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SUPREME COURT OF ARIZONA

SETH FAGERLIE, Plaintiff/Appellee, v. MARKHAM CONTRACTING CO., INC., an Arizona corporation, Defendant/Appellant.	Supreme Court No. CV-11-0195-PR Court of Appeals Division One No. 1 CA-CV 10-0051 Maricopa County Superior Court No. CV2008-007731
MARKHAM CONTRACTING CO., INC., an Arizona corporation, Third-Party Plaintiff/ Counter-Defendant Appellant, v. AMOL RAKKER, Trustee of the Rakker Family Trust dated August 4, 2004; et al. Third Party Defendants/ Counter-Claimants/Appellees,	

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

On its face, the Petition does not attempt to demonstrate any of the reasons that justify review under Rule 23. Indeed, the Lot Owners largely *agree* with the Court of Appeals' recitation of legal principles, and then quarrel with the application of settled law to the unique facts of this case that arose because of anomalous events facing Arizona's real estate market that have now passed, i.e., the willingness of speculators to close escrow on "improved" lots while they were still raw dirt without ensuring that the contractor doing the development work got paid.

Beyond arguing case-specific error correction, the Lot Owners ask the Court to adopt new self-serving rules that would send shockwaves through the construction industry and contravene this Court's long-standing policy to construe Arizona's mechanics' lien statutes to protect laborers. *See, e.g., Leeson v. Bartol*, 55 Ariz. 160, 168, 99 P.2d 485, 489 (1940). The Court of Appeals (J. Irvine, J. Winthrop, and J. Norris) correctly applied the existing statutes and settled law to the unusual facts of this case. The Court should deny review.

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PERTINENT FACTS

Because this case involves an appeal from the Lot Owners' motion for summary judgment, the facts should be viewed in Markham's favor. The Court of Appeals' Opinion ("**Op.**") (¶¶ 2-10) and Markham's Opening Brief ("**O.B.**") (3-16) set forth the facts in accordance with this standard. The key facts are summarized below and in the attached chronology.

I. In 2005, EHV Hired Markham to Help Develop Raw Land Into Site Improved Lots

In 2005, a developer, Estates at Happy Valley, LLC ("**EHV**"), hired Markham to improve its vacant land in Peoria, Arizona.[1] EHV had purchased and subdivided the land into twenty-eight lots (the "**Property**"), and planned to sell "site improved" lots.[2] As the "subdivider," EHV was legally obligated to improve the raw land by installing roads, utilities, and other infrastructure.[3] It hired Markham to do much of this work.[4]

Unbeknownst to Markham, however, EHV immediately began selling the "site-improved" lots. Although typically a purchaser would not close escrow on a "developed" lot before the improvements were completed, in the speculative 2005

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[1] Op. ¶¶ 2-3.

[2] Op. ¶ 2; Separate Appendix to Response to Petition for Review ("**App.**") 2; App. 14 at 003.

[3] App. 7.

[4] App. 1.

Arizona market investors (and lenders) were willing to fully pay for lots with the "improvements" unseen and incomplete. By the end of July 2005, EHV had managed to close on twenty-five lots without paying Markham.[5]

II. In June 2005, Markham Delivered the Preliminary Notice to EHV and Continued Its Work Until January 2008

Meanwhile, on June 20, Markham undertook the initial step required to secure its lien rights by delivering a "preliminary twenty day notice" (the "**Preliminary Notice**") to EHV, the owner/subdivider who had hired it.[6] At that time, Markham had no reason to question whether EHV actually owned the development. After all, its lien attorney had actually visited the recorder's office to confirm ownership before serving the Preliminary Notice.[7] Moreover, EHV was obligated to inform Markham of any sales under A.R.S. § 33-992.01(I). As it turns out, however, EHV had secretly begun unloading the lots.

As the project continued, the scope of Markham's work expanded. For example, although the initial contract did not include the costs for barricades, it was *modified* to include "Traffic Control Equipment" including barricades and

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[5] Op. ¶ 3; O.B. at 6-7; *see also* Lot Sale and Key Event Chronology attached hereto.

[6] Op. ¶ 3; Lot Sale and Key Event Chronology.

[7] Op. ¶ 22; App. 16. (The Lot Owners made the "reasonable inquiry" argument in their reply, leaving Markham's counsel to explain her efforts at the summary judgment hearing, which she could do since her office handled the notice.)

striping.[8] This work (considered "trifling" by the Lot Owners) was needed to manage traffic so that Markham could widen a road and APS could move power lines.[9] One of Markham's subcontractors provided and maintained barricades and traffic control services for several months.[10]

Meanwhile, EHV stopped paying, leaving Markham with more than $500,000 in unpaid invoices.[11] In January 2008, after some negotiations, the City of Peoria allowed Markham to remove its barricades after it finished striping the roads.[12]

III. Markham's Lien, the Subsequent Litigation, and Summary Judgment Ruling Below

Having not been paid for its work, Markham looked to its lien rights. The Lot Owners then sued Markham, requested sanctions under A.R.S. § 33-420, and moved for summary judgment contending that six defects invalidated the lien. With no analysis, the superior court granted the motion and assessed Markham $255,000 in penalties.[13] The Court of Appeals reversed and remanded for resolution of various fact issues.

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[8] Compare App. 1 at 005 with App. 9 at 006-07; Op. ¶ 39.

[9] Op. ¶ 38; App. 12 at 18:22-19:5; 19:14-20.

[10] Op. ¶ 38; App. 9.

[11] Op. ¶ 4.

[12] Op. ¶ 39; App. 12 at 13:22-14:18 and 44:18-23.

[13] Op. ¶¶ 9-10.

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REASONS THE COURT SHOULD DENY REVIEW

This case presents none of the hallmarks of a case warranting review. *See* ARCAP 23(c)(3). Stripped of their rhetoric, the Lot Owners largely ***agree*** with the legal standards set forth by the Court of Appeals and merely disagree with the application of that law to the particular facts of this case. (*Compare* Pet. at 6 with Op. ¶ 21 (reciting the same legal standards applicable to the first issue); Pet. at 10-12 with Op. ¶¶ 17-19 (same second issue). Their factual disagreements, however, reverse the applicable standard of review by, for example, asking the Court to disregard deposition testimony favorable to Markham.[14]

Where the Lot Owners go beyond case-specific factual issues, they ask the Court to create categorical rules that (1) find no basis in the lien statutes, (2) would completely change the manner in which liens are currently perfected, (3) eliminate the lien rights of small laborers, and (4) inject confusion into a statutory system that currently works well. For these and other reasons discussed below, the Court should not entertain the Lot Owners' request to dramatically re-write the lien statutes – particularly in the context of this factually unique case and its limited summary judgment record.

[14] Pet. at 13.

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I. The Lot Owners' Proposed Rule That a Contractor Must Pay for a Title Report at the Preliminary Notice Stage Makes No Sense (Issue 1/Alleged Defect #2)

With respect to the first issue (Alleged Defect #2), the Lot Owners endorse the same legal standards set forth by the Court of Appeals: that (1) a potential lien claimant must "serve the owner *or reputed owner*" a preliminary notice, A.R.S. § 33-992.01(B) (emphasis added); (2) service on a "reputed owner" is sufficient "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 (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 a thing." *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 431, 561 P.2d 750, 755 (App. 1977). (*See* Op. ¶ 21; Pet. at 6.)

Although the Lot Owners disagree with the Court of Appeals' application of those principles, they ignore that the preliminary notice must be served quickly (within twenty days), and that Markham's inquiry into ownership was more than reasonable given the context of this case:

- EHV owned all lots when Markham negotiated with EHV for the site-improvement work beginning in April 2005.[15]
- The land was vacant and unimproved, giving no visual clues that lots had been sold.

[15] *See* App. 1 at 003.

- There were no addresses or assessor-assigned parcel numbers that could be checked for ownership changes.[16]
- 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."[17]
- EHV did not respond to the Preliminary Notice, thereby confirming its accuracy.[18]
- The public report confirmed that EHV owned the property.

In this context, Markham reasonably believed that it was developing lots *to be* sold, not that the unimproved lots had already been sold.

The Lot Owners' reasons for suggesting otherwise find no support in the record. Although there were allegedly signs that said "for sale," no reasonable contractor would anticipate that purchasers would actually close escrow on "site improved" lots while they were still unimproved, raw land – let alone that sales would close without any notice or payment to the contractor from the escrow company. The alleged signs, after all, said "for sale," suggesting *future* sales, not "sold."

Moreover, although the Lot Owners repeatedly emphasize that the plat was seven months' old, it was the most recent information available from the recorder's

[16] *See* App. 16 at 047; *see also* App. 2 at 001 (no addresses listed). This is unsurprising: part of Markham's job was to build the subdivision's roads. *See* App. 1 at 003 (estimating costs for "Earthwork," "Paving," and "Concrete").

[17] App. 16 at 047 ln. 18-19.

[18] *See* App. 11 at 006 ¶ 10 (no owner or interested party responded to the Preliminary Notice).

office, and in this context Markham had every reason to believe it represented the current state of affairs. The Court of Appeals therefore correctly found that, under the circumstances of this case, Markham's inquiry was reasonable and its service on EHV as the "owner or reputed owner" was proper.[19]

The Lot Owners' contention that Markham should have done more is likewise disconnected from reality and unsupported by the record. In particular, they first contend (at 7) that Markham should have searched the "recorder's web site." Markham's lien attorney, however, actually went to the recorder's office, and could only obtain the Final Plat recording from that office (which listed EHV as the owner).[20] More fundamentally, the Lot Owners never made their online search argument in the trial court when it could have actually been determined what was available at that time. Indeed, in their motion for summary judgment they made none of the arguments they now make on this issue.[21] Given that six years have now passed – and the information available online has improved dramatically – it is disingenuous for the Lot Owners to now claim that various searches could have been done when there is nothing on that issue in the record. The fact is, however, without the addresses or individual parcel numbers assigned

[19] Op. ¶¶ 22-23.

[20] App. 16 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.)

[21] App. 13 at 7.

to the particular lots – neither of which was available in June 2005 – Markham could not have done more when it served the Preliminary Notice. Indeed, even today the Recorder's website warns that a properly recorded document will not be indexed and searchable for "10 to 15 *working* days" when a contractor has a mere 20 *calendar* days to serve the Notice.[22]

The Lot Owners also ask the Court (at 7) to write into Section 33-992.01(B) a provision that requires contractors to obtain a "current" title report to identify the record owner before serving the preliminary notice. However, the law has never imposed that burden at the *preliminary* notice stage, and had the Legislature wanted to include that requirement it could have easily done so. Instead, the Legislature drafted this very specific statute to give laborers flexibility, requiring notice to the "owner *or reputed owner*, the original contractor *or reputed contractor*, the construction lender . . . *or reputed construction lender*." A.R.S. § 33-992.01(B) (emphasis added).

A title-check requirement is also unworkable. The preliminary notice must be served no later than twenty days after work commences. A.R.S. § 33-992.01(C). Presumably, therefore, a laborer would need to order a title report when work begins, and hope that sufficient time remains after receiving the report to complete and serve the notices. And, if lenders and speculators are willing to

[22] *See* http://recorder.maricopa.gov/web/faqs.aspx (last visited Aug. 29, 2011) (emphasis added).

close escrow on "site improved" lots before they are actually developed, a title report may be of little help because a laborer could not know if sales closed after receiving a title report. In this case, for example, EHV sold six lots days before delivery of the Preliminary Notice.

The Lot Owners' title report requirement also ignores that the lien laws apply equally to all laborers regardless of the job size. *See* A.R.S. § 33-981(A) (giving lien rights to "*every person* who labors") (emphasis added). For smaller jobs, the cost of a title report may exceed the cost of the job, or wipe out any profit. Imposing such a requirement would, therefore, effectively wipe out the lien rights of those performing smaller jobs. Alternatively, if laborers were somehow able to pass along this new cost, it would significantly increase the initial cost of projects involving many laborers. There is no reason to believe the Legislature intended that result.

If the Lot Owners really think a title-report requirement makes sense at the preliminary notice stage, they should pitch that to the Legislature where the impact of such a change to the construction industry could be better explored. This Court, however, should decline the Lot Owners' invitation to so dramatically tinker with this statutorily based system. *Cf. Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8 P.2d 256, 258 (1932) ("laborers and materialmen, who contribute of their labor

and means to enhance the value of the property of another, should be jealously protected.").

The Lot Owners additionally ask the Court to review the Court of Appeals *alternative* holding under A.R.S. §§ 33-992.01(I) and (J). Their argument, however, runs contrary to the statute's plain language that failure of an "*interested party* to furnish the information . . . *does stop the owner* . . . ." A.R.S. § 33-992.01(J) (emphasis added). Moreover, Markham did in fact "timely giv[e] a preliminary notice," and the Lot Owners do complain about the "[]accuracy of the [notice's] information" by contending that it inaccurately identified the owner.[23] More fundamentally, the Lot Owners cannot legitimately quarrel with the Court of Appeals' key point: "it was reasonable for Markham to rely on EHV to respond to its Preliminary Notice with the names and addresses of the lot owners" under the "circumstances" of this case.[24] And, because the "alternative" holding in no way affects the outcome of this case, reviewing it makes no sense.

II. The Opinion Correctly Held That EHV, as the "Subdivider," Was the Lot Owners' Agent (Issue 2/Defect #1)

A lien is available to laborers who work "at the instance of the owner . . . or his agent." A.R.S. § 33-981(A); A.R.S. § 33-983(A). When the work involves "a lot in an incorporated city or town," as here, the statute defines "agent" to include,

[23] Pet. at 8-9.

[24] Op. ¶ 25.

among other entities, the "*subdivider*." A.R.S. §§ 33-983(A) and (B) (emphasis added). There is no dispute that EHV was the "subdivider." Thus, as the Court of Appeals concluded, "[u]nder the plain terms of these statutes, EHV was the agent of the lot owners for purposes of the lien statutes."[25] The Lot Owners simply ignore Section 33-983(B), which is decisive, as well as the Opinion's discussion of this statute.

Moreover, their argument that the developer actually had no contractual obligation to improve the "site improved" lots is nonsensical. They admit that they purchased (and contracted for) "site-improved lots," which thereby obligated EHV to complete the improvements.[26] *See* A.R.S. § 32-2183(F) (making it "unlawful for a subdivider to sell any lot . . . unless" all promised "improvements are completed" or the "completion of all . . . improvements is assured"); *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 484 ¶ 34, 217 P.3d 424, 434 (App. 2009) ("[A]ll contracts incorporate applicable statutes and common-law principles.").

III. The Opinion Correctly Applied the Law Governing the Date of Completion and There Is No Cause for a New Rule Excluding "Trifling" Work from "Labor" (Issue 3/Defect #3)

With respect to the third issue, Section 33-993(A) requires laborers to record their mechanics liens "within one hundred twenty days after completion" of the

[25] Op. ¶ 15.

[26] App. 14 at 3.

project (or within sixty days after a notice of completion has been recorded), A.R.S. § 33-993(A), which may in certain circumstances include a "[c]essation of labor for a period of sixty consecutive days . . . ," A.R.S. § 33-993(C)(2). Arizona law has long recognized that any "[w]ork actually called for by the contract" extends the date of "completion" under Section 33-993. *Gene McVety, Inc. v. Don Grady Homes, Inc.*, 119 Ariz. 482, 484, 581 P.2d 1132, 1134 (1978). Applying these standards, the Court of Appeals properly remanded to resolve when in fact the project was "complete" under A.R.S. § 33-993(C). *See* Op. ¶¶ 26-40.[27]

Although the Lot Owners contend that the Court of Appeals overlooked two "gaps" in work, that argument rests on (1) improperly construing the facts against Markham, (2) ignoring that the contract, as modified, included barricade work,[28] and (3) ignoring that "[t]he ultimate question is not when Markham completed its work, but when the 'improvement' was completed." (Op. ¶ 30; *see also* Op. ¶¶ 38-40 (debunking much of what the Lot Owners complain about).)

That then leads the Lot Owners to urge this Court to adopt a new rule that work, *even if called for by the contract an lienable*, cannot qualify as "labor" under A.R.S. § 33-993(C) if it is "trifling" (whatever that means). Under a former version of the statute, however, this Court has already declined to interpret "actual

[27] *See also* O.B. at 35-43; Reply at 15-23.

[28] *E.g.*, App. 9 at 006-07 (showing costs for other traffic-control equipment in addition to barricades).

completion" to mean "substantial completion" because doing so required a "linguistic transmutation" and "departure from the legislative language." *Gene McVety*, 119 Ariz. at 484, 581 P.2d at 1134 (interpreting A.R.S. § 33-993(B) (1978)). To construe a "cessation of labor" to mean a cessation of "almost all" labor likewise involves a "linguistic transmutation" of the kind this Court has already rejected. *Id.*[*]

The Lot Owners' proposal also ignores the reality that because construction projects involve all kinds of laborers and suppliers the statute protects "*every person*" who labors, regardless of the job size. A.R.S. § 33-981(A) (emphasis added). By excluding smaller work – like the provision of barricades necessary for road-widening – the Lot Owners' rule would deprive smaller laborers of their full lien rights. Whatever "labor" means under Section 33-993, it cannot be interpreted to preclude a laborer from the protection of the lien statutes simply because the work is minor. *See Columbia Grp., Inc. v. Jackson*, 151 Ariz. 76, 79, 725 P .2d 1110, 1113 (1986) (this Court has "repeatedly held that the mechanics' and

[*] Quoting court of appeals dicta, the Lot Owners contend (at 15) that *Gene McVety* "perhaps suggested, that some work . . . might be so 'trifling' as to not justify postponing the time limitations for filing liens." *See Wooldridge Constr. Co. v. First Nat'l Bank of Ariz.*, 130 Ariz. 86, 91, 634 P.2d 13, 18 (App. 1981). But, as *Wooldridge* recognized, the "crux of *McVety*" was its holding that "actual completion" meant that "[i]f work is done or materials furnished to complete the original contract, the time for filing the lien runs from the last furnishing of labor and materials." *See id.* at 90, 634 P.2d at 17 (quoting *Gene McVety, Inc. v. Don Grady Homes Ind.*, 119 Ariz. 482, 484, 581 P.2d 1132, 1134 (1978)).

materialmen's lien statutes are remedial and are to be liberally construed in favor of materialmen.").

Lastly, the Lot Owners' speculation that laborers might start abusing the current rules ignores that a factfinder could easily conclude that "sham" work done merely to extend timelines does not qualify as work "called for by the contract." *Gene McVety*, 119 Ariz. at 484, 581 P.2d at 1134. There is also no such evidence of any "sham" in this case. The Lot Owners' proposal, therefore, solves a non-existent problem. And, if there were a problem, developing a solution would be better left to the Legislature.

IV. There Is No Reason to Review the Section 33-420 Sanctions

The Lot Owners lastly argue (at 17-18) that Markham should be sanctioned under A.R.S. §§ 33-420 (A) and (C) if it turns out Markham is wrong about the validity of the lien. But the damages available under Section 33-420 "are punitive in nature," and thus the statute "requires a ***knowing violation*** before its sanctions will be imposed." *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) (emphasis added). The Lot Owners' proposed strict liability or "prevailing party" standard runs contrary to the statute and *Wyatt*.

REQUEST FOR FEES

Markham requests attorneys' fees and costs under A.R.S. §§ 33-998(B), 33-420, and 12-341.

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CONCLUSION

The Court should deny review.

Respectfully submitted this 31st day of August, 2011.

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APPENDIX

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

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		