SUPREME COURT
STATE OF ARIZONA

THE WEITZ COMPANY, LLC,

Plaintiff-Appellee,

v.

NICHOLAS HETH, *et al*.,

Defendants-Appellants.

No. CV-13-0378-PR

Court of Appeals
No. 1 CA-CV 11-0788

Maricopa County
Superior Court
No. CV2008-028378

BRIEF OF *AMICI CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION AND AMERICAN SUBCONTRACTORS ASSOCIATION OF ARIZONA

Gaye L. Gould (No. 010889)
gould@sackstierney.com
Sharon B. Shively (No. 009292)
shively@sackstierney.com
Matthew B. Meaker (No. 022595)
meaker@sackstierney.com
James W. Armstrong (No. 009599)
armstrong@sackstierney.com
SACKS TIERNEY P.A. (No. 00182000)
4250 N. Drinkwater Blvd., Fourth Floor
Scottsdale, Arizona 85251-3693
Telephone: (480) 425-2600
Attorneys for *Amici Curiae*

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INTRODUCTION

American Subcontractors Association, Inc. and American Subcontractors Association of Arizona, Inc. (collectively "ASA")[1] submit this brief *amici curiae* to request that this Court affirm the decision of the Arizona Court of Appeals in *Weitz Co. v. Heth*, 233 Ariz. 442, 314 P.3d 569 (2013). Previous Arizona decisions allowing lenders priority over mechanic's liens through the doctrine of equitable subrogation failed to consider the express statutory language and purposes behind Arizona's mechanic's lien statutes, and the intricate statutory system of checks and balances. *Weitz* and cases from other states precluding equitable subrogation under these circumstances are correct, for the reasons stated in Weitz's briefs and below.

Moreover, even if equitable subrogation were allowed in a mechanic's lien situation -- it is not -- allowing the doctrine to be used to obtain priority by the ultimate purchasers of the improved property (and their commercial lenders) would completely defeat the legislative intent behind the mechanic's lien statutes, and would improperly shift the known and assumed risks from the owners and lenders to the contractors and subcontractors who built the project. Allowing ultimate purchasers to obtain the construction lender's priority would also conflict with

[1] These two non-profit trade associations represent more than 5,000 member subcontractors, material suppliers and service providers in the construction industry. The associations and their interest in this matter are described more fully in the accompanying Motion for Leave to File *Amici Curiae* Brief.

long-established Arizona precedent holding that purchasers take property *subject to* mechanic's liens of which they have constructive notice. Equitable subrogation simply cannot be used as Appellants contend here: to allow the developer and construction lender to be paid from sales of the improved property and to permit buyers to ignore the mechanic's liens, while the contractor, subcontractors and suppliers who improved the property are not paid in full.

STATEMENT OF THE CASE AND FACTS

ASA adopts the statement of the case and facts in Weitz's briefs filed herein and in the Court of Appeals.[2] In summary, it is undisputed that the construction started on an empty lot and Weitz and the subcontractors then spent 30 months and $59 million building a 23-story tower containing 165 condominiums. Appellants acknowledge that either before construction was finished, or shortly after, the developer sold 91 of the condominiums, and the proceeds were used to pay down the construction loan, solely for the benefit of the developer and lender, with none of those proceeds used to pay Weitz and the subcontractors who actually built the project. Most of the condominium purchases were financed by purchase money loans, but fifteen buyers paid cash. The borrower and construction lender received nearly $40 million from these 91 sales, without paying Weitz the final $3.8 million owed on the project despite their earlier agreement to pay Weitz the balance due as

[2] ASA has not independently reviewed the record.

the condominiums were sold.[3] The parties stipulated that Weitz's mechanic's lien was $2.125 million.

ASA adopts Weitz's arguments, but files this brief to highlight issues significant to subcontractors and to urge this Court to affirm the decision below.[4]

ARGUMENT

I. THE PARTIES TO CONSTRUCTION CONTRACTS AND LOANS ASSUME DIFFERENT RISKS AND POTENTIAL REWARDS COMMENSURATE WITH THOSE RISKS

A. Construction Contract Risks

General contractors, subcontractors and material suppliers[5] share certain common risks on a construction contract. Among others, they must estimate their

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[3] A construction lender may lose its mortgage priority or be estopped from asserting priority if it induces subcontractors to continue working with a promise or belief that they will be paid. *See, e.g, Pioneer Plumbing Supply Co. v. Southwest Sav. & Loan Ass'n.*, 102 Ariz. 258, 265, 428 P.2d 115, 122 (1967) (if lender induced contractors to rely on a certain fund for payment, subcontractors might have been entitled to an equitable lien); *Watson Const. Co. v. Amfac Mortg. Co.*, 124 Ariz. 570, 577, 606 P.2d 421, 428 (App. 1979) (a mechanic's lien may be given priority over a prior recorded lending mortgage if the lender assures inquiring subcontractors that funds exist to pay future claims or the lender takes over the project).

[4] This brief does not address additional significant issues raised by the parties here or below, most notably the prohibition on partial subrogation, and the inequity and prejudice caused by lack of notice and by the owner and lender reneging on their assurance of payment.

[5] This brief uses the term "subcontractors" collectively to refer to all tiers of construction trades on a construction project, including general contractors, subcontractors and material suppliers.

costs of labor and materials in advance and bid construction projects accurately enough to cover those costs and make a reasonable profit. If they bid too high, they will not get the job. If they bid too low, they will lose money. In either situation, they cannot remain in business and keep their workers employed.

Subcontractors are creditors, but not traditional ones. They provide labor and/or materials on a construction project on the "credit" of the promise of future payment. They frequently extend this credit in larger amounts, and for longer periods, than other businesses. Indeed, they may have all of their capital (or a substantial part of it) tied up in projects under construction. NELSON & WHITMAN, 2 REAL ESTATE FINANCE LAW § 12.4 (5th ed. 2010) [hereafter NELSON & WHITMAN]. Subcontractors, who often must pay their laborers weekly, their suppliers monthly, and their home and field office overhead (rent, electricity, gas, etc.) monthly, routinely wait thirty days or longer to be paid for their labor and materials, while the owners/developers pay no interest for that credit.

Because subcontractors extend these large blocks of credit and have a large number of workers dependent on them for payment, they are vulnerable. Ordinarily, a general contractor enters into a contract with the project owner, and has contractual remedies. However, the contract with the owner does not assure payment. The owner may be financially unstable. In the recent real estate downturn, even the construction lender's financing may be tenuous.

Subcontractors are even further removed. They typically have contractual or other remedies only against the general contractor, which also may be of little value if the general is unable or unwilling to pay for any reason, including non-payment by the owner or other financial stress. As discussed below, the mechanic's lien statutes are one part of the intricate statutory framework adopted by the Legislature to protect subcontractors and ensure that laborers and materialmen are paid for their work. Subcontractors, whether an electrician who has installed wiring, a plumber who has installed piping, or any of the other numerous trades involved in typical projects, cannot simply return to the building and tear out their work if they are not paid. The mechanic's lien on the improved property gives subcontractors a valuable tool to collect payment owed if the owner (or lender) wishes to keep title clear or sell the improved property.

B. The Risks Assumed By Construction Lenders and Project Owners

Construction loans involve higher risks than other types of loans because of two primary uncertainties that do not exist with permanent financing: (1) whether the improvements will be completed, and (2) if so, whether the project's value will meet expectations. ARNOLD & TRACHT, CONSTRUCTION AND DEVELOPMENT FINANCING § 3:7, at 401 (3d ed. 2013) [hereafter CONSTRUCTION FINANCING]. Because construction loans are risky, lenders charge up-front fees and higher interest, and their rewards are often commensurate with that risk. *Id*. §§ 3:1 & 3:5.

Lenders also have many ways to protect their interests through subordination agreements, guarantees, title insurance, and the like. Similarly, construction project owners seek high returns on their investments and therefore accept substantial risk. These parties intentionally assume a much higher level of risk, and seek to reap a much higher potential reward, than do the subcontractors, whose goal is to bring a project in on budget and make a reasonable profit.

The arguments Appellants raise to reverse the decision below thus not only contradict the express statutory language of the mechanic's lien statutes (as the Court of Appeals held), but are also an attempt to have this Court shift to the backs of the contractors credit management and default risks of traditional lending practice. Those risks were not bargained for by the subcontractors, who are skilled in their trades but are not investment bankers who live in the world of (and have the ability to obtain and profit from) loan guarantees, security agreements, pledge agreements and title insurance commitments that may be needed to finance and manage project credit risks. Accordingly, the risk that a construction project will fail should primarily fall on the owners and lenders, and not on the subcontractors.

II. ARIZONA'S MECHANIC'S LIEN STATUTES REPRESENT A COMPREHENSIVE SCHEME DESIGNED TO ENSURE THAT CONTRACTORS ARE PAID FOR THEIR SERVICES

A. Mechanic's Lien Statutes Are Meant to Provide Contractors with a Higher Level of Payment Security

The Arizona Legislature has responded to these economic realities and risks

by creating an intricate statutory system of checks and balances. Some of the most significant tools in that arsenal are the mechanic's lien statutes, which are intended to ensure that subcontractors who provide labor and materials to a construction project have payment security larger than the solvency of their contracting partner. Without the statutory framework put in place by the Legislature, subcontractors would have no security interest and little leverage to ensure that they are paid for their labor and materials.

The mechanic's lien statutes are intended to provide payment security by giving subcontractors a lien for the labor or materials they have contributed to a building, labor that enhances the value of another's property. *Wahl v. Southwest Sav. & Loan Ass'n*, 106 Ariz. 381, 385, 476 P.2d 836, 840 (1970); *United Metro Materials, Inc. v. Pena Blanca Properties, L.L.C.*, 197 Ariz. 479, 484, 4 P.3d 1022, 1027 (App. 2000); *Northwest Fed. Sav. & Loan v. Tiffany Constr. Co.*, 158 Ariz. 100, 102, 761 P.2d 174, 176 (App. 1988). "[T]he intent of the lien statutes is to insure to the laborer and the materialman payment of their accounts." *United Metro*, 197 Ariz. at 484, 4 P.3d at 1027, citing *Arizona Eastern R. Co. v. Globe Hardware Co.*, 14 Ariz. 397, 400, 129 P. 1104, 1107 (1913). "[O]ur Legislature intended that laborers and materialmen, who contribute of their labor and means to enhance the value of the property of another, should be jealously protected." *Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8 P.2d 256, 258 (1932).

All fifty states have some form of mechanic's lien statutes. NELSON & WHITMAN, § 12.4; *In re Fontainebleau Las Vegas Holdings*, 289 P.3d 1199, 1210 (Nev. 2012). The language and details of the statutes vary widely, as does the jurisprudence. CONSTRUCTION FINANCING § 4:226, at 1017. However, the basic premise of all is that those whose labor or materials go into improving real estate should be permitted, in fairness, to satisfy their unpaid bills out of that real estate. NELSON & WHITMAN, § 12.4; *see, e.g.*, *Reliance Universal, Inc. v. Deluth Constr. Co.*, 425 N.E.2d 404, 406 (Ohio 1981).

If the general contractor is financially distressed or insolvent, the security provided by the mechanic's lien is critical. Instead of a non-recoverable contract claim, the lien provides a potential source of payment. The availability of the lien enables subcontractors to bid more competitively because the risk of non-collection is lower so they are not forced to factor elevated risk into their bids.[6] These reduced construction expenses are passed along to Arizona consumers and help to stimulate the construction industry, benefitting developers, lenders and title insurers, as well as subcontractors and those employed in the industry.

While the primary purpose of the mechanic's lien statutes is to increase

[6] For example, a mortgage lender charges a lower interest rate than a credit card lender because the mortgage lender has the collateral as security and thus a lowered risk. The same basic rationale applies to a construction contractor's bid price, and by extension, what the public pays for construction projects.

payment security for subcontractors, a significant secondary purpose is to protect project owners and to provide notice of the mechanic's liens to all. *Arizona Gunite Builders, Inc. v. Cont'l Cas. Co.*, 105 Ariz. 99, 101, 459 P.2d 724, 726 (1969); *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 431, 561 P.2d 750, 755 (App. 1977); *Northwest Fed. Sav. & Loan*, 158 Ariz. at 102, 761 P.2d at 176 (App. 1988) (legislative purpose of A.R.S. § 33-993(A) is to give notice of mechanic's liens). Moreover, under Arizona law, mechanic's liens are not valid unless the claimant substantially complies with the lien statutes' detailed notice and recording requirements. *See, e.g., HCZ Constr., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 366, 18 P.3d 155, 160 (App. 2001); *Commercial Cornice & Millwork, Inc. v. Camel Constr. Servs. Corp.*, 154 Ariz. 34, 37, 739 P.2d 1351, 1354 (App. 1987); *MLM Constr. Co., Inc. v. Pace Corp.*, 172 Ariz. 226, 229, 836 P.2d 439, 442 (App. 1992). To obtain a mechanic's lien, the contractor must timely record a notice and claim of lien with the county recorder's office.[7] *Hunnicutt Constr., Inc. v. Stewart Title & Trust*, 187 Ariz. 301, 304, 928 P.2d 725, 728 (App. 1996). The statutes further provide owners and lenders with other mechanisms to protect themselves, like the bonds and waivers and releases described on pages 6-9 of Weitz's Response to the Petition for Review.

[7] Under A.R.S. § 33-981, every subcontractor and material supplier who constructs, alters or repairs a building or other structure, has a lien as long as it fulfills the statutory requirements.

B. The Arizona Statutes Balance the Competing Interests.

In a state heavily dependent on construction and growth, the Legislature has struck a balance between lenders and contractors. While the mechanic's lien gives contractors needed payment security, the statutes also expressly give priority to an earlier recorded lien or one recorded by a construction lender within ten days of the commencement of work on a construction project. A.R.S. § 33-992(A). A.R.S. § 33-992.01 defines a construction lender as a mortgagee or beneficiary under a deed of trust "lending funds all or a portion of which are used to defray the cost of the construction, alteration, repair or improvement, or any assignee or successor in interest of either." Thus, under Arizona's statutes, a construction lender who records within the ten-day period is given a higher priority lien on the property.

Arguably, the Legislature adopted this accommodation because the construction loan finances the creation of value on the land. CONSTRUCTION FINANCING § 3:7, at 401. While the loan is outstanding, the construction lender's security is the land with a partially completed building on it. ID. § 3:11, at 406.

III. ARIZONA'S MECHANIC'S LIEN STATUTES PRECLUDE THE DOCTRINE OF EQUITABLE SUBROGATION

A. The Express Language of Arizona's Mechanic's Lien Statutes Precludes Equitable Subrogation

The Court of Appeals correctly held that A.R.S. § 33-992(A)'s plain and express language precludes application of the equitable subrogation doctrine.

Under that doctrine, a mortgagee may be substituted into the lien-priority position of a prior lienholder, despite the recording of an intervening lien. *Lamb Excavation, Inc. v. Chase Manhattan Mortg. Corp.*, 208 Ariz. 478, 480, 95 P.3d 542, 544 (App. 2004). This equitable remedy avoids a person from receiving an unearned windfall at the expense of another, and prevents injustice. *Sourcecorp, Inc. v. Norcutt*, 229 Ariz. 270, 272, 274 P.3d 1204, 1206 (2012); RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 7.6(a) (1997) [hereafter RESTATEMENT] ("One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment."). Equitable subrogation is not an absolute right, however, and will not be granted if it results in injustice or prejudice to an intervening lienor. *Fontainebleau*, 289 P.3d at 1209.

The Court of Appeals properly held that equitable subrogation cannot supersede the statutory preference for mechanic's liens because equity cannot override unambiguous statutory language. *Weitz*, 233 Ariz. at 448, 314 P.3d at 575. In doing so, it extensively discussed the recent analogous decision by the Nevada Supreme Court in *Fontainebleau*. There, a bank loaned a developer $150 million secured by a first position deed of trust to build a multi-billion dollar casino in Las Vegas. More than 300 contractors began construction work, many recording mechanic's liens against the property. The developer then obtained a

$1.85 billion construction loan and, as partial security, agreed to execute a deed of trust in favor of the lender to be recorded in first priority position. The project failed. 289 P.3d at 1207-08.

Although Nevada applies equitable subrogation in other contexts, it refused to displace the statutory priority plainly and specifically granted to mechanic's lien claimants:

> The Legislature has spoken and has created a specific statutory scheme whereby a mechanic's lien is afforded priority over a subsequent lien, mortgage, or encumbrance in order to safeguard payment for work and materials provided for construction or improvements on land . . . . Therefore, we conclude that the plain and unambiguous language . . . precludes application of the doctrine of equitable subrogation, as it unequivocally places mechanic's lien claimants in an unassailable priority position.

Fontainebleau, 289 P.3d at 1212. The Nevada Court further noted that the subsequent lender "had ample means to minimize its financial risk through the proper channels of contractual subordination." 289 P.3d at 1212. Here too, Appellants could have sought a subordination agreement from Weitz and the mechanic's lienholders, giving them a voice in renegotiating the risks of the project. That voice would be silenced if *Weitz* is not affirmed.

Weitz agreed with *Fontainebleau* that "equitable subrogation cannot operate to supersede the statutory requirement that mechanics' liens have priority over all subsequent encumbrances, except for construction loans filed within the narrow time constraints of the statute." 233 Ariz. at 449, 314 P.3d at 576. Nevada, like

Arizona, is growth and construction-driven, and the Legislatures of both states zealously protect contractors through their mechanic's lien statutes. *Weitz* also cited other consistent decisions such as *Ex parte Lawson*, 6 So. 3d 7 (Ala. 2008) and *Richards v. Sec. Pac. Nat. Bank*, 849 P.2d 606 (Utah App. 1993). *See also Carl H. Peterson Co. v. Zero Estates*, 261 N.W.2d 346 (Minn. 1977); *SERA Architects, Inc. v. Klahowya Condo., LLC*, 290 P.3d 881, 886 (Or. App. 2012); *cf. Gibson v. Neu*, 867 N.E.2d 188, 201-02 (Ind. App. 2007) (Indiana Code expressly excepts mechanic's liens from equitable subrogation). As the *Richards* Court noted:

> [C]ommercially sophisticated lenders should protect themselves in contract. Commercial lenders can easily examine the property, ask specific questions regarding the existence of intervening lienholders, acquire subordination agreements with any lienholders that exist, or, in many cases, assume the rights of the earlier lender by assignment. In contrast, asking mechanics and materialmen to stay apprised of the state of title for each property they perform work on adds a layer of legal complexity that many have no capacity to incorporate into their businesses. Given the statutory protection granted mechanics' lienholders, it is much more appropriate to have commercial lenders bear the burden of protecting themselves.

Richards, 849 P.2d at 612. The RESTATEMENT itself acknowledges that it would be unjust to allow equitable subrogation for a refinancing lender when a subcontractor recorded an intervening mechanic's lien, even when the second lender has no actual or constructive knowledge of the construction. RESTATEMENT §7.6 illus. 30, followed in *Lawson*, 6 So.3d at 15.

Weitz, *Fontainebleau* and their companions were correctly decided. The

Legislature has struck a balance, which the courts are bound to follow. Appellants and their supporting *amici* recite a vague and speculative "parade of horribles" to argue that this Court must reverse the decision below, but their contentions are wildly overstated. Even if equitable subrogation continues to be potentially available in Arizona in the mechanic's lien context, lenders and title insurers cannot rely on it because the doctrine is applied case by case. Indeed, an absolute rule would allow lenders and title insurers to better evaluate their risks and protect themselves accordingly. Moreover, even assuming the alleged consequences have the slightest validity, an analysis of economic concerns and lending costs "is more properly done by the legislature." *Mortgage Elec. Registration Sys., Inc. v. Roberts*, 366 S.W.3d 405, 413 (Ky. 2012); *Countrywide Home Loans, Inc. v. First Nat. Bank of Steamboat Springs*, 144 P.3d 1224, 1231 (Wyo. 2006) (arguments that equitable subrogation will make refinancing more available to the public are properly directed to the legislature, not the courts.).

B. Equitable Subrogation Does Not Apply to Purchasers of the Improved Property

Even if this Court holds that equitable subrogation may still apply in a mechanic's lien situation, its application to this set of facts would cause an unwarranted and inequitable expansion of the doctrine. Previous Arizona cases that recognized equitable subrogation in a mechanic's lien context involved refinancing by a new lender. *Lamb Excavation*, 208 Ariz. at 483, 95 P.3d at 547

(App. 2004); *Peterman-Donnelly Eng. & Contr. Corp. v. First Nat'l Bank*, 2 Ariz. App. 321, 408 P.2d 841 (App. 1965). This case does not involve a traditional refinancing situation or one in which a permanent lender paid off the construction loan. Instead, the condominium purchasers and their lenders contend that they should be equitably subrogated to the construction lender's first position. The purchasers and the developer/construction lender reached an agreement under which they benefitted each other and disregarded Weitz's mechanic's liens.

In *Lawson,* the Alabama Supreme Court refused to apply equitable subrogation in a strikingly similar case. There, a home-builder paid off a construction loan with loan proceeds from the purchasers of the constructed houses. Lawson was a subcontractor who had installed carpet, tile and marble flooring in many of the residences. When the purchasers bought the houses, Lawson's mechanic's lien had not been perfected and, under Alabama law, the purchasers had no notice of its potential existence. Lawson's lien was subordinate to the senior mortgage held by the construction lender, and the purchasers' lenders, as in this case, argued that they were equitably subrogated to the first priority position of the senior construction mortgage. 6 So.3d at 9-10.

In discussing equitable subrogation, the *Lawson* Court noted that the second loans were made to the ultimate purchasers of the houses, not the original debtor, and not for the direct purpose of extinguishing any prior encumbrance. 6 So.3d at

13 ("Although the moneys from these second loans were loan proceeds in the hands of the purchasers, they merely constituted *payments* by the purchasers to the developer."); *cf. Norcon Builders, LLC v. GMP Homes VG, LLC*, 254 P.3d 835 (Wash. App. 2011) (refusing to equitably substitute unit purchasers to construction lender's first priority position). *Lawson* thus implicitly recognized that a mechanic's lien would be meaningless if the proceeds from the ultimate purchaser could be used to pay off the construction loan without paying the subcontractors.

Lawson also refused to apply equitable subrogation because the purchaser of a new building has constructive notice of potential mechanic's liens and the filing of a lien is still permissible until the six-month statute of limitations runs:

> We hold that the constructive notice supplied by the materialman's lien statute defeats the lenders' equitable-subrogation claim. The materialman's lien statutes "are an expression of legislative intent that should stay the hand of equity in this situation. If we held otherwise, we would violate the equitable maxim that equity follows the law." *Richards v. Security Pacific Nat'l Bank*, 849 P.2d 606, 611 (Utah Ct.App.1993) * * * In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature, and the legislature, in § 35–11–211, clearly stated that a materialman's "lien as to the land and buildings or improvements thereon, *shall have priority over all other liens*, mortgages or incumbrances *created subsequent to the commencement of the work* on the building or improvement.

Lawson, 6 So.3d at 14 (emphasis in original). The Alabama Court also noted the RESTATEMENT exception for mechanic's liens discussed in Illustration 30 referenced above. 6 So.3d at 15. Finally, the court stated:

> The legislature created a specific statutory scheme in which a materialman's lien is given priority over a subsequently created mortgage. The lenders who loaned the money to the purchasers in the present case are sophisticated mortgage companies that could have easily protected their interests. Based on the statutory preference given to materialmen, it is the commercial lenders who bear the burden of protecting themselves.

Lawson, 6 So.3d at 15-16.

Lawson is correct. Allowing purchasers to be equitably subrogated to the construction loan would mean the collateral could be bought and sold *forever* without regard to the intervening mechanic's liens, rendering the lien remedy completely ineffective, contrary to legislative intent.

C. The Condominium Purchasers Were on Constructive Notice of the Mechanic's Lien Claims and Are Subject to Them

A decision to apply equitable subrogation in this situation would be even more inappropriate because, in addition to ignoring the plain statutory language and intent, it would also conflict with an entire line of Arizona precedent dating back at least eighty years (as noted in Weitz's Response to the Petition for Review, at 3-5). As early as 1932, this Court stated that a purchaser of a mortgage takes subject to the claims of laborers and materialmen. *Wylie*, 39 Ariz. at 522, 8 P.2d at 260. A sale or transfer would be subject to the mechanic's liens. *Id*. Cases outside the mechanic's lien context also hold that a real estate buyer on inquiry notice of an adverse interest in the property is not a *bona fide* purchaser and takes the property subject to burdens existing against it. *Davis v. Kleindienst*, 64 Ariz. 251, 169 P.2d

78, 83 (1946); *see also Tucson Fed. Sav. & Loan Ass'n v. Sundell*, 106 Ariz. 137, 142, 472 P.2d 6, 11 (1970) (prospective mortgagee with inquiry notice of adverse, prior or superior rights in the property who still advances money "does so at its peril, and subject to any such superior rights or title.").

These principles were applied to a mechanic's lien by this Court more than thirty years ago in *Collins v. Stockwell*, 137 Ariz. 416, 671 P.2d 394 (1983). Subcontractor Collins timely filed a mechanic's lien when the developer became insolvent. The purchaser and the title company claimed that since they had no notice of the lien and subsequent foreclosure action, Collins had no enforceable claim against the property. This Court agreed with Collins that once the title company discovered that a lien notice had been filed, it should have inquired to ensure that the contractor's claim had either been satisfied or extinguished:

> The purpose of mechanic's lien statutes is to protect the rights of those who furnish labor and materials which enhance the value of another's property. * * * We have consistently held that such liens are remedial and are to be liberally construed to effect their purpose. * * * The lien constitutes a preference over subsequent encumbrances or over other encumbrances as to which there has been no actual or constructive notice. A.R.S. § 33–992. The lien is perfected if, within a specified time after the completion of construction, the contractor, subcontractor, or supplier files a notice of claim of lien in the office of the County Recorder of the county in which the property is located and served a copy on the owner of the property. A.R.S. § 33–993. The effect of filing a notice and claim of lien, an instrument which must be acknowledged and recorded, is stated in A.R.S. § 33–416.

Collins, 137 Ariz. at 418, 671 P.2d at 396 (citations omitted). It is long established

that the recording of a notice of claim of lien is constructive notice to all persons of the contractor's claim. *Id*., 137 Ariz. at 420, 671 P.2d at 398; *see also Hall v. World Sav. & Loan Ass'n*, 189 Ariz. 495, 501, 943 P.2d 855, 861 (App. 1997) (purchaser had record notice); *3502 Lending, LLC v. CTC Real Estate Serv.*, 224 Ariz. 274, 277, 229 P.3d 1016, 1019 (App. 2010) (party may not willfully ignore information which would lead to the discovery of unrecorded adverse claims). Likewise, in *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 157 Ariz. 461, 759 P.2d 607 (1988), this Court held that a party whose title to land was derived from a deed of trust sale was on constructive notice of the potential of a prior mechanic's lien, and a timely mechanic's lien could be enforced.

Based on these decisions, the purchasers of the condominiums in this case cannot be considered *bona fide* because they had record notice of the mechanic's liens.[8] *See, e.g., SERA Architects,* 290 P.3d at 890-91 (refusing to apply equitable subrogation when second lender refinanced while on record notice of services rendered); *In re Mortgages Ltd.*, 482 B.R. 298 (D. Ariz. 2012) (rejecting equitable subrogation in part because subsequent lender knew of broken priority and

[8] In *Sourcecorp, Inc. v. Norcutt*, involving a judgment lien as opposed to a mechanic's lien, this Court commented that it need not address whether a purchaser with actual notice of a judgment lien could ever be equitably subrogated because there was no suggestion in that case that the purchasers had actual notice. 229 Ariz. at 275, 274 P.3d at 1209.

potential mechanic's liens). They should consequently not be allowed to use the doctrine of equitable subrogation, to the prejudice of Weitz.[9]

CONCLUSION

Equitable subrogation is designed to prevent injustice, and will not be applied when there is no injustice to prevent. *Sun Valley Fin. Serv. v. Guzman*, 212 Ariz. 495, 500, 134 P.3d 400, 405 (App. 2006). Here, the decision of the Court of Appeals served justice, and should be affirmed. In contrast, Appellants' demands would effectively rewrite the statutory mechanic's lien provisions and in the process create a great injustice not only to Weitz and its unpaid subcontractors, but to all subsequent subcontractors on future projects who would lose the certainty of the plain statutory language, and have their statutory remedies imperiled and rendered ineffective under the guise of an 'equitable' doctrine.

The Court should not allow property improved by subcontractors to be sold without involving those trades in the process and protecting their right to payment, as the Arizona Legislature intended. The decision of the Arizona Court of Appeals should be affirmed.

DATED this 22nd day of May, 2014.

[9] In fact, the record in *Weitz* shows that some of the purchasers and lenders had actual notice of the recorded mechanic's liens.

SACKS TIERNEY P.A.

By: */s/ Gaye L. Gould*
Gaye L. Gould
Sharon B. Shively
Matthew B. Meaker
James W. Armstrong
Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure, the undersigned attorney for *Amici Curiae* American Subcontractors Association, Inc. and American Subcontractors Association of Arizona, Inc. hereby certifies that the foregoing Brief (i) is, with the exception of headings, footnotes and block quotes, double spaced (ii) uses proportionately spaced Times New Roman typeface, with a point size of 14, and (iii) does not (excluding its table of contents, table of citations, certificate of compliance, and proof of service) exceed 20 pages.

/s/ Gaye L. Gould
Gaye L. Gould

PROOF OF SERVICE

Pursuant to Rule 4(c) of the Arizona Rules of Court Appellate Procedure, the undersigned attorney for Amicus Curiae American Subcontractors Association, Inc. and American Subcontractors Association of Arizona, Inc. hereby certifies that two copies of the foregoing Brief have been served this 22nd day of May, 2014, by first class mail, postage prepaid, upon counsel for the parties and *amici* at the following addresses:

Michael J. Holden, Esq.
Barry A. Willits, Esq.
HOLDEN WILLITS PLC
Two North Central Avenue, Suite 1220
Phoenix, Arizona 85004

Jonathan Sternberg, Esq.
JONATHAN STERNBERG, ATTORNEY, P.C.
2345 Grand Boulevard, Suite 675
Kansas City, Missouri 64108

Attorneys for Plaintiff-Appellee

Charles W. Wirken, Esq.
Scott A. Malm, Esq.
GUST ROSENFELD P.L.C.
One East Washington Street, Suite 1600
Phoenix, Arizona 85004

Attorneys for Defendants-Appellants

Michael R. Scheurich, Esq.
DICKINSON WRIGHT/MARISCAL WEEKS
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012

Attorneys for *Amici Curiae*
Land Title Association of Arizona

John J. Egbert, Esq.
JENNINGS, STROUSS & SALMON, P.L.C.
One East Washington Street, Suite 1900
Phoenix, Arizona 85004

Attorneys for *Amici Curiae* BMO Harris
Bank and Arizona Bankers Association

/s/ Gaye L. Gould
Gaye L. Gould

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