IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

GALEB-MILLER DEVELOPMENT, LLC, an Arizona limited liability corporation,

Plaintiff/Counter-Defendant/Third Party Defendant/Appellee/Cross-Appellant,

v.

MARKHAM CONTRACTING CO., INC., an Arizona corporation,

Defendant/Counter-Claimant/Third Party Plaintiff/Appellant/Cross-Appellee.

No. 1 CA-CV 07-0872

Maricopa County Superior Court
No. CV2002-019416

BRIEF OF *AMICI CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION, AMERICAN SUBCONTRACTORS ASSOCIATION OF ARIZONA, ARIZONA BUILDERS' ALLIANCE, AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ARIZONA CHAPTER

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TABLE OF CONTENTS

SECTION **PAGE NO.**

TABLE OF CASES AND AUTHORITIES. ii

I. THE IDENTITY OF THE CONTRACTOR *AMICI CURIAE* 1

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 2

III. THE IMPORTANCE OF THESE ISSUES TO CONTRACTORS 3

IV. THE PERTINENT STATUTORY SCHEMES 7

V. ANY PENALTY SHOULD BE PER DOCUMENT, NOT PER LOT 12

VI. COURTS SHOULD REFUSE TO ASSESS PENALTIES WHERE DEVELOPERS DO NOT FULFILL STATUTORY OBLIGATIONS 16

VII. CONCLUSION 19

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF CASES AND AUTHORITIES

CASES **PAGE NO.**

Egan-Ryan Mechanical Co. v. Cardon Meadows Dev. Corp., 169 Ariz. 161, 818 P.2d 146 (Ct. App. 1991) 7

Farris v. Advantage Capital Corp., 217 Ariz. 1, 170 P.3d 250 (2007) 13-14

General Petroleum Corp. v. Smith, 62 Ariz. 239, 157 P.2d 356 (1945) 19

Hanson Aggregates Arizona, Inc. v. Rissling Constr. Group, Inc., 212 Ariz. 92, 127 P.3d 910 (Ct. App. 2006) 18

Hatch Companies Contracting, Inc. v. Arizona Bank, 170 Ariz. 553, 826 P.2d 1179 (Ct. App. 1991) 9-10

Performance Funding, L.L.C. v. Arizona Pipe Trade Trust Funds, 203 Ariz. 21, 49 P.3d 293 (Ct. App. 2003) 9

S.K. Drywall, Inc. v. Developers Fin. Group, Inc., 169 Ariz. 345, 819 P.2d 931 (1991) 10

United Metro Materials, Inc. v. Pena Blanca Properties, L.L.C., 197 Ariz. 479, 4 P.3d 1022 (Ct. App. 2000) 8

Wyatt v. Wehmueller, 167 Ariz. 281, 806 P.2d 870 (1991) 12, 18-19

Wylie v. Douglas Lumber Co., 39 Ariz. 511, 8 P.2d 256 (1932) 3, 5, 7

STATUTES

A.R.S. § 12-1191 8

A.R.S. § 33-420 ..... 12, 18

A.R.S. § 33-420(A) ..... *passim*

A.R.S. § 33-981 8

A.R.S. § 33-993(A) 15

A.R.S. § 33-998 ..... 8, 14

A.R.S. § 33-998(A) 10

A.R.S. § 33-1004 ..... 3, 5, 9-10

A.R.S. § 33-1004(A) 9, 17

A.R.S. § 33-1004(B) 9

A.R.S. § 33-1004(C) 11, 17

I. THE IDENTITY OF THE CONTRACTOR *AMICI CURIAE*

The American Subcontractors Association (the "ASA") is a non-profit national membership trade association of 5,500 subcontractors, specialty trade contractors, and suppliers in the construction industry. The ASA is recognized as the united voice dedicated to improving the business environment of subcontractors in the construction industry. The ASA's mission is to amplify the voice of and lead trade contractors to improve the business environment for the construction industry and to serve as a steward for the community. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, a safe and healthy work environment, integrity, and membership diversity.

The ASA has local chapters in more than half of the states in the country. The American Subcontractors Association of Arizona is the Arizona chapter of the ASA.

The Arizona Builders' Alliance represents more than 300 companies and their employees throughout Arizona, including both open shop and union general contractors, subcontractors, professional service firms, and suppliers supporting the construction industry. The Arizona Builders' Alliance is the product of a merger more than 10 years ago of the Arizona Chapters of the Associated Builders & Contractors and the Building Chapter Associated General Contractors.

The Associated General Contractors of America, Arizona Chapter, chartered in 1934, is a not-for-profit association of general contactors, subcontractors, and other construction industry affiliated firms engaged in highway, heavy, industrial, and municipal-utility construction. Since its inception, the Arizona Chapter has been instrumental in bringing about economic and infrastructure development in Arizona through involvement in legislative affairs, specification reviews, labor matters, highway budgeting and appropriations, education and training, and many other subjects of importance to members statewide.

Collectively, the ASA, the American Subcontractors Association of Arizona, the Arizona Builders' Alliance, and Associated General Contractors of America, Arizona Chapter, are referred to as the "Contractor *Amici*."

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the $5000 penalty provided in A.R.S. § 33-420(A) for wrongfully recording a *lis pendens* to be assessed per "wrongful" document recorded, in accordance with the statutory language, or per lot covered by the *lis pendens*, as the trial court erroneously ruled, thus conferring a windfall on developers and creating a chilling effect on the contractors' exercise of their legislatively-granted mechanics' and materialmen's lien rights?

2. Should equity permit a developer to recover the statutory penalty provided in A.R.S. § 33-420(A) for a contractor's allegedly wrongful recording of

a *lis pendens* in connection with a mechanics' and materialmen's lien foreclosure action where the recording was only "wrongful" because the developer failed to timely serve the contractor with the lien discharge bond(s) it had procured (as A.R.S. § 33-1004 required the developer to do), thus effectively rewarding the developer for causing the "wrongful" *lis pendens* that § 33-420(A) was designed to remedy?

III. THE IMPORTANCE OF THESE ISSUES TO CONTRACTORS

This case involves the confluence of the law governing mechanics' and materialmen's liens and the law governing *lis pendens* and the "wrongful" recording thereof. In enacting the mechanics' and materialmen's lien statutes, the Arizona Legislature intended to protect mechanics and materialmen. As the Arizona Supreme Court observed 76 years ago, "[w]e are, however, convinced that our 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). But the trial court's ruling seriously undermines that protection by making contractors, subcontractors, specialty trade contractors, and suppliers potentially liable to pay unwarranted and unjustified penalties under the "false documents" statute, A.R.S. § 33-420(A), for recording *lis pendens* in connection with enforcing their lien rights. In so doing, the court below (1) ignored the

purpose of the lien statutes, (2) misapprehended the purpose of the "false documents" statute, and (3) was oblivious to the dire ramifications of its ruling.

Assessing the statutory $5000 penalty on a per lot or per parcel basis, instead of on the number of "false documents" that were recorded, will have a very real chilling effect on contractors' exercise of their statutory lien rights. The potential for a chilling effect is especially serious because the trial court's ruling will only exacerbate the current trend in which some developers attempt to challenge contractors' liens on spurious grounds. Given the potentially large penalties that could be imposed for multi-parcel or multi-lot construction projects under the trial court's interpretation of § 33-420(A), contractors may eschew their legislatively-granted lien rights altogether for fear of being hit with potentially huge (and wholly unwarranted) fines under the "false documents" statute.

For example, if a utility contractor agrees to place a water line in a new development for $200,000 and does not get paid by the developer, the contractor can record a mechanics' and materialmen's lien and allocate $4,000 to each of the 50 lots in the subdivision. If the developer still does not pay the contractor, that contractor could record a *lis pendens* and file a complaint to foreclose on the lien. If the trial court's interpretation of the penalty calculation under § 33-420(A) is not reversed, and if the developer recorded a § 33-1004 lien discharge bond before the *lis pendens* was recorded, the developer can say "Gotcha" and demand $250,000 in

statutory penalties ($5,000 x 50 lots) even if the developer never served the lien discharge bond on the contractor, as required by § 33-1004, and even if the developer never suffered any actual damages.

Obviously, the leverage that a developer would obtain over the contractor under this scenario, if the trial court's interpretation of § 33-420(A) stands, would be contrary to Arizona's expressed public policy of "jealousy protecting" contractors' rights under the mechanics' and materialmen's lien statutes. *See Wylie, supra.*

The other major defect in the lower court's assessment of penalties against the contractor here is that, by assessing a penalty for recording the notices of *lis pendens* despite the fact that the developer of the property failed to perform its statutory obligation to provide the lien holder with notice that a lien discharge bond had been recorded (thus changing the action from one "affecting title to real property" to one against the bond), the court rewarded bad conduct by the developer and penalized innocent conduct by the lien holder. This contravened the

legislative intent of two different statutory schemes and brought about a result that cannot be squared with sound public policy.[1]

Given the number of large development projects that have been and are under construction in Arizona each year — projects that involve the efforts of hundreds of contractors and the filing of many thousands of liens — the assessment of statutory penalties under A.R.S. § 33-420(A) for the wrongful recording of a lien or *lis pendens* is a subject that is of vital interest to the Contractor *Amici*. Upholding the penalties assessed in the amounts and under the circumstances presented in the instant case would (1) chill contractors' ability to exercise their lawful lien rights, (2) disproportionately punish contractors for innocently making a "wrongful" recording that produces no actual damage to anyone, and (3) generously reward unscrupulous developers who shirk their statutory obligation to serve lien discharge bonds on contractor lien holders and

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[1] Moreover, the fact is that any contractor's counsel worth her salt would undoubtedly *prefer* to bring a complaint against the developer (as principal) and the surety under the lien discharge bond, rather than file a lien foreclosure complaint (which involves multiple parties, including all other lien holders, and questions of priority) against the property (which may or may not have any equity remaining because of its value and any prior recorded deed of trust). It is similarly in the developer's interest to take the lien off the property by filing a lien discharge bond. Thus, there is no valid public policy basis for allowing a developer to hide the pea by not timely serving the lien discharge bond upon the contractor in order to spring the "Gotcha" trap and reap unwarranted penalties from the contractor under § 33-420(A).

thus deliberately cause an otherwise legitimate *lis pendens* to be technically "wrongfully" recorded.

In short, the ruling below tips the balance of power between developers and contractors sharply — and unfairly — in favor of developers. This Court should reverse and make clear (in a published Opinion) that developers may not use the threat of A.R.S. § 33-420(A) penalties as a bludgeon to prevent contractors from exercising their lawful lien rights.

IV. THE PERTINENT STATUTORY SCHEMES

Title 33, Chapter 7, Article 6 of the Arizona Revised Statutes sets forth the statutory scheme governing mechanics' and materialmen's liens. The purpose of this scheme is to "allow[] a person who labors and supplies materials in the construction, alteration, or repair of any building, other structure, or improvement to impress a lien thereon for the work done and the materials furnished." *Egan-Ryan Mechanical Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 167, 818 P.2d 146, 152 (Ct. App. 1991). By enacting the mechanics' lien laws, the Legislature intended to protect the payment rights of laborers and materialmen, who contribute their labor and materials to enhance the value of the property of another. *Wylie v. Douglas Lumber Co., supra.* As this Court has observed, "the intent of the [mechanics'] lien statutes is to insure to the laborer and the

materialman payment of their accounts." *United Metro Materials, Inc. v. Pena Blanca Properties, L.L.C.*, 197 Ariz. 479, 484, 4 P.3d 1022, 1027 (Ct. App. 2000).

To effectuate these goals, contractors follow the procedures set forth in A.R.S. §§ 33-981, *et seq.* in order to perfect mechanics' and materialmen's liens on the construction projects on which those contractors work. Under A.R.S. § 33-998, such a lien "shall not continue for a longer period than six months after it is recorded, unless action is brought within that period to enforce the lien and a notice of pendency of the action is recorded pursuant to § 12-1191 in the office of the county recorder in the county where the property is located." (Emphasis added.) Thus, if contractors are not getting paid for their labor and the materials they have supplied to a construction project, those contractors are statutorily required to perfect their mechanics' and materialmen's liens, file a lien foreclosure action within six months, and, under A.R.S. § 12-1191, record a notice of *lis pendens* concerning such action.

The very nature of that lien foreclosure action can be dramatically altered, however, at the election of the developer of the project. That is, by posting a lien discharge bond, a developer has the ability to unilaterally transform a lien foreclosure action, which is an action "affecting title to real property" within the meaning of the *lis pendens* statute, into an action against the lien discharge bond itself, which is not such an action.

Thus, in A.R.S. § 33-1004, the Legislature provided a mechanism to allow persons having a legal or equitable interest in the land that is subject to a mechanics' lien to record a lien discharge bond and thereby free the real property from the lien. *See Hatch Companies Contracting, Inc. v. Arizona Bank*, 170 Ariz. 553, 557, 826 P.2d 1179, 1183 (Ct. App. 1991) ("[t]he obvious policy of the lien discharge statute is to give property owners the ability to free their property from liens"). As to the nature of the bond, the statute provides that a lien discharge bond must be in an amount "equal to one and one-half times the claim secured by the lien" and "shall be conditioned for the payment of the judgment which would have been rendered against the property for the enforcement of the lien." A.R.S. § 33-1004(B) (emphasis added). The statute further makes clear that it is lien claimants, *i.e.*, contractors exercising their rights under the mechanics' and materialmen's lien statutes, who are designed to be protected by the lien discharge bond: "The bond shall be for the sole protection of the claimant who perfected such lien." A.R.S. § 33-1004(B). *See also Performance Funding, L.L.C. v. Arizona Pipe Trade Trust Funds*, 203 Ariz. 21, 27, 49 P.3d 293, 299 (Ct. App. 2003) ("[t]he mechanics' lien laws and the contractor's bond laws have similar purposes: to protect laborers and materialmen who work on construction projects").

Significantly here, A.R.S. § 33-1004(A) provides that upon the recording of such a lien discharge bond, the real property is discharged from the lien:

> Upon the recordation of such bond, the property shall be discharged of such lien whether or not a copy of the bond is served upon the claimant or he perfects his rights against the bond.

(emphasis added).

The importance of the recording of the lien discharge bond is that "where a discharge of lien bond is filed pursuant to A.R.S. § 33-1004, any action which proceeds, thereafter, to obtain a judgment is transformed into one which does not affect title to real property." *Hatch Companies*, 170 Ariz. at 557, 826 P.2d at 1183. Thus, after a discharge bond has been recorded, the lien claimant does not institute an action against the real property to foreclose upon the lien, but rather files an action against the party posting the bond (the principal) and its surety to recover under the lien discharge bond itself. As the Supreme Court has explained, "[t]he effect of the [lien discharge] bond, when recorded, was to discharge the real property of the lien and provide for recovery, if any, to be satisfied from the bond." *S.K. Drywall, Inc. v. Developers Fin. Group, Inc.*, 169 Ariz. 345, 346 n.1, 819 P.2d 931, 932 n.1 (1991).

It was that precept — that the recording of the bond changes the nature of the action itself — that caused the *Hatch Companies* Court to hold that it was improper to file the *lis pendens* required by A.R.S. § 33-998(A) in lien enforcement actions after a discharge of lien bond had been recorded pursuant to A. R. S. § 33-1004. *Hatch Companies*, 170 Ariz. at 556-58, 826 P.2d at 1182-84.

Notably, because it is the recording of the lien discharge bond that triggers the change in the fundamental nature of the action that the lien claimant files — from an action against the real property to foreclose the lien to an action to recover under the lien discharge bond — the statute mandates that the principal on the bond must serve a copy of the bond on the lien claimant after the bond has been recorded. As § 33-1004(C) requires:

> The principal on such bond shall, upon recordation thereof with the county recorder, cause a copy of the bond to be served within a reasonable time upon the lien claimant, and if a suit be then pending to foreclose the lien, claimant shall within ninety days after receipt thereof, cause proceedings to be instituted to add the surety and the principal as parties to the lien foreclosure suit.

(emphasis added). Thus, developers such as Galeb-Miller are statutorily required to serve contractors such as Markham with copies of any lien discharge bonds those developers have recorded.

The final statute that is of concern here is A.R.S. § 33-420(A), which imposes penalties for knowingly recording a wrongful *lis pendens*:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded or filed in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages

> caused by the recording or filing, whichever is greater, and reasonable attorney fees and costs of the action.

(Emphasis added.)

In *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991), the Supreme Court explained that "A.R.S. § 33-420 requires a knowing violation before its sanctions will be imposed. A person is liable under § 33-420(A) only if he causes a document to be recorded or filed 'knowing or having reason to know that the document is . . . groundless . . . . '" (Emphasis in the original.) In the case of the recording of a *lis pendens*, the claimant is liable under § 33-420(A) "*only* if he knows or has reason to know the lis pendens claim is invalid." *Id.* (emphasis in the original).

V. ANY PENALTY SHOULD BE PER DOCUMENT, NOT PER LOT

The trial court's determination that the $5000 penalty provided in A.R.S. § 33-420(A) for wrongfully recording a *lis pendens* was to be assessed per lot covered by the *lis pendens*, rather than per "wrongful" document recorded, was not only erroneous but creates bad public policy. Plainly, that interpretation ignores the straightforward language used by the Legislature, which calls for the statutory penalty to be imposed per "groundless" document recorded. Moreover, computing the penalty on a per lot basis will necessarily result in an unjustified reward (and increased leverage) to the developer while simultaneously creating a severe chilling effect on the contractors' exercise of their legislatively-granted lien rights.

The magnitude of the potential harm caused by the trial court's error is evident from the facts of this case. *If* Markham did record "groundless" *lis pendens*, only five such wrongful *lis pendens* were recorded (even under the trial court's analysis). Given the statutory penalty of $5000 per wrongfully-recorded document that the Legislature intended, the maximum penalty imposed should have been $25,000 (an amount that is hardly *de minimis*). But, by calculating the penalty imposed by § 33-420(A) as being based upon the number of lots covered by a wrongfully-recorded *lis pendens* rather than the number of documents "wrongfully recorded," the trial court imposed a whopping **$215,000** penalty simply because a total of 43 separate lots were subject to the five "wrongful" *lis pendens*. With that magnitude of penalty potentially at stake in large, multi-lot development projects, developers will have more incentive to challenge contractors' liens (and to lure contractors into recording improper *lis pendens* in conjunction with their lien foreclosure suits when those developers have procured, but not served, lien discharge bonds), and contractors will be justifiably reluctant to exercise their lien rights by foreclosing on their mechanics' and materialmen's liens.

As the Supreme Court cautioned last year, "[a] statute's plain language is the best indicator of legislative intent, and we will not 'engage in other means of statutory interpretation' unless a statute is ambiguous." *Farris v. Advantage*

Capital Corp., 217 Ariz. 1, 2, 170 P.3d 250, 251 (2007). Here, the "plain language" of § 33-420(A) provides that a person "who causes a document . . . to be recorded" and who knows or has reason to know "that the document is . . . groundless" "is liable . . . for the sum of not less than five thousand dollars . . . caused by the recording . . . ." Clearly, the entire focus of § 33-420(A) is on the wrongful recording of a "document" and it is that wrongful recording of a "document" that is being punished by the statutory minimum penalty of $5000 per document. To go beyond the statutory language and assess the penalty based upon the number of parcels or lots covered by the *lis pendens*, *i.e.*, by the wrongfully-recorded "document," is to ignore the Legislature's "plain language" and engraft on § 33-420(A) a concept (how many parcels or lots are involved?) that the Legislature never intended.

Imposing statutory penalties much greater than the Legislature ever intended is not only wrong as a matter of law but will result in bad public policy as well. That is because developers could use threats of the imposition of very significant penalties under A.R.S. § 33-420(A) for a wrongfully recorded lien or *lis pendens* covering numerous lots to attempt to intimidate contractors — that is, to keep contractors from perfecting liens and filing lien foreclosure actions (and the concomitant notices of *lis pendens* required by A.R.S. § 33-998) in the first place. It is a fact of life in the construction industry (and, unfortunately, a growing trend)

that some developers habitually find fault with contractors' liens, crying "bad faith lien" and trying to bring into play the wrongful *lis pendens* statute, A.R.S. § 33-420(A), and its statutory penalty provision when there is no legitimate basis to do so. For example, developers will claim that a lien perfected pursuant to A.R.S. § 33-993(A) (and therefore the action to foreclose that lien and therefore the statutorily-required notice of *lis pendens*) is "groundless" because the lien amount is wrong or the lien is not properly allocated among the lots or units or the lien does not set forth all of the terms and conditions of an oral contract, among other alleged reasons. Even now, contractors must think twice before pursuing their lien rights out of concern that a developer may (unjustifiably) challenge a lien. But that situation would be made significantly worse if the trial court's "per lot" penalty calculation formula were to be upheld.

As shown above, using a "per lot" rather than a "per document" basis as the touchstone for calculating the statutory penalty can easily cause the amount of the penalty to skyrocket when large development projects are concerned. If there is the possibility of receiving a windfall in the form of penalties assessed under A.R.S. § 33-420(A) on a per lot, rather than per *lis pendens* basis, obviously developers of large multi-parcel and multi-lot projects will have even more incentive to challenge contractors' liens, and therefore the *lis pendens* recorded in connection therewith, as being "wrongful" under the statute. Yet, it is precisely

when large development projects are concerned that contractors may have the most need to resort to exercising their statutory lien rights due to the large amounts that such contractors can be owed by developers (or, in the present world, because the developer may become financially unable to fund such projects).

Particularly given the importance of contractors' rights under the mechanics' and materialmen's lien statutes, as recognized by both the Legislature and the Supreme Court, this Court should refrain from adopting an interpretation of § 33-420(A) that would have such far-reaching and adverse consequences and would work a result that is so clearly contrary to sound public policy. Contractors should not be further chilled in the exercise of their lien rights.

VI. COURTS SHOULD REFUSE TO ASSESS PENALTIES WHERE DEVELOPERS DO NOT FULFILL STATUTORY OBLIGATIONS

It is undisputed that the only reason that Markham's notices of *lis pendens* were "groundless" or "wrongfully-recorded" within the meaning of § 33-420(A) was that Markham recorded its *lis pendens* after the developer, Galeb-Miller, had procured lien discharge bonds (but did not timely serve Markham with copies of those bonds). In other words, *if* the developer had *not* procured the lien discharge bonds, the contractors' *lis pendens* would have been proper and no penalty would have been assessed against the contractor. Conversely, *if* the developer had timely *served* the contractor with copies of the bonds, the contractor would have pursued

an action against the bonds rather than against the liens and no *lis pendens* would have been recorded (because actions against lien discharge bonds do not "affect title to real property"), and again, no penalty would have been assessed against the contractor.

Given these scenarios, and in view of the draconian penalty actually imposed on the contractor here, it is evident that the importance of the statutory requirement that a developer who procures lien discharge bonds must serve copies of those bonds on the lien claimant (*i.e.*, the contractor) cannot be underestimated. *See* A.R.S. § 33-1004(C) ("[t]he principal on such bond shall, upon recordation thereof with the county recorder, cause a copy of the bond to be served within a reasonable time upon the lien claimant . . . . "). Indeed, this Court has recently recognized the reason for the statute requiring service of the lien discharge bonds and the pitfalls that may await lien claimants who are not duly served:

> It is advantageous for those with an interest in property to rid their property of liens. The grant of an interest in the underlying real estate to the claimant provides great leverage to a subcontractor in achieving payment of his claim. Such leverage is diminished by the substitution of a bond in place of the lien. Because the statute provides that a lien claimant loses its lien upon the recordation of the bond whether or not service is accomplished, see A.R.S. § 33-1004(A), a lien claimant may not even be aware that he has lost his lien claim and has separate remedies. Under such circumstances the claimant on the discharged lien might well pursue a meritless suit to foreclose upon the lien against those with an interest in

> property that has been discharged. To protect both those with an interest in the real property upon which the lien has been discharged, and the claimant on the former lien, **the statute requires the principal purchasing the bond to serve it on the lien claimant**.

Hanson Aggregates Arizona, Inc. v. Rissling Constr. Group, Inc., 212 Ariz. 92, 94-95, 127 P.3d 910, 912-13 (Ct. App. 2006) (emphasis added).

The failure of the developer to timely serve the contractor with copies of the lien discharge bonds should not be ignored. Rather, the Court, in the exercise of its equitable powers, should refuse to impose the statutory penalty for a wrongfully-recorded *lis pendens* where, as here, the only reason the *lis pendens* was "wrongful" or "groundless" in the first place was because of the developer's failure to fulfill its statutory obligation to inform the contractor of the existence of the lien discharge bonds by serving copies of those bonds on the contractor.

Such a policy would be consonant with the purpose of both the mechanics' and materialmen's lien statutes (to protect contactors) and the purpose of the wrongfully-recorded document statute (to protect property owners). As the Supreme Court noted in *Wyatt v. Wehmueller,* 167 Ariz. at 286, 806 P.2d at 875, "[t]he purpose of § 33-420 is to protect property owners from actions clouding title to their property." Where, as here, it was within the control of the developer itself to protect the property from the filing of an action that would cloud title (by serving the contractor with copies of the lien discharge bonds), then no statutory

purpose is served by penalizing the contactor who only pursued the lien foreclosure action because it had not been served with copies of the bonds (and, in fact, had previously been told by the developer that no lien discharge bonds would be procured).

The result that a developer who fails to fulfill its statutory obligation to serve copies of lien discharge bonds on a contactor should be precluded from reaping a windfall in the form of exorbitant penalties under A.R.S. § 33-420(A) would also further two other aspects of the Supreme Court's understanding of that statute as expressed in *Wyatt*: (1) that "the underlying rationale is deterrence rather than compensation," *id.*, and (2) that "[t]here is, however, no deterrent value in a rule that punishes an unknowing, innocent client," *id.* at 287, 806 P.2d at 876.

Just as the courts, in the exercise of their equitable powers, abate tax penalties under meritorious conditions, *see, e.g., General Petroleum Corp. v. Smith*, 62 Ariz. 239, 246, 157 P.2d 356, 360 (1945), so too should the Court here refuse to impose a penalty on a contractor where it was the developer's failure to timely fulfill its statutory obligation that was the cause of the recording of the "wrongful" *lis pendens*.

VII. CONCLUSION

For the reasons set forth above, the Court should vacate the judgment below insofar as it assessed penalties under A.R.S. § 33-420(A) against the contractor.

Alternatively, any penalty assessed should be limited to $5,000 per wrongfully-recorded *lis pendens*.

RESPECTFULLY SUBMITTED this 7th day of November, 2008.

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