SUPREME COURT OF ARIZONA

MARKHAM CONTRACTING CO., INC., Plaintiff/Appellant, v. CAHAVA SPRINGS PHASE I, INC., et al., Defendants/Appellees.	Arizona Supreme Court No. CV-25-0036-PR Court of Appeals Division One No. 1 CA-CV 22-0746 Maricopa County Superior Court No. CV2021-054458

PLAINTIFF/APPELLANT MARKHAM CONTRACTING CO., INC.'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This Court should deny review of the unpublished decision. The Decision applies well-established unjust-enrichment principles to unique case-specific facts unlikely to recur: property owners who created a revitalization district, controlled it through a single individual, arranged infrastructure work benefiting their properties, expressly agreed to pay assessments funding that work, and then dodged their payment obligations—stiffing the contractor while accepting the benefits.

In ruling that the complaint passed the "low bar" required to state a claim, the Court of Appeals applied settled law allowing contractors to recover for unpaid work in similar circumstances.

As for *Wang*, the Court of Appeals simply clarified the limited scope of its own prior decision in *Wang*, correctly explaining that *Wang*'s "improper conduct" requirement applies only in the tenant-improvement context. This understanding aligns with *Wang*'s holding, the Court of Appeals' prior articulation of *Wang*'s scope, the Restatement, and many other sources. Clarification of that court's decision does not warrant review.

BACKGROUND

I. Defendants arranged for infrastructure improvements paid for via assessments, but then refused to levy the assessments and refused to pay.

Defendants own the property in the Cahava Springs Revitalization District, a tax-levying special improvement district under A.R.S. §§ 48-6801 *et seq.* designed to allow landowners to finance and develop infrastructure improvements. Although Defendants are purportedly four separate entities, they lack independence from each other and from the District. One person—Mark Stapp—serves as President/Director for each Defendant, and as chair of the District. Decision ¶2; *see also* COA Opening Br. at 9-13.

Defendants (i.e., Stapp) formed the District, and then entered into a Development Agreement with the District for infrastructure work (e.g., water lines, roads) that would benefit their properties. Stapp signed the Development Agreement on behalf of each Defendant. Two weeks later Stapp signed the construction contract with Markham on behalf of the District:

Signature on behalf of Defendants	Signature on behalf of District
CAHAVA SPRINGS DEVELOPMENT CORPORATION, a Nevada corporation By: ______________________ Mark Stapp, Its President MORNINGSTAR ROAD PROPERTIES, INC., a Nevada corporation By: ______________________ Mark Stapp, Its President CAHAVA SPRINGS PHASE 1, INC., a Nevada corporation By: ______________________ Mark Stapp, Its President APP0244.	______________________ OWNER By: MARK STAPP Its: VICE CHAIRMAN APP0393.

Defendants expressly agreed that the District would enter construction contracts, funded by bonds secured by assessments on their properties, as A.R.S. § 48-6812 allows. APP0230, § 2.2(a), (c). The District raised $21 million for bonds for the work, and expressly agreed to collect assessments on the properties to repay the bonds. Decision ¶3; APP0331, § 9.2(a); *see also* COA Opening Br. at 13-16.

The District (via Stapp) contracted with Plaintiff/Appellant Markham Contracting Co., Inc., to do the work. Markham substantially completed the work but the District refused to pay. Markham and the District arbitrated their dispute, with Markham obtaining a $6.5 million judgment. This should have been easy to collect because the District had statutory power to levy assessments on Defendants' property (A.R.S. § 48-6815). But the District defaulted on its bonds and never took any steps to collect any assessments, so it never paid the judgment. Decision ¶4; *see also* COA Opening Br. at 16-18.

Defendants' (i.e., Stapp's) complete control over the District enabled him to abuse the revitalization district for Defendants' benefit. Despite forming the District, arranging for the work, and agreeing to levy assessments, Defendants/Stapp refused to impose assessments *on their own property* after exploiting the District's taxing and assessment authority to secure improvements to their land. Defendants have offered no legitimate justification for this arrangement.

II. The superior court dismissed, but the Court of Appeals reversed, clarifying the scope of its own prior opinion.

Markham sued Defendants for unjust enrichment. Defendants moved to dismiss for failure to state a claim. While the motion was pending, Markham moved to amend its complaint. APP0215. The superior court dismissed Markham's claims and denied the motion to amend. Rather than apply the longstanding law governing unjust enrichment claims, it thought a special rule requiring "improper conduct" applied, even though the court of appeals had explained[1] that this special rule from *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314 (App. 2012) is limited to the tenant-improvement context. Decision ¶5; APP0019-20.

Markham appealed. In an unpublished decision, the Court of Appeals reversed. It extensively discussed its own prior decision in *Wang*, reiterating (again) that *Wang* is "limit[ed] to the tenant-improvement context," and that where the unique considerations of the tenant-improvement context "are not at play, *Wang Electric*'s holding does not apply." Decision ¶¶9-10.

The Decision emphasized that *Wang* "left intact the general rule that landowners who engage contractors to improve their land but make no payment to anyone may be liable in unjust enrichment for unpaid work." *Id.* ¶11. The Decision further cited Restatement (Third) of Restitution and Unjust Enrichment ("Third Restatement") § 25. Decision ¶11.

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[1] *Beauchamp Law Office PC v. Gust Rosenfeld PLC*, 2018 WL 1868033, ¶18 (Ariz. App. Apr. 19, 2018).

The Decision underscored that the equitable doctrine of unjust enrichment is "a flexible, equitable remedy," and depends "upon the circumstances of the case." *Id.* ¶8 (quoting *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 53 (1985)). Relying on unusual case-specific facts, the Decision held that "Markham's proposed second amended complaint sufficiently stated a claim for unjust enrichment," and that "[t]he superior court erred by applying *Wang Electric*'s specialized tenant-improvement rule here." Decision ¶¶12-13. The Decision emphasized that Defendants "knowingly used a related agent to incur expenses that benefited their properties, while never paying any assessments to fund those improvements." Decision ¶12.

ISSUE

1. Did the Court of Appeals err in holding that Markham's second amended complaint stated a claim for unjust enrichment in light of the unique case-specific facts presented here?

REASONS TO DENY THE PETITION

I. The Court should deny review of this unpublished Decision because this fact-bound issue is unlikely to recur.

This Court has repeatedly emphasized that "the remedy of restitution is not confined to any particular circumstance or set of facts." *Murdock-*

Bryant Constr., Inc. v. Pearson, 146 Ariz. 48, 53 (1985). Rather, it is "a flexible, equitable remedy available whenever the court finds that the defendant, *upon the circumstances of the case*, is obliged by the ties of natural justice and equity to make compensation for benefits received." *Id.* (citation omitted; emphasis added). It has an "inherent flexibility." Third Restatement § 1 cmt. a.

Because unjust enrichment is an equitable remedy, its application depends heavily on the specific facts of each case. Here, the Decision is unmistakably fact-specific and addresses a unique set of circumstances unlikely to recur. The Decision expressly recognized (¶12) that this case involved the unusual situation where "the defendants and the District were controlled by the same individual" (Mark Stapp). It highlighted (¶12) that the defendants "knowingly used a related agent to incur expenses that benefited their properties, while never paying any assessments to fund those improvements." This unusual level of control and interconnection between the property owners and the District makes this case unique and unlikely to recur.

The Decision underscored (¶12) that the defendants "set up a non-independent revitalization district to manage their properties' development, arranged to fund self-beneficial infrastructure work via assessments, and then failed to follow through to ensure that assessments were made and collected to pay for the work." This exceptional circumstance is unlikely to arise again.

Moreover, the Decision did not rule that Markham can ultimately recover. It merely held (¶12) that Markham's complaint can "survive Rule 12(b)(6)'s low bar." The Decision simply means that Markham's claims can proceed past the pleading stage.

Contrary to the Petition's contention, therefore, the Decision will not have "statewide policy impacts." The Decision expressly linked its holding to its extraordinary facts, emphasizing the flexible and equitable nature of unjust enrichment. Decision ¶¶8, 12. This unpublished decision is therefore unlikely to apply beyond this case, and lacks statewide importance.

II. The Court should deny review because, contrary to the petition, the Decision does not conflict with *Wang*.

A. Courts have repeatedly limited *Wang* to the tenant-improvement context.

Defendants argue that this Court should grant review because the Decision conflicts with *Wang*. There is no conflict. The Court of Appeals merely confirmed, as it had before, the limited scope of its own prior decision in *Wang*. The Court of Appeals delineating the scope of its own decision does not warrant review.

Here, courts have repeatedly confirmed that *Wang*'s "improper conduct" requirement applies only to the tenant-improvement context. The Decision (¶¶8-12) extensively discussed and distinguished *Wang*, confirming that it does not apply and that there is no conflict.

On its own terms, *Wang* addressed a narrow issue: "the viability of an unjust enrichment claim against an owner for improvements made *by its tenant*." *Wang*, 230 Ariz. 319, ¶12 (emphasis added). In this unique and recurring context, *Wang* held that "a contractor *hired by a tenant* to make improvements to leasehold premises, or subcontractors retained by that contractor, can recover unpaid monies for making tenant improvements from the property owner only when that owner has engaged in improper conduct." *Id.* at 320, ¶17 (emphasis added). *Wang* therefore added an additional requirement (improper conduct) not required in other unjust enrichment cases.

The Court of Appeals previously confirmed that *Wang*'s improper-conduct requirement is limited to the tenant-improvement context. In *Beauchamp*, it *rejected* the argument ("This is incorrect") that *Wang* "added an 'improper conduct' element to all analyses of unjust enrichment, and held that "improper conduct does not apply" outside of *Wang*'s limited context. *Beauchamp*, 2018 WL 1868033, ¶18.

The Decision again confirmed the court's understanding of the scope of its own prior opinion, referencing *Wang*'s "limited context" (¶10), and explaining that *Wang* "found the situation of tenant improvements distinguishable" (¶9). The Decision therefore distinguished *Wang* on this basis, explaining that "defendants were not third-party landlords" (¶12), so "*Wang Electric*'s specialized tenant-improvement rule" doesn't apply (¶12).

At bottom, the Court of Appeals is the best situated to articulate the scope of its own decisions and it has now held twice that *Wang* applies only to tenant-improvement cases. This Court does not need to review this issue.

Moreover, as Markham explained below, *Wang* borrowed the "improper conduct" requirement from Colorado, which has likewise confirmed that the requirement is an "exception," which "applies only in situations where a landlord receives a benefit" from tenant-contracted work. *Lewis v. Lewis*, 189 P.3d 1134, 1142-43 & n.5 (Colo. 2008). (*See also* COA-Opening Br. at 42-44; COA-Reply Br. at 29-31.)

Simply put, the Court of Appeals never intended to impose a bright-line rule requiring "improper conduct" in every case, without considering whether other factors could justify an unjust enrichment claim, and that court has now repeatedly disclaimed that it intended to announce such a broad (and senseless) rule.

B. Defendants' arguments for why *Wang* applies broadly do not make sense.

Defendants' Petition offers (at 9-10) three reasons why *Wang* applies more broadly than the Court of Appeals has indicated. These reasons are wrong.

1. Defendants argue that *Wang* invoked the rule that "a subcontractor lacking privity of contract with an owner cannot recover a personal judgment against that owner for unpaid work." (Pet. at 9 (citation omitted).) But *Wang* expressly called that a "general rule," not an absolute rule, and two paragraphs later it expressly *rejected* as too "sweeping" the notion that "the doctrine of unjust enrichment has no application to the owner where an explicit contract exists between the subcontractor and the prime contractor." *Wang*, 230 Ariz. at 320, ¶¶15, 17, & n.6.

That "general rule" cannot be absolute because an owner is often liable in this precise situation, and an entire body of law exists to address these very circumstances. Indeed, this Court has repeatedly permitted unjust enrichment claims to proceed when the claimant had a contract with a non-party. *See, e.g.*, *Flooring Systems, Inc. v. Radisson Group, Inc.*, 160 Ariz. 224, 225 (1989) (reversing dismissal when owner was not "a party to this subcontract agreement"); *Murdock-Bryant*, 146 Ariz. at 54 (affirming judgment for subcontractor when subcontractor's services enriched non-party); *Costanzo v. Stewart*, 9 Ariz. App. 430, 432 (1969) (affirming judgment for subcontractor when owner paid no one).

2. Defendants argue (at 9) that "Arizona follows the Restatement," and they cite to Restatement (First) of Restitution ("First Restatement") § 110 (1937) as support for the broad applicability of *Wang*. But *Wang*'s additional "improper conduct" requirement is not in First Restatement § 110. As explained above (§ II.A), *Wang* borrowed that appendage from Colorado, where it applies only to tenant-improvement cases.

Moreover, the Decision did not depart from or conflict with the Restatement. It recognized that *Wang* cited First Restatement § 110, and then appropriately cited to Third Restatement § 25, which offers further guidance consistent with Arizona law.

The First Restatement articulated the general proposition that a claimant who performs a contract cannot collect restitution from a non-party "*merely* because of the failure of performance by" the claimant's contractual counterpart. First Restatement § 110 (emphasis added). But the First Restatement provided little explanation for how to determine which claims could proceed and which ones could not. The word "merely" in First Restatement § 110 played an important, but unelaborated, qualifying role, because the First Restatement never categorically barred recovery in this situation.

The Third Restatement expressly clarified the contours of this general principle. It explicitly "takes as a starting point" the principles "inherited from [First Restatement] § 110." Third Restatement § 25 cmt. b. It then explains when a claim may proceed: "If the claimant renders to a third person a contractual performance for which the claimant does not receive the promised compensation, and the effect of the claimant's uncompensated performance is to confer a benefit on the defendant, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment." Third Restatement § 25.

The Third Restatement provides three conditions a claimant must meet, including that "restitution may not subject the defendant to a forced exchange." Third Restatement § 25(2). Unlike the First Restatement, this "forced exchange" concept gets extended treatment in the Third Restatement (in §§ 2(4) and 25(2)(a)). It specifies various ways to demonstrate that a forced exchange will not occur, all of which apply here. For example, Third Restatement § 25(2)(a)(i) correctly recognizes that a forced exchange does not occur if "the defendant has expressed a willingness to pay" for the benefit, even if the defendant did not agree to be bound by contract. Here, as explained below, Defendants expressed a willingness to pay in several ways. (*See also* COA Opening Br. at 30-37 (discussing Third Restatement); COA Reply Br. at 13-27 (same).)

As Defendants point out (9-10), previous Arizona cases cite the First Restatement. But Arizona courts now cite Third Restatement (*e.g.*, *Span v. Maricopa Cnty. Treasurer*, 246 Ariz. 222, 227 ¶19 (App. 2019)). The Decision (¶11) correctly recognized that Third Restatement § 25 is "[i]n accord with" with longstanding principles in Arizona and elsewhere, and appropriately cited it approvingly when distinguishing *Wang*. Contrary to Defendants' argument (at 9-10), therefore, the Decision did not depart from the Restatement.

3. Defendants argue (at 10) that *Wang* relied on the concept that "unjust enrichment should not be used to saddle entities with expenses they chose not to incur." (Citation omitted.) The Decision did not run afoul of this concept because Defendants unquestionably did choose to incur these expenses. The Decision (¶12) highlighted that Defendants "knowingly used a related agent to incur expenses," and "arranged to fund self-beneficial infrastructure work via assessments." This is all true. *See* APP0024-26; APP0217-21, ¶¶11-20, 27-28. Moreover, the concept of "expenses they chose not to incur" is the "forced exchange" concept that gets in-depth treatment in Third Restatement § 25. The Restatement appropriately articulates several different ways to satisfy this standard, all of which apply here. (*See* COA Opening Br. at 31-33 (discussing "forced exchange"); COA Reply Br. at 16-21 (same).)

In sum, the Court of Appeals correctly held that *Wang* does not control here. This holding—which merely explains the scope of the court's prior decision—does not warrant review. Moreover, even if the Decision did conflict with *Wang*, it still does not warrant review. *Wang* is a published opinion and is binding on lower courts. The Decision here is an unpublished memorandum decision. If lower courts find themselves caught between this Decision and *Wang*, then *Wang* will control.

III. Contrary to the Petition's argument, the Decision will not create grave consequences.

In urging review, Defendants assert that the Decision will have major policy consequences. Not so.

A. Contrary to the Petition's contention, the Decision does not risk making property owners "unwitting guarantors."

Defendants insist (at 12-13) that holding them liable will make them "unwitting guarantors." But that's not true. First of all, the Decision does not saddle Defendants with unsolicited expenses or expenses they chose not to incur. Defendants did not passively benefit from Markham's work. They always expected to pay. They formed the District, elected their executives to run the District, selected Markham, agreed to fund the work through assessments, agreed that Markham's work would benefit their land, and even agreed to pay for any cost overruns. (Background § I; Decision ¶3.) Tellingly, Defendants never explain how they expected to avoid paying for the infrastructure improvements.

Moreover, Defendants' arguments would apply equally to any unjust enrichment case involving a third-party contract, such as *Flooring Systems, Inc. v. Radisson Group, Inc.*, 160 Ariz. 224 (1989), or *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48 (1985). Those cases permitted unjust enrichment claims to proceed but would have been equally susceptible to Defendants' "guarantor" criticism. In addition, the Third Restatement, cited by the Decision, recognizes that "restitution may not subject the defendant to a forced exchange." Third Restatement § 25(2). Prohibiting "forced exchange" addresses Defendants' concern (at 12) about "property owners becoming 'unwitting guarantors.'" But unlike Defendants' one-word "guarantor" catchphrase, the Third Restatement provides extensive discussion about what factors courts should consider.

B. Contrary to Defendants' argument, the Decision will not jeopardize financing schemes.

Defendants argue (at 13-15) that the Decision will jeopardize revitalization districts' "financing schemes for public infrastructure work." Any effect on such financing schemes, however, stems not from the Decision—which affects only the *property owners*, not the revitalization district—but rather from the District's decision to raise money through bonds and to contract for millions of dollars of construction work, followed by defaulting on the bonds and stiffing the contractor, all in an effort by the property owners to enrich themselves with infrastructure improvements by abusing the statutory scheme.

Defendants counter (at 14) that the law "*requires* this overlap" between the owners and the revitalization district, but that's false. The unique fact the Decision identified was not that property owners were on the board. The unique fact was that "the defendants and the District were controlled by *the same individual*." Decision ¶12 (emphasis added). Although the statutes contemplate property-owner representation on the district board, they don't require, or even contemplate, the extreme concentration of power where a single individual controls all property owners and the District simultaneously. This unprecedented concentration of control is what enabled the misconduct in this case and makes it highly unlikely that similar circumstances will recur in the future.

Defendants also argue (at 14) that "property owners outside the district can benefit from district improvements," so they should not be the only ones on the hook. This makes no sense. The entire point of revitalization districts is for the landowners within the district's boundaries to pay for the improvements. Moreover, Defendants expressly agreed that their property "will benefit from the [infrastructure] improvements in an amount not less than the Assessments" required to finance them. APP0230, § 2.2(c), *accord* APP0239, § 8(a). And the complaint (which must be taken as true) alleges the same thing. APP0220, ¶ 23. Defendants may dispute the degree of benefit and amount of liability later in the case, but that is no reason to dismiss the claims outright.

C. The Decision is consistent with the well-developed body of law allowing contractors to recover.

At bottom, the Decision is consistent with a well-developed body of law, in Arizona and elsewhere, that allows unjust enrichment claims to proceed when the claimant had a contract with a non-party. This Court, for example, reversed summary judgment against a contractor's unjust enrichment claim against an owner who was not "a party to this subcontract agreement." *Flooring Systems*, 160 Ariz. at 225. This Court affirmed the judgment for a subcontractor when the subcontractor's services enriched a non-party. *See Murdock-Bryant*, 146 Ariz. at 54. And the court of appeals affirmed the judgment for a subcontractor when, like here, the owner paid no one for the work performed. *See Costanzo*, 9 Ariz. App. at 432.

Other jurisdictions likewise "allow unpaid furnishers of labor and materials to recover from property owners not in privity of contract with them." *Mike Glynn & Co. v. Hy-Brasil Rests., Inc.*, 914 N.E.2d 103, 109 n.13 (Mass. App. Ct. 2009) (collecting cases). And again, the Third Restatement dedicates substantial material to the topic of when a claimant may recover for unpaid work performed under a contract with a third party.

The outcome in this case, particularly at the pleading stage, is consistent with this long line of authority.

ARCAP 21

Markham requests fees under A.R.S. § 12-341.01.

CONCLUSION

The Court should deny review.

RESPECTFULLY SUBMITTED this 30th day of April, 2025.

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