IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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

APPELLANT'S REPLY BRIEF

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I. The Lot Owners' Contention That a Developer Selling Lots Does Not Qualify as an "Agent" Under A.R.S. § 33-981(A) Runs Contrary to Basic Principles of Lien Law (Alleged Defect #1)

The Lot Owners do not dispute that (1) anyone obligated to the owner to perform improvements is the owner's "agent," (2) EHV was obligated to the Lot Owners to perform the improvements, and (3) EHV hired Markham to perform those improvements.* Accordingly, for purposes of A.R.S. § 33-981(A), Markham completed its work at the "instance" of EHV, the owners' "agent." The Lot Owners' three arguments to the contrary do not withstand scrutiny.

A. "Blue Staking" Is Irrelevant to the Lien's Validity

In their Answering Brief, the Lot Owners first focus on ***when*** Markham began its work, and then argue that "blue staking" does not count because it cannot (allegedly) be liened.[1] However, the date labor first ***began*** on the project is relevant only to Markham's lien's ***priority***, not its ***validity***. *See* A.R.S. § 33-992(A) (Mechanics' liens "are preferred to all . . . encumbrances . . . attaching subsequent to the time the labor was commenced . . . ."). The Lot Owners even acknowledge (at 14) that "that kind of work does not relate back for ***priority***

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* Contrary to the Lot Owners' contention, Markham's work was not "shoddy," and a list of ***remaining*** work on a punch list does not suggest otherwise.

[1] AB:9-11.

purposes." (Emphasis added.) How blue-staking affects the lien's priority is an issue for the trial court to address on remand.

B. Contrary to the Lot Owners' Contention, EHV Had the Requisite "Charge or Control"

The Lot Owners argue (at 11-12) that EHV was not an "agent" under Section 33-983(B) because a jury could not find that EHV had the requisite "'charge or control' of the construction." However, the lien provision governing "city lots," which applies here, explicitly includes "***[e]very*** contractor, subcontractor, architect, builder, ***subdivider*** or other person having charge or control of the improvement or work" as a statutorily defined "agent." A.R.S. § 33-983(B) (emphasis added). Under Section 33-983(B)'s plain language, a "subdivider" like EHV qualifies as an agent, and therefore necessarily has the requisite "charge or control."

Additionally, EHV did not merely have the status of a subdivider. It also had actual "charge or control of the improvement or work . . . either wholly or in part." A.R.S. § 33-983(B); *see also* A.R.S. § 33-981(B) (using similar "charge or control" language in context of liens for work related to structures). Most significantly, EHV hired and paid the laborers and suppliers to perform the work.

EHV also exercised the control over change orders.[2] In addition, the Department of Real Estate Public Report[3] and the related agreement with the City of Peoria[4] obligated EHV to make the improvements. Accordingly, the fact finder may well be ***required*** to conclude that EHV's power to hire and fire workers and its obligation to make certain improvements placed it in "charge or control . . . either wholly or in part" of the project. A.R.S. § 33-983(B).

In light of the controlling statutory language, the Lot Owners' contention that EHV did not itself "engage[] in the ***actual performance*** of the specified work"[5] misses the point. The statute does not require any such "actual performance." And, the 1935 California case relied upon by the Lot Owners (at 11) cannot change that fact.

C. The Lot Owners Had More Than a "Mere Expectation" That EHV Would Improve the Subdivision; EHV Was Obligated to Make the Improvements

Finally, the Lot Owners do not contest the discussion in the Opening Brief or the authorities cited therein (at 22-25) showing that when a party is ***obligated*** to make improvements for an owner – thus obtaining "charge or control" over the

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[2] *See* Appellant's Separate Appendix to the Opening Brief ("**App. __**") at 2 (Change orders).

[3] *See* App. 11.

[4] *See* Appellee's Separate Appendix ("**AB App.**") 1.

[5] *See* AB:11.

improvements – that party qualifies as the owner's "agent" under the lien laws. To avoid that rule, the Lot Owners argue that because "Markham has not pointed to any term" in a contract between the Lot Owners and EHV obligating EHV to make the improvements, a fact finder would be required to find the Lot Owners had "[a]t best" a "mere expectation" that EHV would make improvements.[6]

But the lien statutes intentionally lack such a privity requirement. Indeed, the claimant will often be several steps removed from the owner; "[i]t is not a question of whether the party ordering the [material or labor] is a contractor, but . . . whether the party who ordered the [material or labor] is, in the mechanic's lien law the agent of the owner." *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 181, 370 P.2d 661, 664 (1962) (internal quotation marks and citation omitted); *see also Columbia Group, Inc. v. Jackson*, 151 Ariz. 76, 78, 725 P.2d 1110, 1112 (1986) (affirming lien rights of concrete supplier who supplied sub-contractor, not general contractor or owner). The Lot Owners' "contract" argument therefore misses the point.

Moreover, in this case ***the force of law obligated*** EHV to make improvements for the benefit of the Lot Owners, regardless of their sales contracts. In fact, EHV could not sell lots unless it made arrangements to make the

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[6] AB:13-14.

improvements outlined in the Public Report.[7] *See* A.R.S. § 32-2183(F)(2). And ***EHV is liable to the lot purchasers*** for the promises it made in the Public Report. *See* A.R.S. §§ 32-2183.03(A)-(D) (subdivider liable for "untrue" statements in the Public Report or for a "material misrepresentation with respect to any information included in the . . . public report or with respect to any other information pertinent to the lot"). Thus, Arizona law has imposed on EHV an enforceable obligation running in favor of those buying lots from EHV. Furthermore, the fact that EHV posted an inadequate bond has no affect on that obligation.

Finally, EHV explicitly agreed, as the subdivision's "developer," to make "certain development improvements" as a "precondition to recordation of the Final Plat/Site Plan" and the issuance of building permits.[8] Taken together, these facts show that without the improvements EHV was obligated to perform, there could be no subdivision, no lots, and no lot owners.

In sum, although the Lot Owners would understandably like the protections afforded to those buying owner-occupied "dwelling[s]," *see* A.R.S. § 33-1002(B), the Legislature chose not to give those buying dirt lots the same protection. Accordingly, the Lot Owners cannot defeat Markham's lien.

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[7] OB:25-26.

[8] AB App. 1 at 14.

II. Whether Markham Properly Served a Preliminary Notice Cannot Be Determined as a Matter of Law (Alleged Defect #2)

The Lot Owners concede (at 16 n.26), that alleged Defect #2 does not apply to nine lots. They also recognize (at 18) that (1) A.R.S. § 33-992.01(B) permits service of the preliminary twenty day notice on "the owner ***or reputed owner***" (emphasis added), and that (2) unless a fact finder would be required to determine that Markham had to do more ***as a matter of law***, the trial court erred by granting summary judgment on this issue.

This, then, leaves the Lot Owners to argue that Markham could have easily discovered the true owner with a "few key strokes and a mouse click."[9] Tellingly, the Lot Owners did not make this "internet search" argument below, i.e. when it could have been readily determined what search features existed on the website ***at the relevant time***. Now, however, roughly five years have lapsed since Markham's lien attorneys – experienced construction law counsel[10] – purportedly could have, but did not, conduct this simple internet search. Given the broad and numerous changes in websites during the past five years, to suggest now that an unauthenticated printout from the Assessor's website of results for a search ***conducted on April 19, 2010*** tells the Court ***anything*** about what an internet

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[9] AB:17.

[10] *See* www.constructionlawyersaz.com (last visited July 7, 2010).

search would have shown before Markham served the Preliminary Notice on June 20, ***2005*** is disingenuous.[11]

For this reason, the Court must reject the Lot Owners' request for judicial notice of a ***recent*** printout from the Maricopa County Assessor's office to show that "[e]ntering 'Estates at Happy Valley' is all that was required to obtain the record owner of each lot."[12] In fact, even the current version of the website stresses that the database "may be slightly dated which would have an impact on its accuracy."[13] Yet just prior to June 20, 2005 (from May 12 to June 16), EHV unloaded ***nineteen*** of its twenty-eight lots.[14]

Stuck arguing factual issues that should have been resolved by the jury, the Lot Owners further contend (at 17) that Markham did not "describe *any* efforts whatsoever" concerning the attempt to determine the owner or reputed owner.[15] The record, however, includes ample facts from which a jury could conclude that

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[11] *See* AB:3 n.8; AB App. 2 (unauthenticated 4/19/2010 printout of Assessor's website).

[12] AB:16-17.

[13] Maricopa County Assessor – Advanced Parcel Search, http://www.maricopa.gov/Assessor/ParcelApplication/Default.aspx (last visited July 7, 2010).

[14] *See* Lot Sale and Key Event Chronology attached to the Opening Brief.

[15] AB:17-18, 21.

Markham acted reasonably ***under the circumstances*** by serving EHV as the owner or reputed owner:

- EHV owned all lots when Markham negotiated with EHV for the site-improvement work beginning in April 2005.[16]
- EHV still owned nearly one-third (nine of twenty-eight) of the lots when Markham served the notice on June 20, 2005.
- The land was vacant and unimproved, giving no visual clues that nineteen lots were sold.
- There were no roads (let alone addresses) that could be used to check for ownership changes at the time since installing the roads was part of Markham's work.[17]
- EHV was listed as the owner on the recorded Final Plat map.[18]
- Markham's attorney obtained the Final Plat (which lists EHV as the owner) after her office went "to the recorder's office and there was a deed recorded for this final plat."[19]
- EHV did not respond to the Preliminary Notice, leaving Markham with the impression that its notice was accurate.[20]

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[16] *See* App. 1 (Bid Proposal dated 4/25/2005).

[17] *See* App. 30 (7/13/2009 Transcript) at 047; *see also* App. 2 (Final Plat) at 001 (no addresses listed). This is unsurprising, considering that Markham was hired to build the roads for the subdivision. *See* App. 1 (Bid Proposal) at 003 (estimating costs for "Earthwork," "Paving," and "Concrete").

[18] App. 2.

[19] App. 30 (7/13/2009 Transcript) at 047 ln. 18-19.

[20] *See* App. 22 at 006 ¶ 10 (Affidavit of Michael Markham) (no owner or interested party responded to the Preliminary Notice).

Additionally, Markham's attorney responsible for the Preliminary Notice ***contacted the recorder's office*** before serving it, and could only obtain the Final Plat recording (which listed EHV as the owner) from that office.[21] Given that the Lot Owners concede that accessing the Assessor's website "would have sufficed" to determine ownership,[22] they cannot credibly argue that contacting the recorder's office does not.

The Lot Owners also separately contend that Markham could not rely on EHV's failure to send Markham the information required by A.R.S. § 33-992.01(I)(2) because EHV was not an "interested party" in the sold lots.[23] EHV, however, owned nearly ***one-third of the subdivision***, which therefore obligated EHV to notify Markham that investors had recently snapped up lots. Furthermore, Markham is not arguing that EHV's failure to respond somehow "estop[s]" the Lot Owners from contesting Markham's Preliminary Notice.[24] Instead, EHV's failure to comply with Section 33-992.01(I) is only one of many facts from which a reasonable juror could conclude that, in light of the circumstances and overall

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[21] App. 30 (7/13/2009 Transcript) at 047. (The Lot Owners made the "reasonable inquiry" argument in their reply, leaving Markham's counsel to explain her efforts at the summary judgment hearing.)

[22] AB:17.

[23] AB:19.

[24] *See* AB:19-20.

context, Markham acted reasonably when it concluded that EHV was the "owner or reputed owner" of the subdivision. The issue cannot therefore be decided as a matter of law. *W. Insulated Glass Co. v. McKay*, 174 Ariz. 597, 598-99, 852 P.2d 412, 413-14 (App. 1993) (what constitutes "reasonable inquiry" into ownership is a question of fact).

Lastly, the Lot Owners contend (at 23) that Markham waived the argument that it had no obligation to make repeated inquiries into ownership. But Markham argued below that it "was unaware that EHV was selling off individual lots" and that A.R.S. § 33-992.01 "does not require a complete title search ***at the time of the preliminary notice***."[25] Markham therefore preserved the argument that "[n]othing in the statute required Markham repeatedly to perform record searches before delivering the Preliminary Notice."[26]

III. The Lot Owners Cannot Show, as a Matter of Law, That a "Cessation of Labor" Shortened the Time for Markham to Perfect Its Lien Under A.R.S. § 33-993(A) (Alleged Defect #3)

The Lot Owners do not dispute that Markham and others did not in fact complete their work until January 23, 2008 when KFM Striping & Curb Co. completed the striping work required by the City pursuant to Markham's striping

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[25] CR 133 at 5-6 (emphasis added).

[26] OB:32.

permit.[27] There can also be no dispute that this date – January 23, 2008 – qualifies as the "completion" date under A.R.S. § 33-993(D). That statute, after all, explicitly says that "[i]f no building permit is issued or if the governmental body that issued the building permit for the building, structure or improvement does not issue final inspections and written final acceptances," ***as in this case***, "then 'completion' for the purposes of subsection A of this section means ***the last date on which any labor, materials, fixtures or tools were furnished to the property***." A.R.S. § 33-993(D) (emphasis added). Lastly, Markham recorded all of the information required by Section 33-993(A) no later than March 20, 2008 (well within one hundred twenty days after the "completion" date of January 23, 2008).[28] Accordingly, Markham timely recorded its lien pursuant to A.R.S. §§ 33-993(A) and (D).

The Lot Owners, however, wish to take advantage of an earlier "completion" date. To do so, they point to A.R.S. § 33-993(C) and claim that two 60-day gaps in "labor" caused a "completion" of the project long before Markham and others had in fact completed their work.

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[27] App. 21 (Striping invoice); App. 6 at 038 (City of Peoria permit for "Traffic Signing and Striping").

[28] AB:29 n.34.

As a threshold matter, nothing in Section 33-993 permits a party to use Subsection C's definition of "completion" when Subsection D's definition of "completion" applies. Indeed, whereas Subsection C explicitly says that the "earliest" completion date in that Subsection governs, nothing gives Subsection C priority over Subsection D. Accordingly, the Court may quickly dispose of the Lot Owners' timing argument because, as noted above, Markham complied with Sections 33-993(A) and (D). In addition, to the extent Subsection C could apply, the Lot Owners have the burden of proof, and they have ignored the work going on throughout the project (regardless of who carries the burden).

A. Contrary to The Lot Owners' Contention, They Had to Show That All Labor Stopped

The Lot Owners do not dispute that if they bore the burden to demonstrate a "cessation of labor," this Court cannot affirm on the basis of Alleged Defect #3.[29] The parties further agree that a lien claimant generally has the burden "at the time of trial to" allege and prove "the essential requirements of the statute." *Williams v. A.J. Bayless Markets, Inc.*, 13 Ariz. App. 348, 353, 476 P.2d 869, 874 (1970). Contrary to the Lot Owners' contention (at 27), however, Markham satisfied its burden by demonstrating that it recorded its lien within "one hundred twenty days" after "the last date on which any labor, materials, fixtures or tools were furnished

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[29] *See* AB:25-27.

to the property." A.R.S. §§ 33-993(A), (D). This initial burden ***does "not require an affirmative showing on the part of the lien claimant that there was [n]o cessation from labor***." *First Nat'l Bank in Fort Collins v. Sam McClure & Son, Inc.*, 431 P.2d 460, 462 (Colo. 1967) (emphasis added).

The Lot Owners, however, contend that the project suffered from a "cessation of labor" for 60 days which triggered two earlier "completion" dates. The burden, therefore, shifts to them: "[i]f the owner wishes to take advantage of [the] statutory presumption [that a cessation of labor is "completion"] ***in order to be relieved of liability***, the burden is upon him to" present evidence. *Id.* (emphasis added); *accord Wahl v. Sw. Sav. & Loan Ass'n* (*Wahl I*), 12 Ariz. App. 90, 101, 467 P.2d 930, 941 (1970) (applying same rule to claim that there was "completion" because of "abandonment of construction") *vacated in part on other grounds by Wahl v. Sw. Sav. & Loan Ass'n* (*Wahl II*), 106 Ariz. 381, 476 P.2d 836 (1970);** *see also Troutman v. Valley Nat. Bank of Ariz.*, 170 Ariz. 513, 517, 826 P.2d 810, 814 (App. 1992) (stating general rule in Arizona that the burden to prove that statutory exceptions apply falls "on the party asserting that exception"); *Bridgestone/Firestone N. Am. Tire, LLC v. A.P.S. Rent-A-Car & Leasing, Inc.*, 207

** Although *Wahl I* was "vacated in part and reversed in part," the Supreme Court vacated only "[t]hat part of [*Wahl I*] which is inconsistent" with *Wahl II*, which did not affect the relevant issue in this case. *Wahl II*, 106 Ariz. at 386, 476 P.2d at 841.

Ariz. 502, 515 ¶ 53, 88 P.3d 572, 585 (App. 2004) (applying rule and collecting cases).

Although the Lot Owners attempt to limit *First National* to its facts (at 25-26), the differences they point to are irrelevant; *First National* squarely and correctly addressed the burden-of-proof issue raised here in a nearly identical statutory context. The Lot Owners' argument against *Wahl I* (that proof of "abandonment" differs from proof of "cessation") likewise misses the point. Because "abandonment" ***includes*** cessation of labor, the case law about abandonment is highly relevant to cessation-of-labor issues.[30]

Finally, the rule adopted by these cases makes good sense. Contrary to the Lot Owners' contention (at 28), a contractor or subcontractor facing a property owner who is attempting to avoid liability under the "cessation of labor" provision will not necessarily have any "peculiar[] . . . knowledge." Indeed, such a lien dispute with a subcontractor cannot arise in the context of residential dwellings, A.R.S. § 33-1002(B), and therefore will often pit a sophisticated developer-owner against a subcontractor. Because a "cessation of labor" means a cessation of ***all***

[30] AB:26.

labor on a project,[31] in a typical case the developer will likely have far superior knowledge about whether any 60-day cessation actually occurred.

The Lot Owners' position, meanwhile, results in unfairness. For example, a supplier of excavation equipment used only at the beginning of a job would face proving that ***all later laborers*** did not have a work stoppage if a developer merely alleged that such a gap occurred. Indeed, to place such a burden on laborers would invite developers to routinely allege that there had been one or more cessations of labor, unfairly forcing laborers to try and "disprove" the alleged cessation of labor. Such a result offends the remedial goals of the lien statutes. *See Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8 P.2d 256, 258 (1932).

B. Markham Also Raised Questions of Fact Concerning the Alleged Cessations of Labor

Although the burden of proof issue is fatal to the Lot Owners' position concerning Alleged Defect #3, Markham also raised questions of fact concerning whether any such cessation occurred. The Lot Owners' contention to the contrary rests on construing the term "labor" for purposes of "cessation of labor" in a manner that does violence to the lien statutes.

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[31] *See* OB:36.

1. Contrary to the Lot Owners' Contention, the Phrase "Cessation of Labor" Should Be Construed So as Not to Trigger a "Completion" When Work Is Still Ongoing

As explained in the Opening Brief, Arizona courts have previously rejected attempts to narrowly construe the language triggering a "completion" under A.R.S. § 33-993. In *Gene McVety, Inc. v. Don Grady Homes, Inc.*, 119 Ariz. 482, 484, 581 P.2d 1132, 1134 (1978), for example, the Arizona Supreme Court "rejected" the theory that an "actual completion" of the project under A.R.S. § 33-993(B) (1978) could be triggered by a "substantial[]" completion. *Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 271, 678 P.2d 453, 456 (App. 1983) (summarizing *Gene McVety*). ***Any "[w]ork*** actually called for by the contract" and work "done or materials furnished to complete the original contract" will preclude a completion, ***even if the work is relatively minor***. *Gene McVety*, 119 Ariz. at 484, 581 P.2d at 1134 (emphasis added).

Although no Arizona case has construed "cessation of labor" for purposes of determining when a 60-day gap in work triggers the contractor's obligation to record a lien under A.R.S. § 33-993(C), that phrase – "cessation of labor" – should likewise be construed so as not to trigger a "completion" when work is still ongoing. Indeed, under Section 33-993(C)'s plain language, the "labor" that will preclude a "cessation of labor" need only be ***any*** "labor," not "lienable labor." Any labor that could be liened, however, necessarily would also have to preclude a

"cessation of labor." Otherwise, a project could technically become "complete," even while a laborer continues to perform lienable labor (meaning the laborer could be deprived of the benefits of the lien statutes for ongoing work).

Additionally, the term "cessation of labor" plainly applies to ***all*** labor on the project, not merely that of the lien claimant.[32] The statute, after all, speaks in terms of the "completion ***of a[n] . . . improvement***," not, as the Lot Owners assume, completion of the claimant's work. *See* A.R.S. § 33-993(A) (emphasis added). For this reason, although the Lot Owners attempt to dismiss as irrelevant (at 29 n.35) APS's placement of underground power lines in the trenches and conduit provided by Markham, that work counts.[33]

Furthermore, the Lot Owners' contention that under the "majority view" equipment rental costs cannot create lien rights not only gets the standard wrong,[34] but ignores Arizona's rule that the lien statues also protect a "materialman who rents machinery." *Ariz. Gunite Builders, Inc. v. Cont'l Cas. Co.*, 105 Ariz. 99, 101, 459 P.2d 724, 726 (1969) (reasoning that otherwise the statute "would create a preferred class of materialmen, those whose product is consumed"); *see also*

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[32] *See* OB at 35-37.

[33] *See* App. 24 (Markham Deposition) at 12:10-13:18; *see also* App. 19 (Change Order Regarding APS's Conversion Work).

[34] AB:29.

A.R.S. § 33-981(A) (giving lien to one who furnishes "tools"); A.R.S. § 33-983(A) (giving lien to one who "furnishes . . . material").

Lastly, because a lien may be recorded only if the "bills are not paid in full," A.R.S. § 33-992.01(C)(5), it is axiomatic that a "cessation of labor" can trigger an obligation to record a lien ***only*** if there are amounts due and owing for previously performed work. Accordingly, a "cessation of labor" has to be a true cessation of all labor by everyone on the project, and can only trigger an obligation to record a lien when the bills are not paid in full.

2. Substantial Evidence Precludes Summary Judgment on the Basis of the Alleged Cessation Beginning November 16, 2006

In this case, the notion that a jury would be compelled to find that a "completion" of the project occurred due to a work stoppage, thereby obligating Markham to record its lien, makes no sense. The first 60-day stoppage allegedly occurred between November 2006 and January 2007, and is premised entirely on an apparent gap in Markham's employees' timesheets. As the lien reflects, however, ***there were no unpaid monies due and owing at that time.***[35] Accordingly, Markham could not have recorded ***any*** lien for work that occurred

[35] App. 5 at 69-70.

before this alleged "completion." Markham's lien cannot, as a matter of law, be invalid due to the first alleged gap.

Moreover, a jury could find that Markham provided barricade rental and maintenance during this time.[36] The "inspector's daily reports" also reflect Markham's periodic absence from the jobsite while others worked. For instance, one report states that "Markham will not be back until CPC has finish[ed] with ALL the concrete work."[37] Another report stated, "seems . . . that CPC is going slow, they have a lot more to do before Markham can start hauling in AB."[38] From this evidence, the jury could infer that work on the project continued notwithstanding Markham's absence.

Lastly, the record shows that "[b]lue staking began on the project on May 16, 2005, and was updated every two weeks" until Markham's "last blue stake update . . . on January 24, 2008."[39] Although the Lot Owners argue (at 10) that Markham cannot lien for this work – a proposition that this court need not and should not decide in this appeal – the fact that this work was ongoing every two

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[36] App. 22 (Markham Aff.) at 006 ¶ 12 (explaining that barricades were used "periodically throughout the entire project").

[37] CR 120 (Lot Owners' Statement of Facts) at Ex. 12.

[38] *Id.*

[39] App. 10 at 004 ¶¶ 2, 4.

weeks throughout the project necessarily precludes finding, as a matter of law, that a "completion" of the project had occurred earlier.

3. The Rental and Maintenance of Barricades, a Necessary Part of the Project, Precludes Summary Judgment on the Basis of the Alleged Cessation Beginning August 13, 2007

With respect to the second alleged "cessation of labor," the Lot Owners do not dispute that if providing traffic control required by a city pursuant to a permit means there has not been an actual cessation of labor, the alleged second gap never occurred. On this point, it is worth noting that the barricade permits were in Markham's name (as the contractor).[40] The barricades were required so that APS could relocate power lines underground (for which Markham provided the trenching and conduits).[41] Markham asked the City to allow Markham to remove the barricades,[42] and the City ultimately "agreed to amend the[] striping plan from the original striping plan in a manner that would allow [Markham] to remove the barricades from the site."[43] As noted above, this ongoing work continued until January 2008 (along with the blue-staking), and a jury could find it was "a

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[40] App. 24 (Markham Deposition) at 13:17-25.

[41] *Id.* at 18:8-21; App. 19 (Change Order Regarding APS's Conversion Work).

[42] App. 24 at 14:12-18.

[43] *Id.* at 44:18-23.

necessary instrumentality in accomplishing the work." *Kerr-McGee Oil Indus., Inc. v. McCray*, 89 Ariz. 307, 311, 361 P.2d 734, 736 (1961).

The Lot Owners nevertheless argue that rental of barricades cannot qualify as "labor" because the rental itself is not "lienable labor."[44] As noted in Section III(B)(1), however, "lienable labor" is not the correct standard, and expenses for such rental equipment can in fact be liened. Recognizing as much, the Lot Owners alternatively argue that providing and maintaining barricades is not "labor" under Section 33-993 because the barricades were (1) not part of Markham's contract, or (2) were too "trifling" to count.[45] On the first point, the Lot Owners merely note that Markham's initial ***proposal*** excludes "barricades,"[46] but gloss over that (1) the proposal expressly includes "Traffic control"[47] and (2) that the specific change orders ***related to the barricades*** refer to them as "Traffic Control Equipment."[48]

In terms of whether the barricades were "trifling," the Lot Owners emphasize their expense, but that too is not the proper question. *See Wooldridge*

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[44] AB:29-31.

[45] AB:31-33.

[46] AB:32.

[47] App. 1 (Bid Proposal) at 004.

[48] *E.g.,* App. 20 (Change Orders) at 006-07 (showing costs for other traffic-control equipment in addition to barricades).

Constr. Co. v. First Nat'l Bank of Ariz., 130 Ariz. 86, 90-91, 634 P.2d 13, 17-18 (App. 1981) (proper inquiry is whether work "is done or materials furnished to complete the original contract" (citation omitted)). The important point is that the rental ***and*** maintenance of barricades was necessary to allow APS to move power lines, and was necessary to permit the widening of a road.[49] As Mr. Markham explained, the barricades were "required as part of the process of improving the real estate . . . APS needed them. We needed them . . . they are required to do the work."[50]

Markham's provision of barricades also differs from the costs held not lienable in *Kerr-McGee* and *Hulsey v. LaMance*, 73 Ariz. 430, 242 P.2d 554 (1952). In those cases, unlike here, the court refused to grant a lien when the claimed costs were "not part of the completion of the improvement." *Kerr-McGee*, 89 Ariz. at 311-12, 361 P.2d at 736-37 ("stand-by" machinery which "did not contribute to the improvement"); *Hulsey*, 73 Ariz. at 434-35, 242 P.2d at 556-57 (denying lien for costs incurred to pay supervisor for "errands" and other odd-jobs "after drilling operations ceased").

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[49] App. 19 (Change Order Regarding APS Conversion Work); App. 24 (Markham Deposition) at 19:14-17.

[50] *Id.* at 19:14-20.

In the end, the Lot Owners' argument reduces to the untenable position that the contractor providing traffic control pursuant to a permit issued by the City and as required by the contract is "out of luck," regardless of whether the work was done in good faith. *Cf. Wooldridge*, 130 Ariz. at 91, 634 P.2d at 18 ("Neither party has suggested that appellant acted other than in perfect good faith, or that it in any way attempted to postpone the completion of the contract."). The Court should reject that position.

IV. Nothing in Arizona's Remedial Statutes Prohibited Markham from Timely Recording Its Notice of Correction (Alleged Defects #4 and 5)

With the exception of the purported "original" Exhibit A addressed below, the Lot Owners do not dispute that (1) by March 20, 2008, Markham recorded everything required for a proper "notice and claim of lien" under A.R.S. § 33-993(A), and (2) that if a jury could find that "completion" occurred on or after January 23, 2008, then Markham recorded the lien within "one hundred twenty days after completion." A.R.S. § 33-993(A). Instead, they urge the Court (at 34) to embrace what amounts to a trap for laborers – that Arizona's statutes forbid timely recording corrective documents, giving claimants only one shot at perfection.

But nothing in Section 33-993(A) prohibits corrections to fix earlier clerical errors so long as this is done within the specified "one hundred twenty days." *See* A.R.S. § 33-993(A). To manufacture a prohibition, the Lot Owners note that

Section 33-993(A) requires a claimant to "record one copy with the county recorder." But this minimum requirement does not prohibit filing multiple copies. The limiting feature of Section 33-993 is ***time*** (120 days), not the number of documents.

Forbidding corrections also runs contrary to A.R.S. § 33-420(C), the statute under which the Lot Owners were awarded damages. Section 33-420(C) implicitly approves of amendments because that section makes someone liable if "he wilfully refuses to . . . ***correct***" a "document of record." (emphasis added). Such a "correction" is, in effect, precisely what occurred in this case.[51]

Finally, the Court should give no weight to 53 Am. Jr. 2d Mechanics' Liens Section 231 (indicating that material amendments are disfavored and that claim "must be complete and legally sufficient when filed"). As a threshold matter, one of the key cases it cites, *Linch v. Perrine*, supports Markham's position: "***[t]he great weight of authority***" holds that a lien "cannot be amended ***after*** the time for filing a lien has elapsed." 4 P.2d 353, 355 (Idaho 1931) (emphasis added). Presumably for this reason, the treatise even notes that "[t]hese rules are especially applicable ***after the expiration of the time prescribed by statute for the filing of***

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[51] *See* AB App. 8 (February 29, 2008 Letter to Markham) at 1 (notifying Markham that Exhibit A to Preliminary Notice was missing); App. 7 (Notice of Correction) (recorded March 20, 2008 to add omitted Exhibit A).

the claim" – a critical limitation overlooked by the Lot Owners. *See* 53 Am. Jr. 2d Mechanics' Liens Section 231 (emphasis added) (citations omitted).

As for the Lot Owners' contention (at 33) that "Markham admittedly *never* attached the original Exhibit A (legal description) to the preliminary 20-day notice it served," they do not dispute that the Exhibit A contained in the Notice of Correction is an ***exact duplicate*** of the original Exhibit A, and they do not take issue with the other circumstances surrounding Exhibit A explained in the Opening Brief (at 12-13).[52]

In sum, Markham had one-hundred twenty days after completion to record the requisite information by A.R.S. § 33-993(A). Markham did so with the March 20, 2008 Notice of Correction. The trial court erred if it relied on this alleged defect.

V. The Lot Owners Use Improper Methods of Statutory Construction to Contend That a Lis Pendens Is an "Instrument" Needing "Acknowledgment" (Alleged Defect #6)

The Lot Owners contend that because a *lis pendens* is an "instrument" and because Markham's *lis pendens* was not "acknowledged," the *lis pendens* was never "lawfully recorded." But as explained in the Opening Brief, a *lis pendens* is not an "instrument" governed by A.R.S. § 33-411; it is a "notice of pendency of

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[52] *See also* CR 111 (Markham's Motion for Summary Judgment) at 5 n.2 (explaining same).

action . . . recorded pursuant to section 12-1191." A.R.S. § 33-998(A). With respect to a *lis pendens* related to mechanics' liens, A.R.S. § 12-1191(A) has many detailed requirements but not an "acknowledgment" requirement.

With no help from the statute, the Lot Owners cite an online dictionary that says an "instrument" is a "formal legal document."[53] But that overbroad definition would make all kinds of documents – even appellate briefs – subject to acknowledgement (when they plainly are not). Furthermore, even the online dictionary clarifies the definition with examples that undercut the Lot Owners' argument, stating "a formal legal document ***(as a deed, bond, or agreement)***."[54] The dictionary even describes an instrument as a document that ***itself*** affects or transfers rights. A *lis pendens* – a notice of pending action – does not itself affect or transfer property, but rather is a notice that ***something else*** may affect real property.

The Lot Owners' other efforts to pluck Section 33-411(B) out of its statutory context likewise ignore that "[i]ndividual statutory provisions . . . should be considered in the context of the entire statute." *Ariz. Health Care Cost Containment Sys. v. Cochise County*, 186 Ariz. 210, 213, 920 P.2d 776, 779 (App.

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[53] *See* AB:36 n.44.

[54] http://www.merriam-webster.com/dictionary/instrument (last visited July 7, 2010) (emphasis added).

1996). Section 33-411(B) should therefore be read in the context of Section 33-411 as a whole, which concerns "instruments affecting real property," not *lis pendens*. *See* A.R.S. §§ 33-411(A), (C), (D) (concerning different aspects of instruments "affecting real property"). Indeed, Section 33-411 sits within Chapter 4 of Title 33, which governs "conveyances and deeds." A *lis pendens* is neither; Section 33-411 simply does not speak to the *lis pendens* requirement. Accordingly, whether Markham's *lis pendens* was "acknowledged" is irrelevant and is not a valid basis for summary judgment.

VI. The Lot Owners' Concession That Only a Knowing Violation of A.R.S. §§ 33-420(A) and (C) Triggers Liability Requires Reversal of the Section 33-420 Penalties

The Lot Owners do not dispute A.R.S. § 33-420 requires a "knowing violation."[55] The Lot Owners also do not contest that a court may only impose sanctions on Markham for *Markham's* knowledge, not knowledge imputed from Markham's attorney. *See Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991). These implicit concessions warrant a remand. As discussed in the Opening Brief (at 48-54), the Lot Owners proffered no evidence whatsoever that Markham committed a "knowing" violation of A.R.S. § 33-420.

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[55] *See* OB:48-50; AB:38-41.

The arguments they do make also lack merit. ***First***, relying on *Hatch Companies Contracting, Inc. v. Arizona Bank*, 170 Ariz. 553, 826 P.2d 1179 (App. 1991), the Lot Owners contend that Markham should have known that the "'barricade theory' was unreasonable as a matter of law."[56] But *Hatch* turned on "undisputed" facts and involved settled law; i.e., "no reasonable interpretation" supported the *lis pendens* in that case. 170 Ariz. at 555, 558-59, 826 P.2d at 1181, 1184-85. In this case, by contrast, the facts are disputed and Markham has the ***better*** – and certainly reasonable – interpretation of the pertinent statutes. *Cf. Old Adobe Office Props., Ltd. v. Gin*, 151 Ariz. 248, 253, 727 P.2d 26, 31 (App. 1986) (although court held that lien was improperly preserved because claimant did not comply with statute, "summary judgment [was] inappropriate" because there was "a disputed issue . . . as to whether [the claimant] knew or had reason to know that its claim of lien was invalid").

Second, the Lot Owners argue that Markham had "reason to know" that it did not properly serve the Preliminary Notice pursuant to A.R.S. § 33-992.01.[57] But this argument too rehashes their flawed argument on the merits concerning Alleged Defect #2. The Lot Owners even rely on *Guarriello v. Sunstate*

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[56] AB:38-39.

[57] AB:39-40.

Equipment Corporation, Inc., 187 Ariz. 596, 931 P.2d 1106 (App. 1996), yet make no effort to refute Markham's discussion of that case demonstrating that it involved statutory protections that do not apply in this case, i.e., the protections afforded owner-occupants.[58]

Third, the Lot Owners contend that Markham "knew" for purposes of A.R.S. § 33-420(C) that its lien was invalid because the Lot Owners sent letters that "specified why Markham's lien was invalid."[59] This repeats another false assumption underlying the Lot Owners' position: that a good faith dispute over a lien (if put in a letter threatening penalties as is common in large projects), can subject a contractor acting in good faith to Section 33-420 penalties. In this case Markham even acted on the Lot Owners' correspondence, and "correct[ed]" the recorded document with respect to the February 29th letter's valid points.[60] The requisite scienter cannot be inferred as a matter of law from these letters.

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[58] *See* OB:53-54.

[59] AB:40-41.

[60] AB App. 8 (February 29, 2008 Letter to Markham) at 1 (notifying Markham that Exhibit A to Preliminary Notice was missing); App. 7 (Notice of Correction) (recorded March 20, 2008 to add omitted Exhibit A).

VII. The Trial Court Used the Wrong Damages Calculation

With respect to the proper calculation of any penalty, Markham recognizes this issue was not raised below. Nevertheless, on remand the Court should clarify the proper method of calculation.

A. The Proper Method for Calculation of Sanctions Under A.R.S. § 33-420 Is a Purely Legal Issue the Court Should Address

Although "arguments raised for the first time on appeal" are generally waived, that rule "is merely one of procedure, not jurisdiction." *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535 ¶ 18, 169 P.3d 120, 125 (App. 2007) (internal quotation marks and citation omitted). Furthermore, "when interpretation and application of statutes are involved, [the Court is] not necessarily limited to the arguments made by the parties." *Id.* at 535 ¶ 18, 169 P.3d at 125 (internal quotation marks and citation omitted). In this case, the Court should correctly construe Section 33-420.

B. The Lot Owners' Policy Arguments Do Not Change That Section 33-420's Plain Language Imposes Specific Penalties for Specific Acts; Any Greater Penalty Requires Proof of Actual Damages

On the merits, the Lot Owners urge the Court to sustain their windfall by arguing that the Legislature did not expressly prohibit and must have wanted to

allow (without saying so) the stacking of penalties.[61] As support, the Lot Owners refer only (at 42) to Section 33-420's use of the term "real property." They argue that because "lot" means "real property," a violation of the statute can result in liability for slander of title of multiple pieces of "real property." But Section 33-420 does not provide for sanctions per "real property" any more than it allows sanctions per investor, per lot, or per occupant.

The language ***does***, however, impose specific sanctions for specific acts. Under Subsection (A), "[a] person . . . who causes a document . . . to be recorded . . . is liable . . . for" the greater of "five thousand dollars, or for treble the actual damages caused by the recording." Under Subsection (C) , "a person . . . shall be liable" for the greater of "one thousand dollars, or for treble actual damages . . . if he wilfully refuses to release or correct such document." If the trial court's calculation stands, then the language in Section 33-420 constraining liability to particular acts would be superfluous. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 8, 152 P.3d 490, 493 (2007) (each part of a statute "must be given meaning so that no part will be void, inert, redundant, or trivial" (internal quotation marks and citation omitted)).

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[61] *See, e.g.*, AB:44.

The Lot Owners' argument that applying the correct statutory penalty would encourage contractors like Markham to "record[] a blanket lien on every lot in [a] subdivision" even when not warranted also makes no sense for at least two reasons.[62] First, such second-guessing of the Legislature has no place. Second, the $5,000 per document and $1,000 per "refus[al] to release" sanctions apply only in the absence of greater actual damages. A.R.S. § 33-420. When damages exist, the statutory scheme is harsh, imposing a ***treble*** penalty. *See Wyatt*, 167 Ariz. at 285, 806 P.2d at 874 (comparing treble damages to "punitive damages").[63]

The Legislature also calibrated the penalties in A.R.S. § 33-420 to efficiently deter groundless recordings, but not discourage laborers with lien claims from protecting their interests. *Cf. United Metro Materials, Inc. v. Pena Blanca Props., LLC*, 197 Ariz. 479, 484, 4 P.3d 1022, 1027 (App. 2000) (Arizona law provides laborers "with a lien . . . as well as giving them the ability to enforce these rights and pursue remedies"). On remand, this Court should therefore instruct the court how to calculate damages in accordance with the statute.

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[62] AB:44.

[63] If two lots' owners brought separate actions, those actions would likely be joined. *See* Ariz. R. Civ. P. 19 (governing when a nonparty must be joined).

CONCLUSION

The Court should grant the relief requested in the Opening Brief.

RESPECTFULLY SUBMITTED this 12th day of July, 2010.

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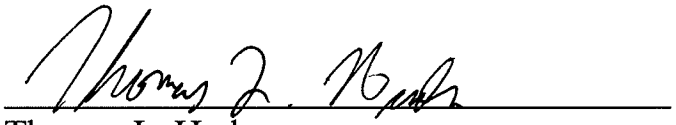
CERTIFICATE OF COMPLIANCE

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 6,985 words.

Dated this 12th day of July, 2010.



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CERTIFICATE OF SERVICE

The undersigned has filed and served Appellant's Reply Brief this 12th day of July, 2010, as follows:

Original plus six (6) copies of Appellant's Reply Brief filed with:

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

Two copies of Appellant's Reply Brief mailed to:

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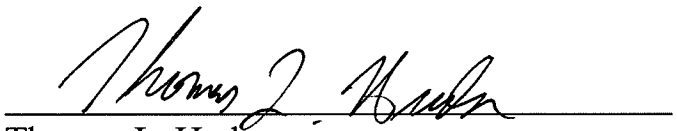

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