24:13-18; *see also* App. Tab 6 (Amended Lien) at 024.

In this case Markham's counsel prepared and delivered a "preliminary twenty-day notice" (the "**Preliminary Notice**") to "Owner/Developer" EHV on June 20, 2005, shortly after Markham had begun its work.[10] *See* A.R.S. § 33-992.01(B). The recorded "final plat" showed that EHV owned the property,[11] and EHV, in fact, owned the Property when Markham submitted its proposal.[12] There were also no outward signs that EHV no longer owned the Property. No one, for example, had started building homes, and the vacant land lacked addresses to check for ownership changes.[13]

## III. EHV's Selling of Vacant Lots Without Informing Markham

Meanwhile, however, and with Markham's bid in hand, EHV began selling the vacant, unimproved lots to hungry investors willing to snatch up Arizona real estate, and did so without informing Markham. Of the twenty-eight lots, three quickly sold on May 12, 2005 (i.e., the recorded date) to investors who would later

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[10] *See* App. Tab 3 (Preliminary Notice).

[11] *See* App. Tab 2 (Final Plat).

[12] *See* App. Tab 1 (Bid Proposal) (dated April 12, 2005); App. Tab 12 (Warranty Deeds) at 035-038 (showing first transfer on May 12, 2005).

[13] *See* App. Tab 2 (Final Plat) (Giving "legal description" in terms of physical geographic location).

purchase three more lots.[14] EHV sold ten more lots between May 18, 2005 and May 27, 2005,[15] and an additional six between June 2, 2005 and June 20, 2005.[16] Of the nine remaining lots, EHV sold four between June 28, 2005 and June 30, 2005;[17] two more on July 27, 2005;[18] and the last three over the next several months.[19]

While EHV was unloading lots, Markham had served EHV with the requisite Preliminary Notice. On that date, June 20, 2008, EHV still owned nine lots – almost one-third of the development. The lien laws, again to protect laborers, obligated EHV to inform Markham promptly if EHV was no longer the owner or reputed owner of any lots. A.R.S. § 33-992.01(I) ("Within ten days of the receipt of a preliminary . . . (or) twenty day notice, the owner or other interested party shall furnish [the sender] a written statement containing" various

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[14] *See* App. Tab 12 (Warranty Deeds) at 032-033, 036-039 (showing recording dates for conveyances of lots 24, 26, and 27 to investors John and Sonia Hreniuc); *see also* Lot Sale and Key Event Chronology attached hereto.

[15] *See* App. Tab 12 (Warranty Deeds) at 002, 005-007, 012, 014-017, 020, 026, 029 (showing recording dates for conveyances of lots 2, 5, 10, 12, 13, 14, 15, 16, 20, and 22); *see also* Lot Sale and Key Event Chronology.

[16] *See* App. Tab 12 (Warranty Deeds) at 003, 008, 011, 024, 027-028, 030-031 (showing recording dates for conveyances of lots 3, 6, 9, 18, 21, and 23).

[17] *See id.* at 009-010, 013, 039-040 (lots 7, 8, 11, and 28).

[18] *See id.* at 004, 025 (lots 4 and 19).

[19] *See id.* at 001, 023, 034 (lots 1, 17, and 25).

information, including the "name and address of the owner or reputed owner."). EHV instead again said nothing to Markham, and presumably said nothing to those who bought the lots about the Preliminary Notice.[20]

## IV. Markham and Others' Work on the Property Until January 2008

But it was open and obvious that contractors were laboring on the Property. Indeed, the Lot Owners bought "site-improved lots."[21] As set forth in the Arizona Department of Real Estate Public Report (the "**Public Report**"), the "[s]ubdivider is to complete" the work EHV hired Markham to do, including "streets, roads and drainage."[22] Accordingly, like a general contractor's relationship to a homeowner, the developer EHV remained obligated to complete (and have Markham complete) the site improvements for the Lot Owners' benefit. In other words, Markham's work is exactly what the Lot Owners paid for when they purchased vacant lots in a development from EHV, and the Lot Owners looked to EHV to ensure completion of that work.

Under the control of EHV (and for the benefit of the Lot Owners), Markham, therefore, continued its work on the Property. Markham's timecards,

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[20] *See* CR 119 (Lot Owners' Motion for Summary Judgment) at 7 (alleging that no lot owners were served).

[21] App. Tab 26 (Lot Owners' Reply) at 003.

[22] App. Tab 11 (Public Report) at 009-010 (attached to Lot Owners' Reply).

for example, indicate that Markham's employees performed work on July 6, 2007.[23] But these time cards capture only a small portion of the story because they do not track the work of Markham's "field managers" and "general superintendents" who manage the job-site, let alone the subcontractors Markham hires.[24] Markham's subcontractors, for example, included H&B Electric, which billed for work completed on August 13, 2007, and KFM Striping & Curb Company, which did striping work on January 23, 2008.[25]

In addition, Markham provided, via a subcontractor, extensive barricade services and maintenance in conjunction with its traffic control services.[26] The barricades and traffic control were essential to the project's safe condition during development.[27] APS, for example, had to relocate power lines after Markham's road-widening,[28] and it needed the traffic control to complete its work.[29] The City

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[23] *See* App. Tab 17 (Markham Time Card dated July 6, 2007).

[24] App. Tab 24 (Markham Deposition) at 6:21-8:23.

[25] App. Tab 18 (H & B Timesheet); App. Tab 21 (KFM Striping Invoice).

[26] App. Tab 20 (Change Order Requests for Traffic Control Equipment); App. Tab 24 (Markham Deposition) at 18:22-19:5, 14-20; App. Tab 22 (Affidavit of Michael Markham in Support of Markham's Motion for Summary Judgment) at 006, ¶¶ 12-13.

[27] App. Tab 24 at 13:6-15:13.

[28] *See id.* at 12:10-13:18; *see also* App. Tab 19 (Change Order Regarding APS's Conversion Work).

[29] App. Tab 24 (Markham Deposition) at 13:6-18.

of Peoria even required Markham to complete the striping before Markham could remove the barricades.[30]

## V. Markham's Notice and Claim of Lien

Ultimately, Markham's development work totaled $3,232,406.[31] It completed the work on January 24, 2008 when it finished the striping work and removed the barricades. Markham subsequently made diligent efforts to get paid by EHV, but EHV ultimately failed to pay Markham $577,035.33, exclusive of interest.[32]

### A. Markham's First Notice and Claim of Lien Recorded on December 28, 2007

This, then, left Markham to look to its lien remedies. Having served its Preliminary Notice on the "owner or reputed owner," Markham accordingly needed to take the next step to perfect its lien: record a "notice and claim of lien" within one-hundred twenty days "after completion" of the improvement. A.R.S. § 33-993(A). Accordingly, on December 28, 2007, while still managing the barricades and traffic control work, Markham recorded a Notice and Claim of

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[30] *Id.* at 13:22-14:18 (discussing negotiations with City of Peoria regarding the barricades) and 44:1-45:10 (explaining need for striping).

[31] App. Tab 6 (Amended Lien) at 019.

[32] *See* App. Tab 24 (Markham Deposition) at 37:1-39:8; App. Tab 6 (Amended Lien) at 005 (stating amount of claim) and 075 (EHV acknowledging indebtedness).

Mechanic's and Materialmen's Lien (the "**First Lien**").[33] Among other items, Markham included in the First Lien a copy of the Preliminary Notice sent to EHV on June 20, 2005. *See* A.R.S. § 33-993(A)(6). But the included copy accidentally listed the wrong proof of service (mistakenly attaching a proof of service regarding a different preliminary notice), and omitted the "Exhibit A" describing the Property that had been attached to the Preliminary Notice.[34] (The "Exhibit A" attached to the Preliminary Notice described the three parcels that existed before EHV subdivided the parcels into residential lots.)[35] The First Lien also labeled its exhibits using letters, and there was a separate "Exhibit A" listing the "Subject Real Property" – the parcels subject to the lien ***as of December 28, 2007***.[36]

### B. Markham's Amended Notice, Claim of Lien, and a Notice of Correction Providing the Required Information by March 20, 2008

However, the lien statute (again to protect laborers) merely provides an outside limit – one-hundred twenty days "after completion" – within which to

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[33] App. Tab 5.

[34] *See* App. Tab 5 (First Lien) at 074.

[35] *See* App. Tab 3 (Preliminary Notice) at 003; App. Tab 8 (Warranty Deed to EHV) at 002 (showing same "Exhibit A"); App. Tab 2 (Final Plat) (stating same information as "Legal Description").

[36] App. Tab 5 (First Lien) at 005, 007. Hereinafter, the Exhibit A attached to the Preliminary Notice mailed to EHV will be referred to as "**Preliminary Notice Exhibit A**" and the "Exhibit A" listing the "Subject Real Property" in Markham's lien will be referred to as "**Lien Exhibit A**."

perfect a lien. A.R.S. § 33-993(A). Accordingly, to correct the missing Preliminary Notice Exhibit A and to add approximately five-thousand dollars to the lien amount (from barricade work), Markham recorded an Amended Notice and Claim of Mechanic's and Materialmen's Lien (the "**Amended Lien**") on January 24, 2008.[37] The Amended Lien also attached the Preliminary Notice,[38] but attached the Lien Exhibit A and not the correct Preliminary Notice Exhibit A.[39] (Lien Exhibit A derives from a litigation guarantee Markham had acquired before recording the First Lien in December 2007.)[40] This mistake caused the Lot Owners to (incorrectly) allege that, because the Lien Exhibit A had been "obtained in December 2007," Markham must have "altered" the document.[41]

On March 20, 2008, Markham recorded a Notice of Correction of Replacement Document (the "**Notice of Correction**") to correct the earlier oversights.[42] The Notice of Correction also included a copy of the Preliminary

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[37] App. Tab 6 (Amended Lien).

[38] *Id.* at 078.

[39] *Id.*

[40] App. Tab 25 (Litigation Guarantee).

[41] CR 120 (Lot Owners' Statement of Facts) ("**Lot Owners' Statement of Facts**") at 5; CR 119 (Lot Owners' Motion for Summary Judgment) at 4.

[42] App. Tab 7 (Notice of Correction).

Notice Exhibit A.[43] Due to concerns regarding the quality of the original Preliminary Notice Exhibit A and its suitability for recording, Markham's counsel re-typed the Exhibit A duplicating the ***exact*** same information from the original.[44] Accordingly, as of March 20, 2008 – well within one hundred twenty days of January 24, 2008 – Markham had recorded all of the information necessary to perfect the lien pursuant to A.R.S. § 33-993.

## VI. The Present Litigation and Rulings Below

In April 2008, a lot owner nevertheless sued Markham, and claimed not only that Markham's lien was invalid, but further that Markham should be sanctioned pursuant to Arizona's false document/slander of title statute, A.R.S. § 33-420 – the statute intended to penalize those who misuse the lien process by ***knowingly*** recording invalid liens.[45] Markham asserted a counterclaim and third-party complaint to enforce the lien, via a lien foreclosure action, against the Lot Owners (who counter-claimed, asserting the same claims as the original Plaintiff lot owner)

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[43] *Id.*

[44] CR 111 (Markham's Motion for Summary Judgment) at 5 n. 2 (explaining need to re-type Preliminary Notice Exhibit A for recording purposes and explaining that the Preliminary Notice Exhibit actually mailed with the Preliminary Notice and the recorded version "are different in their appearance and not content"). Markham notes that the Clerk's Index of Record does not list Markham's Motion for Summary Judgment. It is part of the record and was filed contemporaneously with CR 111.

[45] CR 1 (Complaint).

and the home owners' association ("**HOA**"), and a third-party complaint against EHV seeking contract damages.[46]

To pursue this lien foreclosure action, the lien laws required Markham to file and record a *lis pendens*. *See* A.R.S. §§ 33-998(A) and 12-1191(A). The *lis pendens* gives ***notice*** to parties that an action asserting an interest in real property is pending, but does not itself create any interest in real property. In compliance with the requirement, Markham's attorney filed and recorded a *lis pendens* the same day Markham filed its counterclaims and third-party complaint.

Knowing it was judgment proof, EHV allowed Markham to obtain a default judgment.[47] In February 2009, Markham moved for summary judgment against the Lot Owners and HOA, asking the trial court to, among other things, (1) decide that Markham's lien is valid for the amount set forth in the lien and (2) declare "the date the project commenced for priority purposes."[48] The Lot Owners and the

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[46] CR 7 (Markham's Answer, Counterclaim, and Third-Party Complaint); CR 63 (Answer to Counterclaim/Third Party Complaint of Fagerlie, Rakker, Ardelean, and M&I Bank and Counterclaim); CR 87 (First Amended Answer to Third Party Complaint and Counterclaim).

[47] CR 93 (Default Judgment Against EHV).

[48] CR 111 (Markham's Motion for Summary Judgment).

HOA cross-moved for summary judgment. The Lot Owners argued that Markham's lien were invalid due to six technical "defects" (discussed below).[49]

The Lot Owners also asked the court to award penalties against Markham pursuant to A.R.S. § 33-420(A) and (C) for recording two documents: (1) the First Lien, and (2) the Amended Lien.[50] In the absence of actual damages, that statute sets forth a maximum penalty of $5,000 for knowingly recording a groundless document, A.R.S. § 33-420(A), and $1,000 for refusing to release a lien that the claimant knows is invalid, A.R.S. § 33-420(C). The maximum statutory penalty would therefore total $12,000 ($6,000 for each document). The Lot Owners, however, asked the court to penalize Markham $12,000 ***per Lot Owner*** for recording two allegedly groundless documents. The trial court granted the Lot Owners' and the HOA's motions, explaining that "the Court essentially adopts the rationale and argument presented by the Lot Owners in their Reply Memorandum."[51] When Markham asked the trial court to clarify and reconsider its ruling,[52] the court stated that, "[i]n the Court's view, the Lot Owners legal

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[49] CR 119 (Lot Owners' Motion for Summary Judgment) and App. Tab 26 (Lot Owners' Reply).

[50] CR 119 (Lot Owners' Motion for Summary Judgment).

[51] App. Tab 27 (8/18/2009 Ruling).

[52] CR 151 (Markham's Motion for Clarification); CR 154 (Markham's Motion for Reconsideration).

argument identified by the parties as Defects No. 1, 2, and 3 clearly support this ruling."[53]

The trial court ultimately assessed Markham with $252,000 in statutory penalties,[54] giving each owner ***and*** lender (i.e., the beneficial title holder) a $6,000 per lot windfall (even though the statute says "***or***").[55] In addition, the trial court awarded the Lot Owners $46,789 in fees and costs.[56]

As for Markham's cross-motion concerning the lien's priority, the trial court denied that motion as moot.[57] (If the lien is invalid, its priority does not matter.) Accordingly, the trial court never reached the issue of when Markham first started its work, which the parties disputed below.[58]

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[53] CR 156 (9/25/2009 Order).

[54] App. Tab 28 (Judgment).

[55] *Id.* at 005-006.

[56] *Id.* at 006.

[57] App. Tab 27 (8/18/2009 Ruling) at 002.

[58] *Compare* CR 120 (Lot Owners' Statement of Facts) at 3 (alleging that Markham started work on July 27, 2005) *with* CR 129 (Markham's Objection to Lot Owners' Statement of Facts) at 6 (contesting Lot Owners' allegation and asserting that work began on May 16, 2005).

Markham timely appealed on November 13, 2009.[59] This Court has jurisdiction under A.R.S. § 12-2101(B). (The claims against the HOA have now been resolved, and it is no longer a party on appeal.)

[59] App. Tab 29 (Notice of Appeal).

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## ISSUES PRESENTED

1. In the summary judgment context, a court must view all facts and inferences in the light most favorable to the non-moving party. In this case, the Lot Owners moved for summary judgment on whether Markham's liens were invalid, which turned on six issues:

a. whether EHV, because it was in "charge" of or had "control" over the work qualified as an "agent" of the Lot Owners for purposes of A.R.S. § 33-981 (meaning that Markham performed the work at the "instance" of the Lot Owner's agent under the lien laws), or whether instead there were no facts that qualified EHV as the Lot Owners' agent;

b. whether a fact finder could determine that Markham had a reasonable basis to believe that EHV qualified as an "owner or reputed owner" for purposes of A.R.S. § 33-992.01 on the basis of the "appearances" and circumstances of this case, or whether it could be said that Markham acted unreasonably as a matter of law;

c. whether Markham recorded its lien within one hundred twenty days of "completion" of the work, or whether it could be determined as a matter of law that the work had been "completed" much earlier due to alleged (and disputed) gaps in work;

d. whether Markham timely filed an Amended Lien;

e. whether Markham timely filed the Notice of Correction; and

f. whether a *lis pendens* qualifies as an "***instrument***" affecting real property that requires notarization, or is instead is a document that gives ***notice*** that someone has asserted an interest in real property.

Did the trial court err in resolving these questions against Markham in the summary judgment context?

2. A.R.S. §§ 33-420(A) and (C) are punitive in nature and both require scienter. Because Markham presented evidence that it believed its recordings were valid, did the trial court err by finding Markham liable for $252,000 in damages under A.R.S. §§ 33-420(A) and (C) as a matter of law?

3. The plain language of A.R.S. §§ 33-420(A) and (C) limit the statutory damages ***in an action*** to no more than $5,000 ***per document*** and $1,000 ***per wilful refusal***. Did the trial court err by awarding statutory damages based on a per lot and per owner basis, rather than a per document and per refusal basis?

4. If the Court reverses, should it remand for reconsideration of the awards of attorneys' fees and costs?

5. If the Court reverses, should it award Markham its reasonable attorneys' fees and costs on appeal?

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## STANDARD OF REVIEW

The Court should review *de novo* the trial court's conclusions of law and its interpretation of the pertinent statutes. *Pence v. Glacy*, 207 Ariz. 426, 428 ¶ 10, 87 P.3d 839, 841 (App. 2004). The Court should review *de novo* whether the trial court's "entry of [summary] judgment was proper." *Schwab v. Ames Constr.*, 207 Ariz. 56, 60 ¶ 17, 83 P.3d 56, 60 (App. 2004). On review, the Court "view[s] the evidence and reasonable inferences from it in the light most favorable to the non-moving party." *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 441 ¶ 2, 153 P.3d 1069, 1070 (App. 2007). The moving party always has the "burden of production" and "burden of persuasion" to show that "there are no genuine issues of material fact and it is entitled to summary judgment as a matter of law." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 ¶¶ 12, 16, 180 P.3d 977, 980 (App. 2008).

## ARGUMENT

### I. The Trial Court Erred by Finding Markham's Lien Invalid as a Matter of Law

The Supreme Court long ago explained that "the Legislature intended that laborers and materialmen, who contribute of their labor and means to enhance the value of the property of another, should be jealously protected." *Wylie*, 39 Ariz. at 515, 8 P.2d at 258. To that end, "Arizona's lien statutes are remedial and to be liberally construed to effect their primary purpose of protecting laborers and materialmen." *United Metro Materials, Inc. v. Pena Blanca Props., LLC*, 197

Ariz. 479, 484 ¶ 26, 4 P.3d 1022, 1027 (App. 2000). The statutes are interpreted "in a manner consistent with the 'realities of the construction industry.'" *Performance Funding, L.L.C. v. Ariz. Pipe Trade Trust Funds*, 203 Ariz. 21, 24 ¶ 10, 49 P.3d 293, 296 (App. 2002) (citation omitted). Although the statutes impose various requirements as to notice and timing, "substantial compliance which is not inconsistent with the legislative purpose is sufficient." *Columbia Group, Inc. v. Homeowners Ass'n of Finisterra, Inc.*, 151 Ariz. 299, 301, 727 P.2d 352, 354 (App. 1986).

In this case, the trial court failed to "liberally construe[]" the lien statutes "to effect their primary purpose of protecting laborers and materialmen," *United Metro*, 197 Ariz. at 484 ¶ 26, 4 P.3d at 1027, and failed to "view the evidence and reasonable inferences from it in the light most favorable to" Markham, *Allstate*, 214 Ariz. at 441 ¶ 1, 153 P.3d at 1070.

### A. The Trial Court Could Not Find, as a Matter of Law, That EHV Was Neither an Owner Nor the Owner's "Agent" for Purposes of A.R.S. § 33-981 (Alleged Defect #1)

Under Arizona law, "every person who labors . . . shall have a lien [on the property benefiting from the person's work] . . . whether the work was done . . . at the instance of the ***owner*** . . . or his ***agent***." A.R.S. § 33-981(A) (emphasis added). The Lot Owners argued below that because Markham "dealt only with the Developer," and started work only after the developer began selling lots, the work

was not done at their "instance."[60] To the extent the trial court relied on this first alleged "defect" it erred. EHV (the owner) contracted with Markham to perform the work. The Lot Owners entered into agreements with EHV pursuant to which EHV was obligated to complete the development work. Accordingly, EHV qualified as the Lot Owners' "agent" for purposes of the lien statutes. The work, therefore, was all done at the "instance of the ***owner*** . . . or his ***agent.***" A.R.S. § 33-981(A) (emphasis added).

### 1. A.R.S. § 33-981 Covers Work Done at the Instance of Owners or "Agents" – Anyone Having "Charge or Control" Over the Project

Consistent with their goal of protecting laborers, the lien statutes dispense with the harsh limits of contractual privity and allow a lien for work done or materials delivered both at the "instance of the ***owner . . . or his agent.***" A.R.S. § 33-981(A) (emphasis added); *see also* A.R.S. § 33-983(B) (stating that "the owner shall be liable for the reasonable value of professional services, labor or material furnished at the instance of such agent"). For purposes of these statutes, an "agent" is "[e]very contractor, subcontractor, architect, builder, ***subdivider or other person having charge or control of the improvement or work.***" A.R.S. § 33-983 (B) (emphasis added); *see also* A.R.S. § 33-981(B) ("Every contractor,

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[60] App. Tab 26 (Lot Owners Reply) at 005.

subcontractor, architect, builder or other person ***having charge or control*** . . . either wholly or in part . . . is the agent of the owner.") (emphasis added). Being a lien-statute agent does not "create actual agency, but merely make[s] the contractor a statutory agent for the sole purpose of securing the lien rights of the workman." *Stratton v. Inspiration Consol. Copper Co.*, 140 Ariz. 528, 531, 683 P.2d 327, 330 (App. 1984). "[T]he lien statutes create the statutory agency fiction to allow the subcontractor or material supplier to pursue his remedies directly against the owner." *Id.*

When an owner ***obligates*** another to make improvements to the owner's property – giving the person "charge or control" – the obligated party becomes the owner's agent under the lien laws. *See Harbridge v. Six Points Lumber Co.*, 17 Ariz. 339, 346, 152 P. 860, 862 (1915) (noting that when "a person enters into a contract" for a "building on his land," the lien statutes "enter[] into . . . the contract" and make "the contractor . . . his agent"); *see also, e.g.*, *DeVry Brick Co. v. Mordka*, 96 Ariz. 70, 72, 391 P.2d 925, 926 (1964) (holding that "when lessees were . . . obligated to improve lessors' property" in a particular way, "the lessees became the agents of the lessors"). In a typical case, a landowner contracts with a general contractor who becomes obligated to make certain improvements. As a consequence, the general contractor qualifies as the owner's "agent," meaning that even if the laborers and suppliers never have any contract or relationship with

the owner, they may nevertheless invoke the lien remedies. *See, e.g.*, *Columbia Group, Inc. v. Jackson*, 151 Ariz. 76, 78, 725 P.2d 110, 1112 (1986) (affirming concrete supplier's lien though supplier provided materials to sub-contractor, not general contractor or owner). Additionally, the fact that the owner paid the contractor first does not preclude those with whom the owner has no direct contractual relationship (the laborers) from recording liens on the property. *See Harbridge*, 17 Ariz. at 346, 152 P. at 862 (holding that the owner "knows that the contractor is his agent . . . with . . . statutory authority to bind his property" and if the owner "pays the stipulated price" but does not "protect the laborer or materialman, then the law protects him, by giving him the right to charge the particular property").

This underlying principle – that one who is obligated to perform work for the property owner qualifies as a lien "agent" – has broad application. For example, if "a tenant is ***compelled*** by the terms of his lease to make certain improvements, he is, as a matter of law, thereby created the agent of the lessor for that purpose." *Mulcahy Lumber Co. v. Ohland*, 44 Ariz. 301, 304, 36 P.2d 579, 580 (1934) (emphasis added); *see also Bobo v. John W. Lattimore, Contractor*, 12 Ariz. App. 137, 140, 468 P.2d 404, 407 (1970) (holding that lessee was "agent" because the "lessee's failure to construct [a building] on the leased property . . . would constitute a breach . . . and compliance . . . [was] not optional"). Similarly,

when an executory contract requires a purchaser to make improvements on the property, that obligation qualifies the purchaser as an agent, meaning that work initiated at the purchaser's instance can be liened against the property. *Mills v. Union Title Co.*, 101 Ariz. 297, 300-01, 419 P.2d 81, 84-85 (1966) ("[W]here a contract for the sale of real estate or a lease of such obligates the vendee or lessee to erect a building, the vendee or lessee is constituted the agent of the vendor or lessor because . . . the vendor or lessor is the person who causes the building to be constructed within the terms of the statute.").

### 2. EHV Was the Owner and Owners' Agent Because EHV Was Obligated to Make the Improvements That EHV Hired Markham to Perform

In this case, EHV negotiated with Markham when EHV owned the Property.[61] Although EHV began selling lots before Markham had completed its work, i.e., before they were developed, the Lot Owners did not purchase unimproved, vacant land. They purchased "site-improved lots"[62] from the "subdivider" – EHV – with the bargained for understanding that EHV would

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[61] *See* App. Tab 1 (Bid Proposal); App. Tab 24 (Markham Deposition) at 29:13-32:23, 49:1-51:24 (describing work done in May and June 2005, including blue-staking, delivery of rock material, dust control signage, and surveyor work).

[62] App. Tab 26 (Lot Owners' Reply) at 003.

complete substantial improvements to the subdivision.[63] EHV was therefore obligated to the Lot Owners to complete the very improvements it hired Markham to perform.[64] *See* A.R.S. § 32-2183(F)(2) (declaring unlawful the sale of subdivision lots unless, among other options, "[t]he completion of all proposed or promised subdivision improvements is assured by financial arrangements acceptable to the commissioner" of the Department of Real Estate).

Because EHV was obligated to complete the work for the Lot Owners' benefit, and hired Markham to do so, EHV acted as the Lot Owners' "agent" for purposes of A.R.S. §§ 33-981(A) and 33-983(A). The work was therefore done at the "instance of the ***owner . . . or his agent.***" A.R.S. § 33-981(A) (emphasis added).

Viewed in this light, the situation here is no different than any other case where a property owner enters into a contract that requires improvements to the property. In those situations, the party obligated to perform the work (typically a

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[63] App. Tab 11 (Public Report) at 009. The Public Report, issued by the Arizona Real Estate Commissioner, "authorizes the sale . . . of lots . . . in the subdivision. . . . The owner, agent or subdivider must then furnish each prospective buyer of a subdivision lot with a copy of the report." *Alaface v. Nat'l Inv. Co.*, 181 Ariz. 586, 592, 892 P.2d 1375, 1381 (App. 1994) (explaining A.R.S. § 32-2181, et seq.). The record is silent on whether EHV furnished copies to the Lot Owners.

[64] *See* App. Tab 1 (Bid Proposal).

contractor but here a developer), gains "statutory authority to bind [the] property for the reasonable value of such labor and of such material as may be furnished for the completion" of the work. *Harbridge* 17 Ariz. at 346, 152 P. at 862. The laborers who perform work on the property for the owner's benefit have liens for the value of their work, and do so regardless of whether they have any contractual relationship with the owner. *Id.* at 346-48, 162 P. at 862-63 (allowing material supplier lien for reasonable value of the material supplied, but disallowing personal judgment against owner because there was no contractual privity with the owner); *see also* A.R.S. § 33-981(B) ("[T]he owner shall be liable for the reasonable value of labor or materials furnished to his agent.").

### 3. The Lot Owners' Equitable Arguments Miss the Point and Run Contrary to the Protections Built Into Arizona's Lien Laws

The Lot Owners argued below that they "would never have agreed to pay [EHV] for site improved lots, and then at their 'instance' agree[d] to pay Markham *again* for the price of the site improvements."[65] But the lien statutes leave no room for this argument. Indeed, any owner could make this same argument anytime the owner first pays a contractor who fails to pay the subcontractors. This argument, therefore, is really a request for a court to re-write the statutory lien system.

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[65] CR 119 (Lot Owners' Motion for Summary Judgment) at 6.

Furthermore, the Lot Owners knew laborers were making improvements to their lots – and indeed expected them to do so – and thus could have bargained with the developer to, for example, withhold part of the purchase price until they were assured the contractors were paid. What they could not do is stand by and do nothing but merely hope that the developer would pay the laborers, when that labor benefitted their property.[66] Indeed, as the Supreme Court made clear almost a century ago, "[i]f the owner wishes to be protected, he must trouble himself to inquire what has been the fate of those whose labor and materials have constructed the improvement ***before he pays the stipulated price***. If the owner neglects to protect the laborer or materialman, then the law protects him, by giving him the right to charge the particular property impressed by his labor or material with the payment of the particular debt on account of which improvement it arose." *Harbridge*, 17 Ariz. at 346, 162 P. at 862 (emphasis added).

That is, Arizona's lien law accounts for this situation, and it sides with contractors and laborers. As one commentator explained, the lien statutes may "require[] the owner to pay twice for the same work." Thomas C. Horne, *Arizona Construction Law*, § 401 at 153 (2d ed. 1994). Thus, though the Lot Owners may

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[66] Although the Public Report, *see* App. Tab 11, indicates that EHV set aside some money for improvements, it underfunded them and the Lot Owners did nothing to ensure the amount would be sufficient.

have already paid EHV for "site improved lots," they cannot take the benefit of Markham's work yet escape Arizona's lien laws by later claiming that the "site improvements" were not made at their "instance."

### B. The Trial Court Could Not Find, as a Matter of Law, That EHV Was Not a "Reputed Owner" for Purposes of A.R.S. § 33-992.01(B) (Alleged Defect #2)

For their second alleged "defect," the Lot Owners argued below that Markham failed to serve the requisite "written preliminary twenty day notice" on the "owner or reputed owner" as required by A.R.S. § 33-992.01(B). To the extent the trial court relied on this "defect," it erred. The law permits service on a "reputed owner when reasonable inquiry has been made" into ownership, *Cashway Concrete & Materials v. Sanner Contracting Co.*, 158 Ariz. 81, 82, 761 P.2d 155, 156 (App. 1988), and what constitutes "reasonable inquiry" is a question of fact to be determined on a case-by-case basis. *See Western Insulated Glass Co. v. McKay*, 174 Ariz. 597, 598-99, 852 P.2d 412, 413-14 (App. 1993).

#### 1. A Lien Claimant Need Only Have a Reasonable Basis to Deliver the Preliminary Notice to a Reputed Owner

To protect lien rights, a potential claimant must "serve the owner ***or reputed owner*** . . . a written preliminary twenty day notice." A.R.S. § 33-992.01(B) (emphasis added). An "Owner" is "the person . . . who causes a building, structure, or improvement to be constructed . . . whether the interest or estate of the person is in fee, as vendee under a contract to purchase, as lessee, or other interest

or estate less than fee." A.R.S. § 33-992.01(A)(3). A "reputed owner" is "one who has for all appearances the title and possession of property; one who, from all appearances or from supposition, is the owner of the thing." *Lewis*, 114 Ariz. at 431, 561 P.2d at 755. Like the other lien-statute requirements, Section 33-992.01 only requires "[s]ubstantial compliance." *Jackson*, 151 Ariz. at 79, 725 P.2d at 1113.

The law permits service on a "reputed owner when reasonable inquiry has been made" into ownership. *Cashway*, 158 Ariz. at 82, 761 P.2d at 156 (relying on statement of reputed contractor's employee that employer was "original contractor" qualified as reasonable inquiry). What constitutes "reasonable inquiry," however, is a question of fact to be determined on a case-by-case basis. *See McKay*, 174 Ariz. at 598-99, 852 P.2d at 413-14; *Brown Co. v. Cal. App. Dep't Super. Ct.*, 196 Cal. Rptr. 258, 260-64 (Cal. Dist. Ct. App. 1983) (although lien claimant made "no effort to verify" the accuracy of information from the general contractor, "questions of the claimant's reasonableness and good faith in naming a reputed owner are questions of fact to be determined by the trier of fact").

### 2. Whether Markham Had a Reasonable Basis to Believe That EHV Was an Owner or Reputed Owner Turns on Disputed Questions of Fact

In this case, it was undisputed that EHV owned all the lots when Markham proposed to perform the work. It was also undisputed that EHV still owned nine

lots on June 20. Although EHV started selling lots after Markham started work, "all appearances" indicated that EHV was the owner of the whole property: (1) the land was vacant, unimproved, and unoccupied; (2) EHV was listed as the owner on the publicly available plat map (the only thing available at the recorder's office without addresses), and (3) EHV failed to disclose to Markham that it had started selling lots.[67]

Indeed, when Markham served EHV with the Preliminary Notice – a notice that amounted to directly asking EHV whether it had sold any lots and legally obligating EHV to answer if it had – EHV said nothing, effectively re-assuring Markham that it was still the owner. *See* A.R.S. § 33-992.01(I) ("[W]ithin ten days of the receipt of a preliminary . . . notice, the owner or other interested party shall furnish [the sender] a written statement containing" various information, including the "name and address of the owner or reputed owner."). Consequently, "all appearances" and "supposition" indicated that EHV was the owner, which qualified it as the "reputed owner" for purposes of A.R.S. § 33-992.01(B). *Lewis*, 114 Ariz. at 431, 561 P.2d at 755.

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[67] *See* App. 2 (Final Plat); App. 23 (Affidavit of Michael Markham) (no owner or interested party responded to the Preliminary Notice as required); App 30 (7/13/2009 Transcript) at 047-48 (stating without dispute that, in lieu of addresses to research, the recorder's office could provide the final plat and related deed and that a full title search would be burdensome at the preliminary-notice stage).

Whether, Markham could rely "on a reasonable supposition that [EHV] still owned the property" under the circumstances of this case, or instead had to conduct further inquiry, "is a question of fact which remains to be decided." *McKay*, 174 Ariz. at 598, 852 P.2d at 413. Although the Lot Owners will say that Markham should have repeatedly run title searches, it cannot be determined, as a matter of law, that Markham was so obligated under the circumstances of this case during this ***preliminary*** stage. *Cf. Nelson v. Indus. Comm'n of Ariz.*, 134 Ariz. 369, 373, 656 P.2d 1230, 1234 (1982) (noting in another context that "[w]hat constitutes reasonable diligence is peculiarly a question of fact").

More fundamentally, with respect to ***nine*** of the lots, there can be no dispute that Markham served the Preliminary Notice on the owner because EHV still owned nine lots on June 20. Furthermore, even if Markham had some obligation to run title searches (a point Markham contests), it is nonsense to suggest that Markham should be charged with constructive knowledge of the **six** additional lots that were recorded during the twenty days before it served the Preliminary Notice. Nothing in the statute required Markham repeatedly to perform record searches before delivering the Preliminary Notice.

### 3. The Lot Owners Failed to Demonstrate Below That This Issue Could Be Resolved by Way of Summary Judgment

In their summary judgment briefing, the Lot Owners stated that they "owned 19 of the 28 lots when the Preliminary Notice was served,"[68] and that warranty deeds for some lots had been recorded before June 20, 2005.[69] But this is just another way of stating that EHV was not the true owner of all the lots; it does not show that Markham unreasonably served a "reputed owner." And, in light of the other evidence concerning the circumstances of this case, it in no way suggests that the issue of service on EHV could be resolved as a matter of law.

*Lewis v. Midway Lumber* and *Williams v. A.J. Bayless*, 13 Ariz. App. 348, 476 P.2d 869 (1970), which the Lot Owners cited below, do not call for a different result. Foremost, those cases concern the naming of the owner or reputed owner in the notice and claim of lien under A.R.S. § 33-993, not the service of the ***preliminary*** notice under A.R.S. § 33-992.01. The scenarios are similar, but their differences are decisive. Under A.R.S. § 33-993(A), a claimant has as many as one hundred and twenty days after a project's completion to record a notice and claim of lien; the preliminary notice must be served within twenty days of work for which the claimant hopes to receive compensation, A.R.S. § 33-992.01(E). What

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[68] CR 119 (Lot Owners' Motion for Summary Judgment) at 7. The HOA did not address this point.

[69] App. Tab 26 (Lot Owners' Reply) at 005.

amounts to "reasonable efforts" at the end of a project and within a four-month time frame is different from what is reasonable in the initial twenty-day notice period.

Accordingly, *McKay* is much more instructive. In *McKay*, like this case, the original owner sold property after work had already commenced, and the contractor named the original owner as the "reputed owner" in the notice and claim of lien, causing the trial court to invalidate the lien. 174 Ariz. at 598, 852 P.2d at 413. Although the new owner argued, like the Lot Owners here, "that there was no evidence that [the contractor] made an effort to determine who owned the property," this Court remanded, reasoning that "whether [the contractor] made an effort . . . or whether [it was] entitled to rely on a reasonable supposition that [the original owner] still owned the property . . . is a question of fact." *Id.* at 598-99, 852 P.2d at 413-14.

As in *McKay*, the Court should reverse and remand so that a factfinder may determine "whether [Markham was] entitled to rely on a reasonable supposition that [EHV] still owned the property." *Id.* at 598-99, 852 P.2d at 413-14. Moreover, an outright reversal is required as to the nine lots EHV still owned as of June 20, 2005, and the six lots that had conveyances recorded in the twenty days before June 20, 2005.

### C. The Trial Court Could Not Find, as a Matter of Law, That All Work on the Project Was Completed More Than 120 Days Before the Lien Was Recorded for Purposes of A.R.S. § 33-993(A) (Alleged Defect #3)

To perfect a lien a laborer must, in addition to complying with the initial requirements, record the lien "within one hundred twenty days of completion" of the project. A.R.S. § 33-993(A). The Lot Owners contended below that Markham failed to do this, and that this amounted to a third "defect" that rendered Markham's lien invalid.[70] To the extent the trial court accepted that argument, it erred for at least two reasons.

First, "completion" under § 33-993 is precluded by ***any*** work on the ***entire*** improvement; it is not focused on the particular work of the lien claimant. Here, however, the Lot Owners erroneously focused exclusively on Markham's work, not the entire project. Second, even with respect to Markham's work, the facts were disputed concerning whether and when Markham completed its work.

#### 1. The Work and Labor Relevant to Completion/Cessation Is All Laborers' Work on the Entire Project/Improvement, an Issue on Which the Lot Owners Bore the Burden of Proof

Section 33-993(A) requires laborers to record their mechanics liens "within one hundred twenty days after completion" of the project (or within sixty days after a notice of completion has been recorded). A.R.S. § 33-993(A). The statute

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[70] CR 119 (Lot Owners' Motion for Summary Judgment) at 7-8.

defines "completion" as "the earliest of . . . 1. Thirty days after final inspection and written final acceptance . . . 2. Cessation of labor for a period of sixty consecutive days, except when such cessation of labor is due to a strike, shortage of materials or act of God." A.R.S. § 33-993(C).

The labor relevant to "completion" is determined with reference to labor ***for the overall project***, not just one party's work. *See Lewis*, 114 Ariz. at 430, 561 P.2d at 754 (the Section 33-993 timelines begin the day the "improvement" is completed, not the day the individual claimant's contract is completed); *cf.* A.R.S. § 33-993(D) ("If no building permit is issued . . . then 'completion' . . . means the last date on which ***any*** labor, materials, fixtures or tools were furnished to the property" (emphasis added)); *see also First Nat'l Bank in Fort Collins v. Sam McClure & Son, Inc.*, 431 P.2d 460, 478 (Colo. 1967) (citing *Joralmon v. McPhee*, 71 P. 419, 423 (Colo. 1903)) (interpreting similar statute to mean that "[w]henever ***any*** labor, whatever its character, is performed on a building (or improvement) in furtherance of its completion, there is no cessation from labor.") (emphasis added); *Baird v. Havas*, 164 P.2d 952, 953 (Cal. Dist. Ct. App. 1946) ("no doubt the cessation on labor must be ***absolute*** during the thirty-day period" (emphasis added)).

Furthermore, any "[w]ork actually called for by the contract" and work "done or materials furnished to complete the original contract" count, ***even if the***

***work is relatively minor***. *Gene McVety, Inc. v. Don Grady Homes, Inc.*, 119 Ariz. 482, 484, 581 P.2d 1132, 1135 (1978) (holding under former version of statute that the installation of "water meter boxes required by the contract" extended the time of "actual completion"); *Wooldridge Constr. Co. v. First Nat'l Bank of Ariz.*, 130 Ariz. 86, 91, 634 P.2d 13, 18 (App. 1981) (holding that ninety hours of correction work, including re-striping parking lot and re-plumbing of drinking fountain, among other things, extended the time of completion and "cannot be considered so inconsequential as to be 'trifling', particularly in view of the remedial nature of the mechanics' lien laws") (citation omitted).

Contrary to the Lot Owners' argument below,[71] the Lot Owners have the burden to show that a "cessation of labor" relieves them of Markham's lien – Markham is not required to make "an affirmative showing . . . that there was [n]o cessation." *First Nat'l Bank in Fort Collins*, 431 P.2d at 477 (concluding that the burden is on the owner if he "wishes to take advantage" of "presumption of completion on proof of 30 days' cessation from labor"); *accord. Wahl v. Sw. Savs. & Loan Ass'n*, 12 Ariz. App. 90, 101, 467 P.2d 930, 941 (1970) (explaining in the context of the prior lien statute less favorable to materialman "that ***the party urging abandonment has the burden of proving the same***") (emphasis added);

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[71] App. Tab 26 (Lot Owners' Reply) at 007-08.

*vacated in part on other grounds by Wahl v. Sw. Savs. & Loan Ass'n*, 106 Ariz. 381, 476 P.2d 836 (1970); *cf. Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996) (party asserting a claim is time-barred "has the burden of proving" so).

### 2. The Lot Owners Failed to Carry Their Burden Because They Provided No Evidence of Cessation of Work on the Improvement

Because "completion" focuses on all laborers and the entire improvement, the Lot Owners were obligated to "come forward with evidence [they] believe[d] demonstrate[d] the absence of a genuine issue of fact," *Thruston*, 218 Ariz. at 115, 180 P.3d at 980, concerning "the last date on which ***any*** labor, materials, fixtures or tools were furnished to the property." A.R.S. § 33-993(D) (emphasis added); *see also Lewis*, 114 Ariz. at 430, 561 P.2d at 754 (completion determined on the basis of entire improvement, not individual claimant's work).

They failed to do so. In fact, they provided ***no evidence*** of a general cessation of labor for 60 days, but rather focused exclusively on Markham's work. As *Lewis* and A.R.S. § 33-993 indicate, however, that is not the proper inquiry. Accordingly, the trial court could not have entered summary judgment in favor of the Lot Owners on this basis.

### 3. The Trial Court Could Also Not Determine, as a Matter of Law, That Markham Stopped Work for 60 Days

In addition, there were genuine issues of fact concerning whether even Markham stopped work for 60 days. Although the Lot Owners argued that there were at least two "cessations of labor" that rendered the project complete before Markham recorded all of the documents to perfect the lien, these issues likewise turned on disputed questions of fact.[72]

The first alleged work stoppage started on November 16, 2006.[73] But in support of this highly fact-specific contention, the Lot Owners relied exclusively on *Markham's* time sheets.[74] But those times sheets tracked only certain employees (not the on-site supervisors). They also did not track Markham's sub-contractors (let alone other laborers or suppliers).[75] Accordingly, a reasonable jury could not even find, let alone be required to conclude, that a gap in Markham's time cards equated with a gap in its overall work.

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[72] App. Tab 26 (Lot Owners Reply) at 006.

[73] *Id.*

[74] CR 120 (Lot Owners Statement of Facts) at 3; App. Tab 16 (Markham Time Cards).

[75] App. Tab 24 (Markham Deposition) at 8:18-23; CR 129 (Markham's Objection to Lot Owners' Statement of Facts) at 7 ("the documents . . . do not reflect that there was a cessation of labor").

The second "cessation" of work allegedly started on August 13, 2007, the date on which H&B Electric performed work for Markham.[76] But, overwhelming evidence showed that Markham's work continued: (1) from April 2007 until January 2008, Markham paid a subcontractor thousands of dollars for the rental and continual maintenance of barricades as a necessary part of the work it was performing such as relocating lines,[77] (2) one of its subcontractors performed the striping work on January 23, 2008;[78] and (3) APS moved the power lines after Markham had widened a road.[79]

#### 4. The Lot Owners' Contention That Barricades Necessary for a Project Cannot Qualify as Work, as a Matter of Law, Lacks Merit and Overlooks Other Work Like Striping

This work, including providing and maintaining the barricades, counts as "labor" within the broadly construed meaning of A.R.S. § 33-993(C). The barricades were rented ***and*** maintained as part of Markham's road widening and

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[76] CR 120 (Lot Owners Statement of Facts) at 3.

[77] App. Tab 20 (Change Order Requests for Traffic Control Equipment); App. Tab 24 (Markham Deposition) at 12:10-13:18, 18:22-19:20; App. Tab 22 (Affidavit of Michael Markham in Support of Markham's Motion for Summary Judgment) at 006.

[78] App. Tab 21 (KFM Striping Invoice).

[79] App. Tab 20 (Change Order Regarding APS's and Cox Communications' Conversion Work); App. Tab 24 (Markham Deposition) at 12:10-13:18.

traffic control duties, all "in furtherance" of the improvement.[80] *See First Nat'l Bank in Fort Collins*, 431 P.2d at 478 ("***any*** labor . . . in furtherance of [the improvement's] completion" means there is "no cessation from labor"). Additionally, the barricades were "work actually called for by the contract." *Gene McVety*, 119 Ariz. at 484, 581 P.2d at 1134. Numerous change orders reflect additional traffic control expenses,[81] and Markham's original proposal included an estimated cost for "traffic control."[82]

Indeed, there can be no doubt that the subcontractor providing the barricade rental and performing the maintenance would be ***entitled to a lien under the lien statutes***. *See* A.R.S. § 33-981(A) ("***every*** person who laborers or furnishes . . . shall have a lien" (emphasis added)); A.R.S. § 33-983(A) ("A person who furnishes . . . material or labors . . . shall have a lien"); A.R.S. § 33-987 (same). Accordingly, because that work could be liened, it could not *a fortiori* cause a cessation of work.

The Lot Owners nevertheless contended below that the provision of barricades cannot, as a matter of law, constitute work – even under a large construction contract like this one – because otherwise a claimant could

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[80] *See* App. Tab 24 (Markham Deposition) at 15:6-13.

[81] App. Tab 20 (Change Order Requests for Traffic Control Equipment).

[82] App. Tab 1 (Markham's Bid Proposal) at 004.

perpetually extend the date of completion by simply renting barricades.[83] This policy argument not only improperly focuses only on one aspect of the project's work, but is also flawed for multiple other reasons.

First, this argument would exclude all kinds of inexpensive or easily completed labor that clearly qualifies as work that would prevent "completion" under A.R.S. § 33-993. But the broadly construed statute is intended to give laborers protection, no matter how insignificant the labor.

Second, the proper focus under § 33-993 is not the difficulty or expense of the work, but rather its legitimate relationship to the project – either implicitly in furtherance of, or expressly required by the contract. *See Gene McVety*, 119 Ariz. at 484, 581 P.2d at 1134 ("If work is done or materials furnished to complete the original contract, the time . . . runs from the last furnishing of labor and materials."); *Wooldridge*, 130 Ariz. at 91, 634 P.2d at 18 (work could extend the lien timeline when, in addition to being more than "trifling," it "was done to comply with the owner's interpretation of the contract" and there was no suggestion that the work was done "to postpone the completion"). Here, the evidence shows that the barricades were ***needed as part of the job*** and required in light of Markham's contractual obligation to provide traffic control.

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[83] *See* App. Tab 26 (Lot Owners' Reply) at 007.

Third, focusing on the proper standard addresses the concern that a contractor might use barricades as part of a "sham" to extend a project's completion date. If there were evidence that a claimant was, for example, paying for fencing as a pretext for extending the lien timelines – evidence not presented in this case – then a factfinder could conclude that such labor did not extend the completion date because it was not "in furtherance of [the job's] completion," *First National Bank in Fort Collins*, 431 P.2d at 478, and was not "called for by the contract," *Gene McVety*, 119 Ariz. at 484, 581 P.2d at 1134. On the other hand, concluding that work such as barricade maintenance could never, under any circumstances count as "labor" as matter of law, would create traps for laborers that run directly contrary to the protections the Legislature intended.

In sum, there was no "cessation of labor" causing a "completion" under A.R.S. § 33-993, or at a minimum there are questions of fact on this issue. Viewing the facts in Markham's favor, even Markham's work continued at least until January 24, 2008. Because Markham recorded the First Lien on December 28, 2007 (before that date), and recorded its Notice of Correction fixing clerical errors on March 24, 2008 (61 days after January 24, 2008), it recorded the lien "within one hundred twenty days of completion." A.R.S. § 33-993(A).

### D. The Trial Court Could Not Find That Markham Failed to Cure Any Technical Defects by Timely Recording a Notice of Correction (Defects #4 and #5)

As noted above, to perfect a mechanic's lien, a claimant must record a "notice and claim of lien" within "one hundred twenty days after completion of" a project. A.R.S. § 33-993(A). That notice "shall contain" several pieces of information, including "[a] copy of [the] preliminary twenty day notice and the proof of mailing" of the preliminary notice, A.R.S. § 33-993(A)(6). In addition, the preliminary notice must include "[a] legal description, subdivision plat, street address, location with respect to commonly known roads or other landmarks in the area or any other description of the jobsite sufficient for identification." A.R.S § 33-992.01(C)(4). In this case, the Lot Owners not only contended that Markham failed timely to record its lien, but also claimed that the lien omitted these required pieces of information (alleged "defects" 5 and 6).

It is undisputed, however, that by March 20, 2008 Markham had recorded its Notice of Correction that included this information.[84] Accordingly, because March 20 is less than one hundred twenty days after January 24, 2008 (the earliest possible date of "completion"), Markham timely provided the requisite information. Indeed, although Markham made clerical errors in its First Lien,

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[84] App. Tab 7 (Notice of Correction) (attaching Preliminary Notice and correct "Exhibit A" with legal description).

recorded on December 28, 2007, the statute gave Markham a full "one hundred twenty days after completion" to record the requisite information, i.e., until May 22, 2008. A.R.S. § 33-993(A). Not surprisingly, other courts agree there is "no sound reason against the right to file an amended lien within the [time limit] within which an original claim may be filed is apparent." *Heberling v. Day*, 209 P. 908, 912 (Cal. Dist. Ct. App. 1922). Indeed, that is the only interpretation consistent with the statute's "remedial purpose." *See United Metro Materials, Inc.*, 197 Ariz. at 484 ¶ 26, 4 P.3d at 1027 ("Arizona's lien statutes are remedial and to be liberally construed to effect their primary purpose of protecting laborers and materialmen.").

Tellingly, the Lot Owners did not dispute below that Markham recorded the correct information by March 20, but instead argued that March 20 was too late.[85] But the Lot Owners' timing argument rested on their flawed contention concerning a "cessation of labor" before January 2008, debunked in Section I(C).

In the end, therefore, these alleged defects (#4 and #5) reduce to a repeat of alleged Defect #3. Any reliance by the trial court on the Lot Owners' argument

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[85] CR 119 (Lot Owners' Motion for Summary Judgment) at 8; App. Tab 26 (Lot Owners' Reply) at 008 (arguing that the Notice of Correction "was recorded too late").

that Markham failed to provide the requisite information in its lien notice was error.

### E. A Lis Pendens Need Not Be Notarized to Preserve a Lien (Alleged Defect #6)

Arizona law requires that a lien claimant record a *lis pendens*, which gives notice of a lawsuit affecting title to real property, "within five days of filing the action." A.R.S. § 12-1191(A). Without a *lis pendens*, the lien extinguishes after six months. *HCZ Constr., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 364, 18 P.3d 155, 158 (App. 2001). In this case, Markham's attorney recorded a *lis pendens* pursuant to A.R.S. §§ 12-1191(A) and 33-998 (A) when Markham brought its lien foreclosure action. Although Markham's counsel signed the *lis pendens*, it was not "acknowledged" (akin to having a signature notarized). *See* A.R.S. § 33-401(B) ("Every deed or conveyance of real property must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments.").

The Lot Owners contended below that A.R.S. § 33-411(B) required that the *lis pendens* be "acknowledged" (not just signed). This argument (Defect #6) is likewise meritless, and any reliance on it by the trial court to grant summary judgment was error.

Section 33-411 appears in Article 2 (Recording) of Chapter 4 (Conveyances and Deeds). Subsection (A) states that "[n]o instrument ***affecting real property***

gives notice of its contents to subsequent purchasers or encumbrance holders . . . unless recorded." (emphasis added). Subsection B states that such "[a]n instrument shall not be deemed lawfully recorded unless it has been previously acknowledged." Section 33-411 has no application to a *lis pendens* because a *lis pendens* is not an "instrument," let alone an "instrument affecting real property."

As used in Title 33, an "instrument" is a document such as a contract, conveyance, or deed that transfers or creates interests in real property. For instance, A.R.S. § 33-401(A) uses the term "instrument" to describe a writing that can transfer an "estate of inheritance" or "freehold." *See also Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 401, 923 P.2d 863, 867 (App. 1996) (holding that a "contract right" to a "right of first refusal is an 'instrument affecting real property'" under A.R.S. § 33-411). A *lis pendens* does not qualify as an "instrument."

A *lis pendens* also does not affect real property or create a right in property. Rather, it is a "notice of the pendency" of "an action affecting title to real property." *See* A.R.S. § 12-1191(A). That is, by definition a *lis pendens* gives ***notice*** that some ***other*** thing may affect real property. In this case, the "instrument" affecting real property is Markham's recorded lien, and the signatures

on that document ***were*** "acknowledged."[86] Indeed, the Legislature requires that the "notice and claim of lien ***shall be made under oath***." A.R.S. § 33-993(A) (emphasis added). Tellingly, that requirement is not found in the *lis pendens* statute, A.R.S. § 12-1191. Accordingly, it is of no consequence that the *lis pendens* in this case was not "acknowledged."

## II. The Trial Court Erred by Determining, as a Matter of Law, That Markham Could Be Sanctioned Under A.R.S. § 33-420

Arizona's groundless lien statute, A.R.S. § 33-420, makes one liable for specified penalties for a "knowing violation" of the statute. *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991). Although required to view the facts in Markham's favor, the trial judge sanctioned Markham under A.R.S. § 33-420 notwithstanding the parties' dispute over whether Markham knowingly violated the statute. In adopting the Lot Owners' Reply,[87] the trial court further accepted the flawed legal conclusion that A.R.S. § 33-420(C) does not require a knowing violation.

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[86] *See* App. Tab 5 (First Lien) at 006. The Amended Lien and Notice of Correction also have signatures acknowledged by a notary.

[87] App. Tab 27 (8/18/2009 Ruling) at 001.

### A. Liability Under A.R.S. § 33-420(A) and (C) Requires Proof of the Client's Scienter

The Supreme Court has held that "[t]he damages available under § 33-420 are punitive in nature." *Wyatt*, 167 Ariz. at 286, 806 P.2d at 875. In light of its punitive nature, the statute "requires a ***knowing violation*** before its sanctions will be imposed." *Id.* at 284, 806 P.2d at 873 (emphasis added).

Subsection A imposes civil liability for knowingly causing a groundless lien to be recorded: "[a] person . . . who causes a document asserting [a groundless claim in real property] . . . ***knowing or having reason to know*** that the document is . . . invalid is liable [for specified penalties]." (emphasis added). *See Old Adobe Office Props., Ltd. v. Gin*, 151 Ariz. 248, 253, 727 P.2d 26, 31 (App. 1986) (applying A.R.S § 33-420(A) to the filing of lien claims and reversing summary judgment because there was "a disputed issue . . . as to whether [claimant] knew or had reason to know that its claim of lien was invalid").

Subsection C, in turn, punishes a person for refusing to release or correct a recording that the person "knows" is invalid after being requested to do so: "A person who is named in a document . . . and who ***knows*** that the document is . . . groundless . . . or is otherwise invalid shall be liable . . . if he ***wilfully*** refuses to release or correct such document . . . within twenty days . . . of a written request," A.R.S. § 33-420(C) (emphasis added).

Both Subsection A and C, therefore, impose a "scienter" requirement limiting liability to ***knowing*** violations of the statute. *See Wyatt*, 167 Ariz. at 285, 806 P.2d at 874 (explaining that liability is imposed "only for knowing violations," i.e., the "scienter" necessary for criminal punishment).

Furthermore, because of this scienter requirement, liability requires proof of the claimant's scienter, which ***cannot*** be imputed from the attorney to the client. *Wyatt*, 167 Ariz. at 284, 806 P.2d at 873 ("liability on the claimant (*i.e.*, the client instead of the lawyer) for . . . the filing . . . *only* if he knows or has reason to know the [document] is invalid"); *id.* (the client's scienter ***cannot*** be proven on the basis of "imputed knowledge"); *see also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 130, 907 P.2d 506, 516 (App. 1995) (the false document statute "requires scienter on the part of the client before the client can be punished for the attorney's acts" (citation omitted)).

### B. The Lot Owners Offered No Evidence of Markham's Scienter

Although determining a party's scienter necessarily involves a fact-intensive analysis, the Lot Owners proffered no evidence – none – that Markham had the requisite scienter for liability under Subsection A or C. With respect to Subsection A, they merely stated that "Markham willfully refused" to release the lien and "[a]ccordingly . . . entitled" the Lot Owners to damages under A.R.S.

§ 33-420(A).[88] After Markham clarified that the statute required actual proof of scienter,[89] the Lot Owners merely ***argued***, that "Markham had reason to know that the Lot Owners owned the property when it started work and when it served its preliminary notice on the Developer;" and "Markham knew or at least should have known that its 'barricade' theory was groundless and that its lien was untimely."[90] But this conclusory *ipse dixit* is not evidence. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990) (though movant need not "affirmatively establish the negative," "[c]onclusory statements will not suffice").

With respect to Subsection C, the Lot Owners erroneously claimed that it has no scienter requirement, and instead "only requires that a person named in the valid lien fails to release it after written demand."[91] This excises key language from the statute, which imposes liability only upon proof of a "***willful***" refusal to release a document that the claimant "***knows***" is groundless, not for a mere "failure to release." The trial court therefore erred by "adopting" the Lot Owner's strict liability argument.[92]

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[88] CR 119 (Lot Owners' Motion for Summary Judgment) at 10.

[89] CR 129 (Markham's Response) at 13.

[90] App. Tab 26 (Lot Owners' Reply) at 009-0010.

[91] *Id.* at 009.

[92] App. Tab 27 (8/18/2009 Ruling).

Furthermore, the summary judgment evidence demonstrated that Markham lacked the requisite scienter for liability under Subsection A or C. Viewing the facts and inferences in Markham's favor, a reasonable jury could find that (1) Markham did not know that EHV had already started selling lots, (2) it reasonably believed that the Preliminary Notice had been delivered "to the Owner or Repute[d] Owner," and (3) Markham's work was ongoing when Markham first recorded its lien in 2007.[93] In other words, Markham had every reason to believe that its lien was valid when recorded.[94]

Prior cases confirm the trial court erred. In *Old Adobe*, for example, the court found that failure to include any certificate of mailing rendered a lien invalid, but "that summary judgment [was] inappropriate" with respect to A.R.S. § 33-420. 151 Ariz. at 253, 727 P.2d at 31. The court reasoned that "evidence may show that" the claimant normally served claims in a manner "different than the [invalid] method," and therefore did not have reason to know that the current claim was invalid. *Id.* at 253 n.1, 727 P.2d at 31 n.1; *see also Coventry Homes, Inc. v. Scottscom P'ship.*, 155 Ariz. 215, 219, 745 P.2d 962, 966 (App. 1987) (even

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[93] App. Tab 22 (Markham Affidavit in Support of Summary Judgment) at 005-006; App. Tab 24 (Markham Deposition) at 55:3-16 (indicating Mr. Markham intended to serve the owner or reputed owner, and understood that his lien attorney conducts research concerning ownership).

[94] App. Tab 22 (Affidavit of Michael Markham, Jr.) at 006.

though the record contained "substantial evidence" suggesting the recording party "should have known" of the groundless recording, summary judgment was inappropriate because there was "evidence from which contrary inferences can be drawn").

*Guarriello v. Sunstate Equipment Corp.*, relied on in the Lot Owner's Reply, does not change the analysis. 187 Ariz. 596, 931 P.2d 1106 (App. 1996). There, Division Two held that a mechanics' lien-claimant who wrongly recorded a lien against an "owner-occupant," a person who is exempt from mechanics' liens in many circumstances, *see* A.R.S. § 33-1002 (B), was liable under A.R.S. § 33-420. 187 Ariz. at 598, 931 P.2d at 1108. Among other requirements, an "owner-occupant" has a recorded title, A.R.S. § 33-1002 (A)(2)(a), and the claimant "was statutorily obligated before recording its lien to ascertain whether [the owner] was an owner-occupant and thus exempt from the filing." *Guarriello*, 187 Ariz. at 598, 931 P.2d at 1108. Because the claimant had "reason to know" – and was "statutorily obligated" to know – whether the owner had record title and was thus an exempt "owner-occupant," it was liable under Section 33-420 for filing the invalid lien. *Id.* (also finding liability under Subsection 33-420(C)). In contrast, Markham was not "statutorily obligated to ascertain," for example, whether a court would consider rental and maintenance of barricades to be "labor" under A.R.S. § 33-993(C). Accordingly, whether Markham ***knew or had reason to know*** that

the documents were invalid when its attorney recorded the First Lien and Amended Lien necessarily remains an issue of fact.

As the moving party, the Lot Owners had the "heavy" burden to persuade the court that there was "no genuine issue of material fact and [they are] entitl[ed]" to damages under Section 33-420 "as a matter of law." *Thruston*, 218 Ariz. at 115-116 ¶¶ 15-17, 180 P.3d at 980-981 (citations omitted). The Lot Owners failed to meet this burden, and the trial court therefore erred by awarding Section 33-420 penalties.

## III. The Trial Court Calculated Penalties Under A.R.S. § 33-420(A) and (C) Pursuant to a Method That Went Way Beyond What the Legislature Intended and That Would Unduly Chill Laborers from Protecting Their Rights

When there are no claimed "actual damages caused by the recording," as in this case, liability under A.R.S. § 33-420 is limited to no more than $5,000 per allegedly groundless recorded document and $1,000 per alleged "refus[al] to release or correct" under A.R.S. § 33-420. In setting these penalties, the Legislature carefully balanced deterring the recording of groundless documents against concerns about unduly chilling laborers from attempting to protect their lien rights. Yet in this case, the trial court awarded the Lot Owners $6,000 for *each lot* and awarded the lending banks $6,000 on *each lot* for which they were a

"beneficial owner," resulting in a punishment to Markham (and windfall to the Lot Owners) of $252,000.[95] In addition to reversing the assessed penalties, the Court should therefore clarify how any penalties should be calculated on remand. The trial court erred, and glaringly so, in its calculation.

### A. The Plain Language of Sections 33-420(A) and (C) Limits the Statutory Penalty to $5,000 Per Recorded Document and $1,000 Per Refusal to Release

The "cornerstone" of statutory construction "is the rule that the best and most reliable index of a statute's meaning is its language." *Backus v. State*, 220 Ariz. 101, 104 ¶ 11, 203 P.3d 499, 502 (2009) (internal quotation marks and citation omitted). If "the language is clear and unequivocal, it is determinative of the statute's construction." *Id.*

Section 33-420's language is clear. First, A.R.S. § 33-420(A) imposes a $5,000 penalty on any person who knowingly causes a ***document*** to be recorded that invalidly purports to encumber real property:

> ***A person*** purporting to claim an interest, or a lien . . . against, real property, ***who causes a document asserting such claim to be recorded*** . . . knowing or having reason to know that the document is . . . invalid ***is liable*** to the owner ***or*** beneficial title holder of the real property ***for*** the sum of not less than ***five thousand dollars, or*** for treble the actual ***damages caused by the recording***, whichever is greater . . . .

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[95] App. Tab 28 (Judgment).

A.R.S. § 33-420(A) (emphasis added). Thus, the ***recording of a document*** triggers liability, and sets the liability ***for that act*** as the greater of "treble the actual damages" or "five thousand dollars."

Likewise, A.R.S. § 33-420(C) imposes a $1,000 penalty on one who ***wilfully refuses*** to release or correct ***a recorded document***:

> ***A person*** who is ***named in a document*** which purports to create an interest in, or a lien . . . against, real property and who knows that the document is . . . invalid ***shall be liable*** to the owner or title holder ***for*** the sum of not less than ***one thousand dollars, or for treble actual damages . . . if he wilfully refuses to release or correct such document*** . . . within twenty days . . . of a written request from the owner or beneficial title holder . . . .

A.R.S. § 33-420(C) (emphasis added). Here, the ***wilful refusal*** of a written request triggers liability, and sets the liability ***for that act*** as the greater of "treble actual damages" or "one thousand dollars."

The statute's plain language precludes multiplying the penalty based on either (1) the ***amount*** of real property affected, or (2) the number of plaintiff-owners (absent proof of actual damages). First, A.R.S. § 33-420 does not mention "lots" or "parcels," although the Legislature has repeatedly shown it knows how to draft statutes using these terms when it intends to draw such distinctions. *See, e.g.*, A.R.S. § 33-991(B) (limiting liens to "the particular lot or lots" upon which improvement is made); A.R.S. § 9-463.01(C)(5) (describing powers to regulate subdivisions and allowing "payment of a . . . fee . . . based upon the number of lots

or parcels"); A.R.S. § 9-463.02(A) (defining subdivision and using term "lots"); A.R.S. § 9-1132(B) ("All contiguous lots . . . shall be deemed to be one parcel of land.").

Second, as happened here, A.R.S. § 33-420(B) allows an "owner or beneficial title holder" to bring "***an action*** for damages ***as described***" (emphasis added). Thus, the statute's plain language confirmed that, in "***an action***" the "damages ***as described***" are the greater of (1) the minimum penalties of $5,000 per document and $1,000 per refusal, or (2) treble actual damages.

This Court has recently confirmed that Section 33-420 does not permit the multiplication or stacking of penalties in the absence of proof of actual damages. *See Lebaron Props., LLC v. Jeffrey S. Kaufman, Ltd.*, 223 Ariz. 227, 230-231 ¶14, 221 P.3d 1041, 1044-45 (App. 2009). There, a single person recorded one *lis pendens* against one owner, but the *lis pendens* was recorded on behalf of five separate defendants. *Id.* Focusing on the plain language that imposes a penalty on "the person 'who causes'" the recording, the Court held that the penalties could not be multiplied based on the number of defendants. *Id. See also Richey v. W. Pac. Dev. Corp.*, 140 Ariz. 597, 601, 684 P.2d 169, 173 (App. 1984) (declining to "decide whether multiple owners at the time of filing would each become entitled to the minimum" penalty).

The Legislature chose language tying the minimum penalties to particular ***acts***, not the number of lots or parties in an action affected by those acts, and a court is not free to add terms. *See In re Martin M.*, 223 Ariz. 244, 247 ¶ 9, 221 P.3d 1058, 1061 (App. 2009) (a court "cannot rewrite a statute under the guise of divining legislative intent").

### B. The Statute's Purpose and Context Confirm That the Court Should Construe A.R.S. § 33-420 to Limit the Penalty to $5,000 Per Document and $1,000 Per Refusal

Although the Court need look no further than the statute's plain language, the statute's purpose and structure confirm that the Legislature intended to limit the statutory penalty to $5,000 per document and $1,000 per refusal (absent proof of *actual* harm). *See Vicari v. Lake Havasu City*, 222 Ariz. 218, 222 ¶ 13, 213 P.3d 367, 371 (App. 2009) (when language is ambiguous, court may look to "secondary principles of statutory construction and consider . . . the history, context, and spirit and purpose of the law, to glean legislative intent").

First, the trial court's construction of Section 33-420 would frustrate the protection afforded laborers. The Legislature enacted A.R.S. § 33-420 in response to a series of "nuisance or harassment suits" making claims for "so-called 'common law lien[s]'" targeted at public officials. *See* Arizona Legislative Council, Summary Analysis of H.B. 2485 (1981). The Legislature deemed $5,000 and $1,000 sufficient to deter persons from recording false documents or willfully

refusing to release them upon written request, but not too large to discourage laborers wishing to enforce their lien rights. The language also limits the harshness of ***automatic*** penalties (and the windfall it could bring to owners or title holders) in the face of often complicated issues by requiring owners or title holders to prove ***actual*** damages if they seek a sum greater than the minimum penalties. Indeed, the Lot Owners' theory that each "owner" can collect a penalty would expose laborers to virtually limitless sanctions in situations where a piece of land has been sold to a pool of investors.

Second, the statute appears in Article 2 ("**Recording**") of Title 33 ("**Property**"). Article 2's provisions focus on what documents may be "recorded," and the effects that follow from such "record[ings]." *See, e.g.*, A.R.S. § 33-411.01 ("Any document evidencing the sale, or other transfer of real estate or any legal or equitable interest therein, excluding leases, ***shall be recorded*** by the transferor . . . .") (emphasis added); A.R.S. § 33-416 (documents properly "recorded in the proper county" provide certain legal "notice"). Each of the statutes in Article 2 thus places significance on the ***recording of a document***. Given this context, the Legislature intended to tie the minimum penalties in A.R.S. §§ 33-420(A) and (C) to the recording of a document (rather than the number of owners or lots impacted); Subsection 33-420(A) specifically makes someone "who causes a document . . . to be recorded . . . liable . . . for . . . five thousand dollars."

Third, A.R.S. § 33-420(E) makes recording a groundless document "a class 1 misdemeanor." This provision "must be interpreted consistently" with the civil penalty in Subsection 33-420(A). *Wyatt*, 167 Ariz. at 285, 806 P.2d at 874. An individual found guilty of a class 1 misdemeanor pursuant to Subsection 33-420(E) may be fined a ***maximum*** of $2,500 for each false document recorded. A.R.S. § 13-802(A) (listing criminal fines for class 1 misdemeanors). The per-document criminal fine is convincing evidence that the Legislature intended a comparable civil penalty.

In the absence of actual damages, the Legislature limited the statutory penalties to $5,000 per recorded document and $1,000 per willful refusal to release. The Court should clarify these calculations, or at a minimum reduce the judgment to no more than $12,000.

## IV. The Court Should Reverse the Lot Owners' Award of Attorneys' Fees and Costs

If the Court reverses on the basis of any of the issues raised above, it should reverse and remand the fees and costs award in favor of the Lot Owners.

## CONCLUSION

Markham performed substantial work improving the Lot Owners' property, has not received the full value for its work, and should not be denied the benefits to which it is entitled under Arizona's remedial lien laws. Markham properly

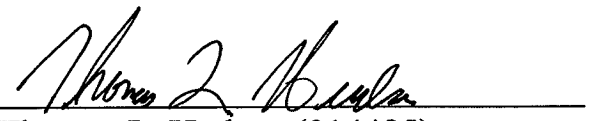
perfected its rights under A.R.S. § 33-981, *et seq,* or at a minimum there are questions of fact on this issue.

Accordingly, the Court should reverse the judgment based on the summary judgment ruling, reverse the dismissal of Markham's third-party complaint as moot, and remand the case back to the trial court so that a factfinder may decide the genuine issues of fact that remain. (Alternatively, and at a minimum, the Court should reduce the judgment in favor of the Lot Owners to no more than $12,000.)

Lastly, the Court should reverse the award of attorneys' fees ($49,500) and costs ($2,171), and award Markham attorneys' fees and costs pursuant to A.R.S. § 33-998 (B), A.R.S. § 33-420, and A.R.S. § 12-341. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 393-94, 710 P.2d 1025, 1048-49 (1985) (the "successful party" for purposes of A.R.S. § 12-341.01 includes party achieving reversal of an unfavorable interim order that is central to the case and determines a significant issue of law).

RESPECTFULLY SUBMITTED this 7th day of April, 2010.

OSBORN MALEDON, P.A.

By 

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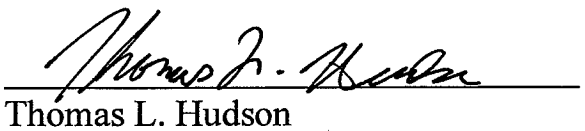
## CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Civ. App. P. 14, I hereby certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a Roman font, and contains 13,960 words.

Dated this 7th day of April, 2010.



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## CERTIFICATE OF SERVICE

The undersigned has filed and served Appellant's Opening Brief and Appellant's Separate Appendix this 7th day of April, 2010, as follows:

Original plus six (6) copies of Appellant's Opening Brief and separate appendix filed with:

Clerk of the Arizona Court of Appeals
1501 West Washington, Room 203
Phoenix, Arizona 85007-3329

Two copies of Appellant's Opening Brief and one copy of Appellant's Separate Appendix mailed to:

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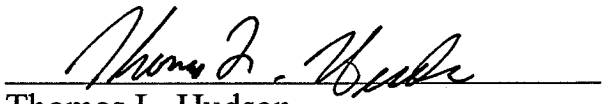

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Attorney for Defendant/Appellant

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FAGERLIE V. MARKHAM CONTRACTING CO
LOT SALE AND KEY EVENT CHRONOLOGY

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| LOT | EHV SALE OF LOT - WARRANTY DEED RECORDING DATE | DEED OF TRUST RECORDING DATE |
|---|---|---|
| **1/29/2004 - EHV ACQUIRES THE PROPERTY** | | |
| **4/25/2005 - MARKHAM SUBMITS PROPOSAL TO OWNER** | | |
| 24, 26, 27 | 5/12/2005 | |
| 10 | 5/18/2005 | |
| 15 | 5/19/2005 | 5/19/2005 |
| 13, 20, 22 | 5/25/2005 | 5/25/2005 |
| 2 | 5/25/2005 | |
| 14 | 5/26/2005 | 5/26/2005 |
| 12, 16 | 5/27/2005 | 5/27/2005 |
| 5 | 5/27/2005 | |
| 6 | 6/2/2005 | 6/2/2005 |
| 21 | 6/7/2005 | |
| 9 | 6/14/2005 | 6/14/2005 |
| 3, 18, 23 | 6/16/2005 | 6/16/2005 |
| **6/20/2005 - PRELIMINARY 20-DAY NOTICE SERVED** | | |
| 11 | 6/28/2005 | 6/28/2005 |
| 8 | 6/28/2005 | 6/28/2005 |
| 7, 28 | 6/30/2005 | 6/30/2005 |
| 19 | 7/27/2005 | 7/27/2005 |
| 4 | 7/27/2005 | |
| 17 | 8/26/2005 | |
| 1 | 10/4/2005 | |
| 25 | 7/11/2006 | |
| **12/28/2007 - MARKHAM RECORDS NOTICE AND CLAIM OF LIEN** | | |
| **1/24/2008 - LAST DAY MARKHAM ALLEGES WORK IS DONE** | | |
| **1/24/2008 - MARKHAM RECORDS AMENDED NOTICE AND CLAIM OF LIEN** | | |
| **3/20/2008 - MARKHAM RECORDS NOTICE OF CORRECTION** | | |
| **5/23/2008 - 120 DAYS AFTER 1/24/2008, THE LAST DAY OF WORK** | | |