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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 SUPPLEMENTAL BRIEF

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* For the Court's convenience, this brief contains four addendums containing copies of legal authorities. Citations to those authorities link to the appropriate addendum.

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"[T]he remedy of restitution is not confined to any particular circumstance or set of facts. It is, rather, 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." *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 53 (1985) (quoting Dan B. Dobbs, *Handbook on the Law of Remedies* 235 (1973)). As explained below, within the unjust enrichment (i.e., restitution) context, Arizona law, the Restatement, *Dobbs on Remedies*, and other authorities have long distinguished between cases involving (1) a property owner who has others make improvements to benefit the owner's own property, and (2) a tenant who has others improve the leasehold.

In Arizona, *Flooring Systems, Inc. v. Radisson Group, Inc.*, 160 Ariz. 224 (1989), governs the former cases, and *Wang Electric, Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314 (App. 2012), the latter. This case falls squarely under *Flooring Systems*, and that case confirms the Landowners should not be granted immunity. Moreover, Markham's complaint satisfies the *Wang* standard.

The Restatement (Third) of Restitution and Unjust Enrichment § 25 (2011) comports with existing Arizona law and confirms that Markham's unjust-enrichment claim should proceed. Although the Landowners assert § 25 is "inconsistent" with Arizona law, they have never explained which rule in § 25 conflicts with Arizona law, let alone how it does so. Ultimately, the Landowners ask the Court to make Arizona an outlier by becoming the first Court anywhere to make an allegation of "improper conduct" a necessary condition to stating an unjust-enrichment claim outside the tenant-improvement context.

I. Longstanding Arizona law does not grant the Landowners immunity from Markham's unjust-enrichment claim.

A. For decades, Arizona law has permitted unjust-enrichment claims when owners fund improvements to benefit their own property and then fail to pay anyone for them.

In *Flooring Systems*, this Court reversed dismissal of a subcontractor's unjust-enrichment claim against the owner of the Radisson Resort and its agent (a designer) when the owner failed to pay anyone for a portion of the work completed for its benefit. 160 Ariz. at 227. The owner hired a third party (general contractor Five Star) who "then entered into a subcontract agreement with Flooring. … *Neither Radisson nor CSA was a party to this subcontract agreement*." *Id.* at 225 (emphasis added).

In doing so, this Court reconciled the existing owner-improvement/contractor cases to explain when the plaintiff/worker's unjust-enrichment claim can proceed and when it cannot. Under *Flooring Systems*, the unjust-enrichment claim may proceed when the owner ultimately failed to pay *anyone* for at least some of the work completed by the worker/claimant. Other Arizona cases draw the same distinction.[1]

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[1] For example, in *Costanzo v. Stewart*, 9 Ariz. App. 430, 432 (1969), this Court affirmed judgment for a subcontractor for unjust enrichment when the owner paid no one. And in *Com. Cornice & Millwork, Inc. v. Camel Constr. Servs. Corp.*,

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In contrast, unjust enrichment is unavailable if the defendant/owner has "fully paid" for the improvements made to its property, but the party the owner paid then failed to pay the claimant. *Id.* at 226. In those cases, because the owner had fully paid for the work, it cannot be said that the owner was "unjustly enriched." *Id.* *Flooring Systems* "harmoniz[ed]" the existing contractor cases by sorting between "two types": (1) where "the defendant paid no one for the benefits received," and (2) "the defendant paid in full," even though the plaintiff was not paid. *A M Leasing, Ltd. v. Baker*, 163 Ariz. 194, 198 (App. 1989).

The Restatement later drew this same distinction in the context of the claimant making improvements to benefit an owner's property. The Restatement noted that these cases often follow "two standard patterns," and that "in an ideal case for recovery" by the worker, "it might be shown that the defendant has received the very performance that he specifically requested and agreed to pay for." Third Restatement § 25 cmt b. In such cases, "there is in principle no forced exchange to the extent that the defendant's liability in restitution is congruent with his own bargain." *Id*. In other words, this Court and the Restatement agree that *in this context*, restitution involving

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154 Ariz. 34, 35 (App. 1987), the Court of Appeals explained that the "Owner agreed to pay Subcontractor the full amount due under the subcontract and the change orders," but had never paid anyone for a portion of the remaining amount due.

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unpaid workers "frequently turns, not on an evaluation of the benefit conferred, but on the issue of payment by the defendant/owner." *Id*.

In addition to whether the defendant/owner expected but failed to pay, *Flooring Systems* emphasized several other factors that matter (or don't) in this context—factors that have guided Arizona courts for decades:

- ***Direct* payment to worker by owner not required; payment can flow through agents or other intermediaries.** It does *not* matter whether "the defendant intended to [directly] compensate the plaintiff for the services rendered or that the plaintiff intended that the defendant be the party to make compensation." *Flooring Sys.*, 160 Ariz. at 227 (quoting *Murdock-Bryant Constr.*, 146 Ariz. at 54). Payment, for example, may come from the party the owner hired to carry out the project. *Id.*
- **Contract with owner not required; the owner's contract with the third party that hired the worker shows the worker expects to be paid.** No direct contract with the owner is necessary (otherwise it would be a contract case, not an unjust-enrichment case), but if the owner has an agreement with the third-party that hired the worker (*e.g.*, the subcontractor has a contract with the general contractor the owner retained), that contract "both evidences [plaintiff's] expectation of compensation and the circumstances which make it unjust to allow [defendant] to retain the benefits." *Id.*
- **Benefit not gratuitous or "conferred officiously."** If the benefit is offered gratuitously or without the owner's consent, there is no unjust enrichment. *Id.*

The Key Takeaway: if the owner had planned to ultimately fund the improvements being made to benefit its own property (or led the worker to so believe), the owner caused a developer, contractor, or other third party to get the work done (like a development district), and that third party hired the worker, the worker may have an unjust-enrichment claim against the owner if the owner pays no one for the work.

In *Flooring Systems*, these considerations meant that the defendants "were not entitled as a matter of law to prevail on" the worker's "unjust enrichment claim," *id.*, and the same is true here. In both *Flooring Systems* and here, the owners planned to ultimately fund the improvements even though they were not parties to the contract with the workers. But the owners then paid no one for a portion of the improvements. However, the contractors responsible for that work did not intend to "work gratuitously," and did not act "officiously." *Id.* They intended "to be paid for [their] services," as evidenced by their contracts with the party that had the agreement *with the owner to do the work* (the general contractor and District). For these reasons, the opening sentence in the Landowners' Petition (at 1)—that "[i]n Arizona, a property owner is not liable to a contractor in unjust enrichment for the benefits received from the contractor's performance under a contract to which the property owner is not [a] party"—mischaracterizes Arizona law.

B. *Wang*'s "improper conduct" standard expressly applies only in the tenant-improvement context.

The Landowners' contention that *Wang* applies to cases where the owner (rather than a tenant) engages the third party who contracts with the worker to improve the owner's property (with the owner intending to pay for the improvements) is specious. *Wang* adopted a narrow out-of-state rule applicable only to tenant-improvement cases, and found no fault with *Flooring Systems'* guidance for cases like this one.

In *Wang*, the Court of Appeals explicitly noted at the outset the "two categories" of contractor cases *Flooring Systems* discussed. *Wang*, 230 Ariz. at 318 ¶ 12. It could not overrule or modify *Flooring Systems*, but it could have criticized that case and did not. Instead, it *reaffirmed* the rule that governs this case: "when the owner has failed to fully pay its obligation, our courts have held that recovery for unjust enrichment is available because permitting the owner to retain the benefit without fully paying for it would be unjust." 230 Ariz. at 318-19, ¶12 (citing *Flooring Sys.*, 160 Ariz. at 227, and other cases).

After reaffirming *Flooring Systems*, *Wang* then turned to the case before it, explaining that "[n]either category of [these] cases [discussed in *Flooring Systems*] addresses the viability of an unjust enrichment claim against an owner for improvements *made by its tenant—the situation before us*." *Id.* at 319 (emphasis added). In other words, *Wang* would be addressing a *different* context. Within that narrowly defined context, *Wang* then held that a plaintiff making an unjust enrichment claim filed against an owner for improvements *made by its tenant* must show that the owner engaged in "improper conduct." *Id*. at 320, ¶17. The Court of Appeals therefore (1) knew about this Court's binding precedent, (2) agreed with it, (3) explained it applied to a *different* context, and (4) adopted its own new rule for *tenant-improvement* cases.

Wang "adopt[ed]" this invented "improper conduct" rule not from the Restatement or other generally applicable unjust enrichment principles, but from out-of-state authority: *DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115 (Colo. 1998). *See Wang*, 230 Ariz. at 320, ¶15 ("We agree with and adopt the holding in *DCB Construction* [adopting the improper conduct standard]."). In doing so, *Wang* carefully articulated its holding so as not to conflict with the *Flooring Systems* line of cases where *the owner* hires a third party who then hires a contractor to improve *the owner's property*: "[W]e hold 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.* ¶17 (emphases added).

That limitation is hardly surprising because *DCB* relied on a treatise rule that applied to the tenant-improvement context, 965 P.2d at 121 (citing Dobbs, *Remedies* at 473), and emphasized that its holding applied exclusively to the landlord-tenant context: "[W]e hold that injustice *in this context* requires some type of improper, deceitful, or misleading conduct *by the landlord*." 965 P.2d at 122 (emphasis added). Notably, the Colorado Supreme Court later cabined *DCB*'s rule to "appl[y] only in situations where a landlord receives a benefit from a failed contract between a tenant and a party working at the tenant's behest," *Lewis v. Lewis*, 189 P.3d 1134, 1143 n.5 (Colo. 2008). Unquestionably, then, *DCB*'s invented "improper conduct" pleading

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rule does "*not extend to all unjust enrichment circumstances*." *Id*. at 1142 (emphasis added). The Landowners' contention (Pet. at 11) that the "court of appeals committed pure legal error" by not expanding *Wang* beyond "the landlord-tenant" context misreads the law.

C. Owner-improvement and tenant-improvement cases differ.

The unjust-enrichment considerations typically relevant in owner-improvement cases differ from those typically relevant in tenant-improvement cases. In the *owner*-improvement context, the owner typically wants to make improvements that benefit *its own property*. The owner often initiates the improvements by engaging someone to manage the project (e.g., a designer/agent like CSA, a general contractor like Five Star, or here a development district), who then engages others to make these improvements. The owner typically plans and expects to fund the improvements that will benefit its property, whether through direct payments, financing, or assessments. The contractors that get hired to perform the work typically understand they are dealing with others in privity with the owner, but they have no contract directly with the owner and do not expect the owner to directly pay them. But when the owner fails to pay anyone for the improvements made by the contractor to the owner's property—improvements for which the owner had planned to pay—decades of Arizona law permits an unjust-enrichment claim (as *Flooring Systems* confirms). *See* Argument § I.A.

By contrast, in the tenant-improvement context, the tenant typically desires to alter *someone else's* property for the tenant's own benefit. The tenant may negotiate to have the landlord pay for the improvements, but in reality that means the landlord in effect finances the improvements through lease payments, i.e., the owner intends the tenant to ultimately pay for the work over time. In this context, the tenant (not the owner) usually engages the third party who then hires others to perform the work, and those others typically do not understand themselves to be performing the work at the owner's request.

Indeed, in this context the owner may or may not need or even want the tenant improvements, and the improvements may even impose a burden if the tenant vacates the premises. *Cf.* Decision ¶10 ("individual tenant improvements may or may not add value to the property, as the next tenant may operate another variety of business and be required to remove the previous tenant's improvements to accommodate its own venture"). As noted, the owner also does not typically plan to bear the full economic weight of the tenant improvements, but rather expects to recoup any monies spent through lease payments. In this context, therefore (and absent other factors) restitution is far more likely to prejudice the defendant, making something like an "improper conduct" inquiry more appropriate. Absent something like that, when a tenant fails to pay the contractor, forcing the owner to pay may "subject the defendant to an obligation from which it was understood by the parties that the defendant would be free." Third Restatement § 25(2)(c).

Although the Landowners claim "decades of case law" support their theory (*see*, *e.g.*, Pet. at 3, 6, etc.), they cite no court, anywhere, that has extended the "improper conduct" pleading standard beyond the narrow tenant-improvement context. Simply put, "where the claimant improves the landlord's property under contract with a tenant," rather than someone engaged by the owner, "[d]ifferent issues" come into play. Third Restatement § 25 cmt. b.

D. This case falls squarely under *Flooring Systems*, not *Wang*.

At the pleading stage, the Court must "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶7 (2008). *Flooring Systems*, not *Wang*, governs Markham's complaint.

In this case, as in *Flooring Systems*, the owners (Landowners/Radisson) entered into agreements with third parties (the District/Five Star and CSA) to hire others (Markham/Flooring Systems) to make improvements to benefit *their own property* with plans to pay for the improvements (which they then failed to do). The Landowners[2]—all controlled by Mark Stapp—created the Cahava Springs

[2] The complaint alleges the same unjust-enrichment claim against all Landowners on the same theory, and no defendant has asked to be treated differently

Revitalization District for the express purpose of making infrastructure improvements to benefit *their own properties*. APP0217, ¶6; APP0248-51 (description of improvements). Stapp signed the Development Agreement on behalf of each Landowner. APP0244. The Landowners expressly acknowledged that their property (i.e., the Assessed Property) "receives a benefit" from the improvements of at least the value of the assessments that would be used to pay Markham. APP0044, § 8(a); *accord* APP0230, § 2.2(b) ("benefit … not less than the Assessments.").

Like in *Flooring Systems*, the owners engaged and directed a party to oversee the improvements (here, the District), which then contracted with the contractor/ subcontractor (Markham) to make improvements that would benefit the owner's property. In this case, Markham was even selected "in consultation with the Developer," which was one of the Landowners (Defendant/Appellee Cahava Springs Development Corporation). APP0229, § 1(a). The District also retained that same Landowner as "Development Manager" specifically "to manage the installation" of the work Markham performed. *Id.* The District Board consisted entirely of the Landowners' representatives. (*See* COA Opening Br. at 12-13 (collecting citations)). In fact, the Landowners expressly "consent[ed to] or acknowledge[d] … the execution of the construction contracts." APP0239-40, § 8.

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or sought dismissal based on circumstances unique to it. This brief therefore refers to "the Landowners" collectively, as the parties have done throughout this case.

Akin to *Flooring Systems*, Markham expected to be paid (it was not acting gratuitously or officiously), and the Landowners expected to fund Markham's payment through bonds/assessments. The Landowners agreed to assessments of specific amounts on each lot to fund the work, "based on the benefits received by each lot." APP0230, § 2.2; APP0264-74 (assessments by lot); APP0058 (collection agreement). They had estimates of the improvements' expected costs, down to the penny (APP0248-51), and they even agreed that additional debt could be placed on their properties if necessary to cover any cost overruns. APP0220-21, ¶28.

Finally, the Landowners paid no one for all of the improvements Markham made because the District—controlled by the Landowners through Stapp—chose not to collect the assessments, even after promising to "collect when due all Assessments." APP0331, § 9.2(a); APP0219, ¶16; APP0367. Behind the curtains, Mark Stapp orchestrated everything. He signed the Development agreement on behalf of each Landowner (promising to use assessments to fund the work). He signed the contract with Markham (promising to pay Markham using those assessments from the Landowners). Presumably acting for the benefit of the Landowners, Stapp then refused to collect the assessments or pay Markham. APP0221-22, ¶¶ 30, 35.

The Landowners are not therefore unwitting third parties who happen to benefit from a tenant's independent decision to make improvements. Rather, the

Landowners *created* the District for the express purpose of financing infrastructure improvements to benefit their properties. They *agreed* that their properties would benefit from those improvements in an amount not less than the assessments to be levied to finance them. And they *controlled* the District's decision-making, including the decision whether to bill and collect the assessments. They have never explained how they expected not to pay.

These facts place this case squarely under *Flooring Systems*, not *Wang*. In fact, to distinguish *Flooring Systems*, *Wang* even emphasized that the *tenant* rather than the *owner* had requested the work. *Wang* explained that if the owner, Smoke Tree, had "directly engage[d]" the general contractor KAI (who then hired the subcontractors) "to construct tenant improvements and then with[e]ld payment, knowing it would affect payment to the subcontractors," then the case would have been like *Flooring Systems*, where "unjust enrichment [was] available as [a] remedy[.]" *Wang*, 230 Ariz. at 320, ¶16 (citing *Flooring Systems*, 160 Ariz. at 226-27). In other words, when a landowner engages a third party to coordinate improvements on its property, understands it will have to pay for those improvements, but fails to do so, then the landowner may be liable for restitution.

That's this case. Although the District was not a general contractor, the Landowners entered into an agreement with the District for the express purpose of constructing the improvements, which is the fact that matters for unjust enrichment.

Although the Landowners financed their improvements with assessments, what matters is that the Landowners never paid the required assessments *that they had already agreed to*, knowing that such failure would affect payment to Markham. *Wang* thus confirms that "unjust enrichment" is "available as [a] remedy" in this case. *Id*. Indeed, this is "an ideal case for recovery" because "the defendant has received the very performance that he specifically requested and agreed to pay for," yet failed to do so. Third Restatement § 25 cmt. b.

The Landowners even concede (Pet. at 11 n.4) 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." (quoting the Decision and calling it "[c]orrect" on this point). But they claim that this case differs because Markham "alleged that it 'constructed the infrastructure for the development *at the request of Cahava Springs Revitalization District*,' not the Defendant Property Owners." But that's no different from *Flooring Systems*, where the contractor made the improvements at the request of Five Star (the general contractor), not the owner (Radisson). The Landowners' own Petition therefore confirms the Court of Appeals reached the correct result in this case.

E. In any event, the Landowners' conduct qualifies as "improper" under *Wang*.

If the Court nevertheless decides to import *Wang*'s improper conduct standard into the owner-improvement context—rather than cabining it to the tenant-improvement context or simply clarifying that Restatement § 25 governs—the extraordinary facts here (accepted as true with inferences in Markham's favor) would also permit a finding of "improper conduct" under *Wang*.

As noted, *Wang* "adopt[ed] the holding from *DCB Construction*," i.e., that the claimant must allege "*some form of* improper, deceitful, or misleading conduct." *Wang*, 230 Ariz. at 319, ¶¶14-15 (emphasis added); *DCB*, 965 P.2d at 122 (same). Neither *Wang* nor *DCB* demands fraud or intentional deceit. The test requires only "*some type*" of wrongdoing—a context-driven, fact-specific inquiry that "will depend to a large extent on the facts of the specific case." *Redd Iron, Inc. v. Int'l Sales & Servs. Corp.*, 200 P.3d 1133, 1138 (Colo. App. 2008).

In this case, the Landowners created and controlled the District. They knew that a contractor would work on their property, knew the expected price, and acknowledged in writing that the work would benefit their property by at least that much. They arranged for the work and agreed to pay. But after leading Markham to believe it would get paid via the assessments, the Landowners deliberately sabotaged the promised mechanism to preclude Markham from getting paid. (*See* Argument § I.D, above; *see also* COA Opening Br. at 9-18, 49-51; COA Reply Br. at 32-38.) That easily satisfies any requirement of "*some form of* improper, deceitful, or misleading conduct." *Wang*, 230 Ariz. at 319, ¶14 (emphasis added).

In *DCB* itself, the Colorado Supreme Court suggested that evidence that the landlord "improperly *created the impression* that either [it] or [its tenant] would pay for the work being done" could be improper conduct. 965 P.2d at 123 (emphasis added). The "reasonable inferences" from Markham's allegations are that the Landowners misled Markham and others that they would pay for the improvements, and then deliberately decided not to pay. *Cullen*, 218 Ariz. at 419, ¶7.

These facts make this case different from *Wang* or *DCB*, where a mostly-passive landlord happened to benefit from a tenant's decision to improve the premises, and where courts might doubt whether the landlord wanted the improvements and whether they would benefit the property. Here, by contrast, the Landowners affirmatively set the entire project in motion, knew what work would be done and how much it would cost, promised that assessments on their properties would fund the work, and then used their control over the District to stiff Markham. Particularly at the pleading stage, where the case has had no discovery and no fact development, these allegations satisfy "some form of improper conduct."

II. The Restatement reconciles *Wang*, *Flooring Systems*, and other Arizona precedent and confirms Markham's case should proceed.

The Landowners emphasize that Arizona has long followed the 1935 First Restatement § 110, which provides that "[a] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other *merely because* of the failure of performance by the third person." (Emphasis added). That old section has now been replaced with Third Restatement § 25.

Notably, § 25 "takes as a starting point" the rule "inherited from Restatement of Restitution § 110 (1937)," i.e., "that when A confers a benefit on B as the performance of A's contract with C, C's failure to render the performance promised to A *does not necessarily mean* that B has been enriched at A's expense; nor does it mean that any enrichment of B is necessarily unjust." Third Restatement § 25 cmt. b (emphasis added). Section 25 therefore starts with the rule the Landowners agree governs this case. However, instead of leaving courts to guess at the meaning of § 110's ambiguous "merely because" standard, § 25 gives courts meaningful guidance through "two principal tests." *Id*.

These two tests accord with existing Arizona law. The first test uses the concept of "a forced exchange" and identifies the circumstances that are likely "not [to] subject the defendant to a forced exchange" in § 25(2)(a)(i)-(iii). *Id*. *Wang* relied on First Restatement § 110 (the foundation for § 25), and also invoked "the Arizona-adopted principle that unjust enrichment should not be used to saddle entities with expenses they chose not to incur," 230 Ariz. at 320, ¶ 15. That Arizona "principle" *Wang* invoked is the very concept of "forced exchange" built into Restatement § 25's first "principal test[]." Third Restatement § 25 cmt. b.

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Flooring Systems also cited Restatement § 110, and then helpfully explained that the two lines of Arizona cases with superficially different results turned on whether the defendant had paid *anyone* for the benefit received. (*See* Argument § I.A, above.) Section 25 captures that same concept with its second test, which asks whether the defendant B stands "to obtain a valuable benefit at [claimant] A's expense without paying *anyone* for it." Third Restatement § 25 cmt. b. (Emphasis added; citation omitted). So, although the Court did not have the benefit of § 25 when it decided *Flooring Systems*, the distinction it drew is § 25's second principal test, i.e., there is "no unjust enrichment if [the owner] has paid the contract price" to the general contractor or others. *Id*.

Ultimately, then, § 25 refines and better clarifies the same Rule in the old § 110. Moreover, § 25 is not merely *consistent* with existing Arizona law, it better explains why Arizona courts have reached the results they have, and it would provide better guidance in future cases.

But the Landowners want the Court to ignore § 25. (*See*, *e.g.*, COA Ans. Br. at 34; Pet. at 10 n.3 (suggesting § 25 is "inconsistent" with *Wang*)). They have, however, never substantively criticized § 25, nor explained how in principle it conflicts with Arizona law (i.e., which "principal test[]" Arizona should reject).

The Landowners oppose applying § 25 to this case because § 25 confirms Markham's unjust-enrichment claim should go beyond the pleading stage. (*See* COA

Opening Br. at 30-37.) Tellingly, when confronted with this argument in the Court of Appeals, the Landowners addressed only one subfactor of the forced-exchange test (§ 25(2)(a)(i) ("defendant has expressed a willingness to pay")), and disputed whether the Landowners "agreed to bear ultimate responsibility for paying for th[e] improvements." (COA Ans. Br. at 37.) Setting aside that this is not a dispute the Court should resolve on a motion to dismiss, Markham's opening brief contained an entire section explaining how the Landowners agreed to bear ultimate responsibility (COA Opening Br. at 13-16), and the Landowners did not dispute any of that. (*See* COA Ans. Br. at 33-42; *see also* COA Reply Br. at 17-19.)

III. The Landowners' proposal ignores decades of precedent, would make Arizona an outlier, and would invite mischief.

Although the Court of Appeals (Judge Timmer) intended to limit *Wang*'s holding to the landlord-tenant context, the Landowners want this Court to *extend* *Wang*'s "improper conduct" requirement to all unjust enrichment cases. They invite the Court to do so even though the tenant-improvement context raises different concerns from the context here, and even though they identify no court anywhere that has so broadly extended an improper-conduct pleading rule.[3] They invite the

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[3] The limited jurisdictions that require improper conduct do so only in the tenant-improvement context. *Compare, e.g.*, *Hayes Mech., Inc. v. First Indus., L.P.*, 812 N.E.2d 419, 429 (Ill. App. 2004) (requiring improper conduct in tenant-improvement case), *with C. Szabo Contracting, Inc. v. Lorig Constr. Co.*, 19 N.E.3d 638, 649 (Ill. App. 2014) (citing Third Restatement § 25) (not requiring improper conduct in non-tenant-improvement case).

Court to do so even though their request stands on its head this Court's foundational rule that "the remedy of restitution is not confined to any particular circumstance or set of facts," but rather is "a flexible, equitable remedy," *Murdock-Bryant,* 146 Ariz. at 53. They ask the Court to make Arizona an extreme outlier.

Doing so would obliterate the core distinction drawn across the Restatement, *Dobbs on Remedies*, existing Arizona precedent, and authorities from other jurisdictions, i.e., that it is one thing when the property owner enters into an agreement with a third party to make improvements that will benefit the owner's own property, and quite another when "the claimant improves the landlord's property under contract with a tenant." Third Restatement § 25 cmt. b. There is no good reason for the Court to ignore this distinction.

Granting the Landowners immunity from Markham's unjust-enrichment claim—immunity which does not exist under existing Arizona law—would also invite further abuse of the development district statutes by unscrupulous developers. (*See* COA Opening Br. at 54-57; Resp. to PFR at 22-24.) There is no good reason for the Court to do this either.

CONCLUSION

The Court should affirm the Court of Appeals, vacate the judgment, reverse the denial of the motion for leave to amend the complaint, and remand for further proceedings. *See* Decision ¶15.

RESPECTFULLY SUBMITTED this 23rd day of March, 2026.

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ADDENDUM 1:
First Restatement § 110

Restatement (First) of Restitution § 110 (1937)

§ 110 Restitution from Beneficiary of a Contract with Third Person Who Has Failed to Perform

A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person.

Comment:

a. Restitution from the transferee. The rule stated in this Section is to be contrasted with that stated in § 17 by which restitution from the transferee is permitted if the benefit was conferred as the result of fraud or mistake except where the transferee is a bona fide purchaser. If the contract with the third person or the transfer of the benefit is not rescindable because of fraud, mistake or duress, the fact that the contract could be subsequently rescinded against the other contracting party because of his failure to perform does not entitle the transferor to restitution from the transferee. This is true both where the transferee is a creditor beneficiary (see Illustration 1) and where he is a donee beneficiary (see Illustration 2), because a payment made freely and with a knowledge of the facts cannot be recovered unless made in anticipation of a promise which is not performed by the transferee. This distinguishes the situation from that which exists before the benefit has been conferred, in which case neither the creditor beneficiary nor the donee beneficiary has any greater rights than the promise (see Restatement of Contracts, § 140).

The rule stated in this Section has no application to conveyances of land for which the transferee does not pay value, in States in which, by statute or otherwise, the grantor of land has a lien for the purchase price, except where he surrenders the lien. It does not apply to contracts made with agents for undisclosed principals who have received the benefits, as to which see § 111(2).

Illustrations:

1. A owes B $10,000. In consideration of A's promise to pay C $10,000, C conveys Blackacre to B in extinguishment of A's debt to B. A fails to perform his promise. C is not entitled to restitution from B.

2. A promises to pay C, a jeweler, $15 per month for ten months in return for which C promises immediately to deliver a ring to A's fiancée, B, as a gift from A. There is no agreement for C to retain a security interest in the ring. A makes the first payment of $15 and C sends the ring to B. Thereafter A fails to make further payments. C is not entitled to the return of the ring from B.

b. Restitution from promisor. A person who has failed to perform a promise has a duty of restitution under the rules stated in the Restatement of Contracts, §§ 347-357, irrespective of the fact that the consideration for his promise is a promise of payment or transfer to a third person or is a payment or transfer to a third person. The fact that performance has been given to the third person and not to the promisor does not prevent the promisee from obtaining from the promisor by way of restitution the value of what he gave. As to cases where the beneficiary is entitled to restitution, see the Restatement of Contracts, § 356.

ADDENDUM 2:
Third Restatement § 25

(Highlighting added by counsel)

Restatement (Third) of Restitution and Unjust Enrichment § 25 (2011)

§ 25 Uncompensated Performance Under Contract with Third Person

(1) 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.

(2) There is unjust enrichment for purposes of subsection (1) only if the following three conditions are met:

(a) Liability in restitution may not subject the defendant to a forced exchange (§ 2(4)). This condition is likely to be satisfied if the benefit realized by the defendant

(i) is one for which the defendant has expressed a willingness to pay,

(ii) saves the defendant an otherwise necessary expense, or

(iii) is realized by the defendant in money.

(b) Absent liability in restitution, the claimant will not be compensated for the performance in question, and the defendant will retain the benefit of the claimant's performance free of any liability to pay for it.

(c) Liability in restitution will not subject the defendant to an obligation from which it was understood by the parties that the defendant would be free.

(3) Restitution by the rule of this section may be qualified or denied if recovery would conflict with a system of priorities, established by other law, ordering claims against the third person, the defendant, or the assets of either.

Comment:

a. General principles and scope. Most transactions for which restitution may be available by the rule of this section fall within one of two common (though nonexclusive) patterns. In a first set of cases, A is a subcontractor, B is a property owner, and C (now unavailable) is the general contractor with whom both parties have dealt. In a second, A has performed work benefiting B's property under a contract with C, who is typically a tenant or a family member of B; C had an interest in seeing the work performed but no authority to bind B to pay for it. In either setting, the exit or insolvency of C leaves A without compensation for work that was performed as requested. If a further consequence of the interrupted transaction is that B stands to obtain a valuable benefit without paying for it, the outcome may be one that the law will characterize as unjust enrichment.

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While two scenarios mentioned account for all (or nearly all) the cases allowing restitution within the rule of this section, there is nothing about their facts that would restrict the scope of the rule to such cases exclusively.

b. Threshold limits to the claim. Under a traditional analysis, the restitution claim described in this section would often be barred by invoking a test of "privity." The rule here stated affords an equivalent protection to the interests of the defendant, without allowing the defendant to employ a formal test of privity to escape liability in cases of unmistakable unjust enrichment. The method adopted is to authorize restitution as necessary to prevent unjust enrichment, and to establish a rigorous test of unjust enrichment as a threshold requirement of the claim.

Section 25 takes as a starting point the proposition, inherited from Restatement of Restitution § 110 (1937), that when A confers a benefit on B as the performance of A's contract with C, C's failure to render the performance promised to A does not necessarily mean that B has been enriched at A's expense; nor does it mean that any enrichment of B is necessarily unjust. The limited circumstances in which B might be unjustly enriched by A's performance are identified by two principal tests. The first is that restitution to A not subject B to what this Restatement calls a forced exchange (§ 2(4)). Circumstances in which this requirement are likely to be met are indicated by § 25(2)(a)(i)-(iii). The second fundamental requirement of unjust enrichment in these circumstances is that B must stand to obtain a valuable benefit at A's expense without paying anyone for it (§ 25(2)(b)). There is accordingly no unjust enrichment if B has paid the contract price to C; nor if B has paid in full (to C and to others, following C's default) the price originally fixed by contract for the work to which A has made an uncompensated contribution. Compare Illustrations 1 and 2.

Illustrations:

1. Owner hires Builder to renovate an office building. Builder hires Subcontractor to do the necessary painting. Owner's representatives at the site approve all aspects of the work as it is performed, including the labor and materials supplied by Subcontractor. Builder defaults before the project is completed; Owner hires another firm to complete the project. Builder files for bankruptcy without paying Subcontractor. Subcontractor seeks to recover from Owner the reasonable value of its labor and materials. Owner can show that its aggregate payments to Builder and the other firms with which it dealt following Builder's default equal or exceed the original contract price for the work performed. Subcontractor has no claim against Owner under this section.

2. Same facts as Illustration 1, except that Owner's original contract with Builder failed to cover significant aspects of the project as ultimately completed at Owner's direction. A direct comparison of Owner's overall expenditures with the original contract price is therefore inconclusive. Reviewing the evolution of the work and the sequence of Owner's payments, the court finds as a fact that Owner has obtained the benefit of Subcontractor's work without paying anyone for it. Subcontractor has a claim against Owner

under this section to recover the reasonable value of its labor and materials or the price fixed by its contract with Builder, whichever is less.

Nor will the test of § 25(2)(b) be satisfied in the converse case, where A attempts to recover from B in restitution instead of pursuing a viable contract claim against C. See Illustration 3.

Illustration:

3. Buyer contracts with Developer for the purchase of a newly-constructed house and with Nurseryman for the installation of shrubbery. Nurseryman completes performance before the house is completed and submits an invoice to Buyer for $1000. Shortly before the date fixed for closing of the house purchase, Buyer dies. Nurseryman's invoice has not been paid. Developer cancels the contract by an agreement with Buyer's estate under which neither party pays anything to the other; Developer then sells the house (including the shrubbery) to another purchaser. Nurseryman sues Developer in restitution. Nurseryman's performance increased the value of the real estate by $1000; Developer obtained $500 of this added value on resale of the property. The court finds that Nurseryman still has a viable contract claim against Buyer's estate. Nurseryman has no claim against Developer (**§ 25(2)(b)**), notwithstanding that Developer has been enriched at Nurseryman's expense.

Even if restitution is the claimant's only recourse, restitution will be denied where the imposition of a liability in restitution would overturn an existing allocation of risk or limitation of liability previously established by contract. There is accordingly no claim in restitution when B has already paid the contract price for the benefits received, even if the contract price is less than the cost or value of the performance in question. Nor is there restitution under this section if the imposition of liability would alter the basis of the underlying transaction, subjecting B to an obligation from which the parties understood that B would be free. In the cases within § 25, of course, B's potential liability to compensate A is never addressed by the parties' agreement: if it were, A's claim against B would be in contract rather than restitution. But restitution is *inconsistent* with the parties' contractual arrangements only when it may also be said that B's liability was contractually limited, as in Illustration 4; or when, on a fair interpretation of the parties' agreements, it was understood that B was to be free from the obligation in question. See Illustrations 5-6.

Illustrations:

4. Builder contracts with Crane Service to supply the progressively larger cranes needed for a construction project at a rate of $1000 per week for the duration of the job. When Service is unable to furnish equipment of the necessary size from its own inventory, Service advises Builder that it will rent a crane for its own account from third-party Supplier. The only crane available that will handle the job rents for $3000 per week. Supplier's crane is used on Builder's job for one week. Builder pays Service for that week at the contract rate of $1000. Service fails to pay Supplier and files for bankruptcy. Supplier is not entitled to restitution from Builder.

5. Broker agrees to market property of Seller in exchange for a commission payable by Seller. Broker's efforts result in a transaction between Seller and Buyer that proves to be profitable for both parties. Seller fails to pay Broker the promised commission and becomes insolvent. Although Buyer's advantageous transaction with Seller would not have occurred without Broker's intervention, Broker has no claim against Buyer under this section. Restitution in such a case would alter the basis of the underlying transaction, subjecting Buyer to an obligation that all parties understood would be borne by Seller.

6. Father holds a credit card issued by Bank. Acting at Father's direction, Daughter uses the card to purchase valuable jewelry as a gift for herself. By the terms of the credit agreement, to which Daughter is not a party, Daughter's authorized use of the card creates an unsecured debt of Father to Bank. Father dies, leaving an unpaid credit-card balance and no estate. Bank has no claim against Daughter under this section. Restitution in such a case would alter the basis of both the extension of credit and the gift, subjecting Daughter to an obligation that all parties understood was Father's alone.

Restitution under this section is initially limited, in other words, to circumstances in which the imposition of a new, noncontractual liability running from B to A will not contradict or undermine preexisting contractual dispositions regulating the three-cornered transaction that brings the parties together. But frequently it will not. A transaction in which A renders services to B without receiving the compensation promised by C is by definition one that has not gone as anticipated; the turn of events by which B stands to benefit at A's expense often lies outside the range of contingencies that the parties have regulated by agreement. So long as contract is not a bar, the availability of restitution in this context depends above all on whether a remedy may be granted to A without subjecting B to a forced exchange.

This fundamental safeguard takes essentially different forms in cases falling within the two standard patterns. If the claimant is an unpaid subcontractor, in an ideal case for recovery it might be shown that the defendant has received the very performance that he specifically requested and agreed to pay for. Although the disruption of the transaction may complicate the valuation of claimant's performance, there is in principle no forced exchange to the extent that the defendant's liability in restitution is congruent with his own bargain. This is why restitution in cases of unpaid subcontractors so frequently turns, not on an evaluation of the benefit conferred, but on the issue of payment by the defendant/owner. See Illustrations 1-2.

Different issues characterize those cases in which the defendant has not requested the performance in question, as where the claimant improves the landlord's property under contract with a tenant. Because the benefits conferred in cases of this kind are generally nonreturnable—typically consisting of services and improvements to realty—a claim under this section confronts restitution's fundamental reluctance to require a defendant to pay money, at a price set by someone else, for goods and services he had no adequate opportunity to select or to refuse. See § 50, Comment *c*. The result is a transactional setting in which restitution is commonly said to be disfavored, if not altogether unavailable. Yet the difficulty lies less in the identification of potential unjust enrichment than in the formulation of a remedy that will not be prejudicial to the defendant.

To recapitulate: this section authorizes restitution only as the claimant's secondary recourse; only if the defendant will otherwise retain the benefit without paying for it; only if restitution is not displaced by the parties' contractual arrangements; and only if restitution will not subject the defendant to a forced exchange. The same conditions follow if the defendant's liability under § 25 is merely tested by the rule of § 50(3) (reaffirming that the innocent defendant's liability in restitution must not leave him in a worse position than if the underlying transaction had not taken place).

c. Unjust enrichment. If a claimant under § 25 seeks restitution for a performance that the defendant has previously agreed to pay for—the typical setting of the claim asserted by an unpaid subcontractor—the issue of unjust enrichment will be dominated, in many instances, by the question of defendant's payment. If the defendant has paid (or remains liable to pay) the agreed-on price for the benefits in question, the defendant has not been unjustly enriched. See Comment *b* and Illustrations 1-2.

Assuming that the defendant retains benefits that otherwise will not be paid for, the claimant under § 25 still confronts the same difficulties that burden every restitution claim in respect of unrequested, nonreturnable benefits. Restitution will not be granted if it would subject the defendant to a forced exchange. The claimant bears the burden of establishing the value to the defendant of the performance in question. The court must be satisfied, moreover, that it is not inequitable to require the defendant to pay money for benefits received in the absence of agreement.

As with claims in respect of improvements and services in other transactional settings, the obstacles of valuation and liquidity may sometimes be overcome. There is no forced exchange to the extent that specific restitution is available. See Illustration 7. If the benefit conferred on the defendant has been directly or indirectly reduced to a money equivalent, the principal obstacles to restitution are likewise removed. In the present context, a benefit is typically reduced to money by a subsequent disposition of improved property, or by the saving of an otherwise necessary expense. See Illustrations 8-11.

Illustrations:

7. Acting without Owner's request or involvement, Contractor installs heating and air-conditioning equipment in Owner's business premises under agreement with Tenant. The cost of the installation is $65,000. Tenant defaults on its lease and abandons the premises without paying Contractor. Contractor seeks to recover the value of the equipment from Owner in restitution. Some of the items supplied by Contractor are standard commercial units, easily removable and suitable for installation elsewhere. The depreciated value of these removable items is $18,000. Other, fixed elements of the installation are worth $30,000 to someone in the position of Tenant, but their value to Owner is merely speculative. Contractor has a claim against Owner under this section to recover $18,000, which Owner may satisfy by allowing removal of the equipment.

8. Merchant agrees with Tenant to supply the fertilizer necessary to prepare Blackacre for spring planting at a price of $1000. The fertilizer is applied, and the crop is planted. Tenant abandons his lease before the completion of the term, surrendering his interest in the growing crop to settle his account with Landlord, and departs without paying Merchant. Landlord relets Blackacre and eventually sells the final crop planted by Tenant, realizing a profit of $5000 over and above the lost income from Tenant's default. Without the fertilizer supplied by Merchant, Blackacre would be entirely unproductive. Merchant has a claim against Landlord to recover $1000.

9. Owner retains Broker to find a purchaser for Blackacre, agreeing to pay a commission of five percent of the sale price. Broker agrees to share its commission 50/50 with Sub-broker, should Sub-broker be the procuring cause of a sale of Blackacre generating a commission to Broker under its contract with Owner. Owner eventually sells Blackacre for $1 million to a purchaser introduced by Sub-broker. In connection with the transaction, Broker is found to have committed a breach of its duty of loyalty to Owner. Because of the involvement of Sub-broker, Owner is not injured by Broker's breach; but Owner's obligation to pay a commission to Broker is discharged. Sub-broker has a claim against Owner under this section for the value of its services, not exceeding the amount ($25,000) to which it would have been entitled under its contract with Broker.

10. Lease requires Tenant to construct certain improvements to Blackacre in accordance with Landlord's detailed specifications, the improvements to become property of Landlord at the termination of the lease. Builder improves Blackacre in accordance with the lease requirements, pursuant to a contract with Tenant which fixes the price of the work at $35,000. Tenant defaults on the lease and surrenders possession without paying Builder.

Landlord relets the property for the remainder of the lease term, obtaining an additional $50,000 for the use of the improvements, over and above the rent reserved in the original lease. Builder has a claim under this section to recover $35,000 from Landlord.

11. Owner solicits pre-contract bids from potential suppliers to a construction project. Seller submits a bid for carpet installation which Owner selects and approves. Owner thereafter enters a general construction contract with Contractor; Contractor purchases carpet from Seller on the terms previously negotiated by Owner. Seller furnishes goods and services valued at $30,000 under its contract with Contractor. Contractor abandons the project, leaving Seller unpaid, and files for bankruptcy. Owner's contract with Contractor permits Owner to withhold money otherwise due, in the event that suppliers have not been paid. Exercising its rights under this provision, Owner retains $25,000 from payments otherwise due to Contractor. Seller has a claim against Owner under this section to recover $25,000. If Owner anticipates that other unpaid suppliers may assert claims to the retained funds, Owner may protect itself through interpleader.

If specific restitution is not feasible, and if the circumstances of the transaction do not permit the claimant to assert that the defendant has obtained or retained the benefit of the claimant's performance in money, a conclusion that the defendant has been unjustly enriched depends on a judgment about the value of the performance in advancing the purposes of the defendant (§ 49(3)(a)). The elements of the transaction that will support or refute a finding of unjust enrichment vary with the particular facts of each case, but the logic that guides the inquiry is rarely difficult to perceive. Thus restitution from a landlord in respect of work done under contract with a tenant is easier to obtain if the work was required by the landlord, not merely permitted. Compare Illustration 10 with Illustration 12. A defendant property owner is more likely to be held liable for improvements ordered by a third person if he stands by and permits the claimant's performance to proceed, under circumstances such that—were the work not directly beneficial to the owner—one would normally expect the owner to object. See Illustration 13. If work performed by the claimant under contract with a third party discharges an independent obligation of the defendant, the benefit to the defendant is to that extent established. See Illustrations 14-15. Generally speaking, the greater the defendant's involvement in the transaction between the third party and the claimant, the easier it should be to establish the necessary benefit. See Illustration 16. In some of these scenarios, overtones of implied contract and estoppel visibly serve to reinforce what might otherwise be regarded as a marginal restitution claim.

Illustrations:

12. Owner leases restaurant premises to Lessee. With Owner's permission, Lessee employs Builder to resurface the parking lot. Builder does the job in two days, supplying labor and materials with a reasonable value of $2500. Lessee fails to pay Builder, abandons the premises, and disappears. Builder seeks to recover the cost of the resurfacing from Owner. While the paving work is doubtless of some benefit to Owner, there is no evidence that Owner would have paid to have the work done at this particular time; nor that the rental value of the property has been increased in consequence. Builder is not entitled to restitution under this section.

13. Builder constructs an addition to Owner's house, supplying labor and materials having a reasonable value of $25,000. The work is done under a contract between Builder and Owner's adult Daughter, who resides permanently in the house with her parents. Daughter, who has no regular income, fails to pay Builder and files for bankruptcy shortly after the work is completed. Construction of the addition extends over six months, Owner and his wife being present at all times. The completed addition increases the appraised value of the house by $15,000. Builder has a claim against Owner under this section to recover $15,000. (If the court is concerned—notwithstanding Owner's apparent acquiescence in the improvement—that restitution will subject Owner to a forced exchange, relief to Builder might take the form of an equitable lien on the property, not to be foreclosed so long as Owner and his wife maintain the house as their principal residence. See **§ 9**, Illustration 5; **§ 56**, Illustration 4.)

14. Owner charters a vessel to Lessee. By the terms of the charter, as subsequently construed, the maintenance of the ship's engines is the responsibility of Owner. An engine fails and has to be replaced. Without consulting Owner, Lessee has a new engine installed by Supplier at a contract price of $50,000. Lessee fails to pay Supplier and files for bankruptcy. Supplier attempts to foreclose a maritime lien on the vessel, but the lien is held not to have attached. On the other hand, the court finds that the replacement of the engine was necessary, and that the work saved Owner an expense of at least $45,000. Supplier has a claim against Owner under this section for $45,000.

15. Owner contracts with A to construct a building. A subcontracts part of the work to B. B in turn subcontracts part of its work to C. C performs under its contract; B defaults and becomes insolvent. C has not been paid by either B or A. A has been paid in full by Owner, but A has paid no one for the work done by C. C has a claim against A under this section for the value of its performance.

16. Owner contracts with A to carry out extensive modifications to an airplane. A subcontracts the interior renovation to B. Before undertaking the job, B seeks and obtains assurances from Owner about its financial commitment to the project. B performs, but A defaults and the unfinished project is eventually abandoned. B sues Owner to recover the amount due on its contract with A. Owner has no contractual liability to B. While the difficulty of quantifying the benefit to Owner makes the restitution claim a marginal one, the court finds it inequitable that Owner "induced B to undertake the work, then refused to see B paid." B is entitled to recover from Owner the amount by which Owner was enriched by B's performance, an amount substantially less (on these facts) than the unpaid contract price.

d. Measure of recovery. Cases governed by § 25 often present a disparity between a recovery in restitution and the compensation to which the claimant would have been entitled under the defaulted contract. A successful claimant under this section recovers the amount of the benefit conferred on the defendant or the claimant's cost of performance, whichever is less. Because the claimant's recovery is based on the defendant's enrichment, and not on the claimant's contract with an absent third person, the claimant necessarily bears the risk that fluctuations in value, whatever their origin, will cause the value placed in the hands of the defendant to be less than the cost of performance. See Illustrations 17-18.

Illustrations:

17. Blackacre contains low-grade coal, profitable for strip-mining only in certain market conditions. Owner grants mining rights to Lessee in exchange for a royalty of $2.50 per ton of coal extracted. Lessee employs Miner to mine the coal at a price of $25 per ton uncovered and loaded. After Miner has mined 8000 tons, Lessee abandons the operation without paying Owner or Miner. Plans for the sale of the coal have fallen through, and the coal is sitting unloaded at the pit. Miner seeks to recover the value of its work from Owner. Although Blackacre has been theoretically improved by the mining of 8000 tons of coal, there is at present no market for coal of this grade; the future value of Miner's performance to Owner is entirely speculative. Miner has no claim in restitution under this section.

18. Owner leases restaurant premises to Tenant for 60 months at $5000 per month. The lease allows Tenant to make specified improvements to the property and provides that the expense of permitted improvements (not exceeding $25,000) may be deducted from the rent. Tenant hires Builder to make permitted improvements at a cost of $25,000. Builder performs the contract. Tenant defaults on the lease and files for bankruptcy without paying

Owner or Builder. Owner relets the premises to another tenant at $4000 per month. Builder's improvements do not increase the value of the premises for most potential tenants. Builder has no claim in restitution against Owner.

e. Statutory liens. The potential for unjust enrichment in circumstances addressed by § 25 explains, in part at least, the widespread availability by statute of mechanics' and materialmen's liens affording at least part of the relief to which claimants may be entitled under this section. (Statutory liens may grant the lienor more generous relief than would be available by principles of unjust enrichment.)

Claimants under § 25 tend to be persons who have failed to take advantage of these statutory remedies, or who fall outside the classes of persons to whom the remedies are available. Because relief by way of restitution is consistent with the objectives of the statutes, the majority of the courts that examine the issue conclude that neither the availability of statutory liens nor the claimant's failure to perfect such a lien forecloses a claim under this section.

f. Competing priorities. A claim under this section will be denied if restitution would disrupt an otherwise applicable scheme of priorities regulating claims against the third person, the defendant, or the property of either. See § 25(3). The practical significance of this qualification is to foreclose what would otherwise be a recurrent claim of unjust enrichment between unsecured and secured creditors of the same debtor. While the immunity of the secured creditor from claims of this kind is unquestioned in the usual case, the statutory scheme of priorities does not insulate from liability any and all transactions tending to the unjust enrichment of one creditor at the expense of another. Conscious involvement by the secured creditor in the transaction between the unsecured creditor and the debtor, producing an improvement in the secured creditor's position that the court finds inequitable, may expose the secured creditor to a claim under this section in a particular case. Compare Illustrations 19-20.

Illustrations:

19. Merchant supplies goods on open account to a business operated by Debtor. Bank finances Debtor's operations, taking a security interest in all of Debtor's personal property. Debtor ceases operations and files for bankruptcy. Debtor's secured debt to Bank exceeds Debtor's assets. Debtor's unsecured debt to Merchant is $25,000, of which Merchant will recover nothing in bankruptcy. The result of Merchant's extension of credit to Debtor is that Bank will realize an additional $20,000 on the sale of Debtor's collateral. Merchant has no claim against Bank under this section, because Bank's enrichment at Merchant's expense is a foreseeable and accepted consequence of the legal regime that governs the creation of security interests in personal property. See **U.C.C. § 9-201(a)** (rev. 2000).

20. Same facts as Illustration 19, except that Bank initiates and encourages the continued extension of unsecured credit by Merchant to Debtor, at a time when Bank anticipates Debtor's insolvency, with the purpose and effect of enhancing the value of the Bank's security. Bank's involvement in procuring the transaction between Merchant and Debtor may lead a court to conclude that Bank has been unjustly enriched, notwithstanding the conventional priorities among creditors, if the facts will not support a liability based on misrepresentation or estoppel.

Reporter's Note

a. General principles and scope. See generally 2 Palmer, Law of Restitution § 10.7(b) (1978 & Supp.); Dawson, The Self-Serving Intermeddler, 87 Harv. L. Rev. 1409, 1444-1457 (1974); Rendleman, Quantum Meruit for the Subcontractor, 79 Tex. L. Rev. 2055 (2001); Annot., 62 A.L.R.3d 288 (1975) (restitution in favor of unpaid subcontractor).

b. Threshold limits to the claim. Illustration 1 is based on Commerce Partnership 8098 L.P. v. Equity Contracting Co., 695 So.2d 383 (Fla. Dist. Ct. App. 1997). Illustration 2 is based on Ontiveros Insulation Co. v. Sanchez, 129 N.M. 200, 3 P.3d 695 (Ct. App. 2000). Cases denying restitution to an unpaid subcontractor on the ground that the defendant/owner has already paid all of (or more than) the price fixed by contract for the work in question, counting payments made both to the defaulting general contractor and to other parties, are extremely numerous. See, e.g., Providence Elec. Co. v. Sutton Place, Inc., 161 Conn. 242, 287 A.2d 379 (1971) (no unjust enrichment where record permits inference that defendant has paid general contractor); Cohen v. Delmar Drive-In Theatre, Inc., 46 Del. 427, 84 A.2d 597 (1951) (no unjust enrichment where owner paid general contractor in full); Blum v. Dawkins, Inc., 683 So.2d 163 (Fla. Dist. Ct. App. 1996) (same); SLR Plumbing & Sewer, Inc. v. Turk, 757 N.E.2d 193 (Ind. Ct. App. 2001) (same); International Paper Co. v. Futhey, 788 S.W.2d 303 (Mo. Ct. App. 1990) (no unjust enrichment where general contractor's default obliged owners to expend more than the contract price to obtain promised performance); Pella Windows & Doors, Inc. v. Faraci, 133 N.H. 585, 580 A.2d 732 (1990) (same); Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 440 S.E.2d 129 (1994) (same); DJ Painting, Inc. v. Baraw Enterprises, Inc., 172 Vt. 239, 776 A.2d 413 (2001) (no unjust enrichment where owner has already paid the adjusted contract price for the work actually done).

The large volume of such decisions—rejecting a claim by the unpaid subcontractor against the owner, but on the ground of the defendant's prior payments to others—are significant in weighing the authorities for and against the rule stated in § 25. Most of these decisions carry the reasonable implication, even if they do not state directly, that the plaintiff's restitution claim would be viable if the benefits in question had not been paid for. In a case from which the issues of payment and valuation may be eliminated—a claim against a defendant who stands to retain the performance for which he contracted, and without paying anybody for it—denial of restitution is today a distinct rarity. Concededly, there remain jurisdictions in which the subcontractor's claim will be rejected out of hand. A decision like that in Henning v. Security Bank, 564 N.W.2d 398 (Iowa 1997), may still state baldly that a subcontractor not in privity with the owner can recover only by enforcement of a mechanic's lien. But the lingering impression that unpaid subcontractors not in privity can rarely recover in restitution no longer reflects the tendency of the decisions.

Illustration 3 is based on Callano v. Oakwood Park Homes Corp., 91 N.J.Super. 105, 219 A.2d 332 (App. Div. 1966).

Illustration 4 is based on Advance Leasing & Crane Co. v. Del E. Webb Corp., 117 Ariz. 451, 573 P.2d 525 (Ct. App. 1977). Illustration 5 is based on Eckert v. Soverel Marine, Inc., 380 So.2d 569 (Fla. Dist. Ct. App. 1980), and Kagan v. K-Tel Entertainment, Inc., 172 App. Div. 2d 375, 568 N.Y.S.2d 756 (1991). Illustration 6 is based on Sears, Roebuck & Co. v. Stover, 32 Ohio Misc.2d 1, 513 N.E.2d 361 (Municip. Ct. 1987). The contrary decision in Sears, Roebuck & Co. v. Ragucci, 203 N.J.Super. 82, 495 A.2d 923 (1985), suggests that a person using another's credit card—with the permission of the holder, and on the understanding between them that the holder will pay the ensuing charges—might indeed be liable to the card issuer in quasi-contract for benefits received. The decision reflects inadequate analysis. Setting aside the distracting features of credit cards as a payment system, allowing restitution in such a case would be equivalent to imposing liability on any other recipient of a gift that the donor had purchased on credit and failed to pay for. Assuming that the underlying credit transaction between seller and donor is free from fraud or other defect, liability of the donee to the seller in such a case would be unthinkable, for the reason stated in § 25(2)(c). See Restatement of Restitution § 110, Comment *a*, Illustration 2 (1937).

c. Unjust enrichment. Illustration 7 is based on General Leasing Co. v. Manivest Corp., 667 P.2d 596 (Utah 1983). See also Lane-Moore Lumber Co. v. Kloppenburg, 204 Iowa 613, 215 N.W. 637 (1927) (allowing supplier of building materials to remove house constructed by tenant on landlord's property). Illustration 8 is based on Patureau-Miran v. Boudier, Cass. req. June 15, 1892 (D. 1892.1.596, S. 1893.1.281), the seminal decision in the French law of unjustified enrichment. For English translations of the relevant texts see Cases, Materials and Texts on Unjustified Enrichment 38-42 (Beatson & Schrage eds., 2003). Illustration 9 is based on Reisenfeld & Co. v. Network Group, Inc., 277 F.3d 856 (6th Cir. 2002). Illustration 10 is based on Frank M. Hall & Co. v. Southwest Properties Venture, 747 P.2d 688 (Colo. Ct. App. 1987). See also Kazmier v. Thom, 63 Ohio App.2d 29, 408 N.E.2d 694 (1978) (allowing restitution from owner for value added to rental property by fence, installed by tenants in compliance with lease requirement). Illustration 11 is based on Flooring Systems, Inc. v. Radisson Group, Inc., 160 Ariz. 224, 772 P.2d 578 (1989). See also Zalay v. Ace Cabinets of Clearwater, Inc., 700 So.2d 15 (Fla. Dist. Ct. App. 1997) (comparing the aggregate claims of unpaid subcontractors and suppliers to the amount of the original contract price still undisbursed).

Illustration 12 is based on Puttkammer v. Minth, 83 Wis.2d 686, 266 N.W.2d 361 (1978). Illustration 13 is based on Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966). For a contrasting case see Duckworth v. Poland, 30 Ark.App. 281, 785 S.W.2d 472 (1990), denying restitution for improvements to defendant's land performed under contract with occupant, owner's nephew. In *Duckworth* the defendant/owner lived out of state, had no notice that improvements were under way, and never spoke to the claimant until after the work had been completed. Illustration 14 is based on Kane v. Motor Vessel Leda, 355 F.Supp. 796 (E.D. La. 1972).

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Illustration 15 is based on United States on behalf of Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am., 695 F.2d 455 (10th Cir. 1982). Illustration 16 is based on Midcoast Aviation, Inc. v. General Elec. Credit Corp., 907 F.2d 732 (7th Cir. 1990). See also Costanzo v. Stewart, 9 Ariz.App. 430, 453 P.2d 526 (1969) (noting that unpaid subcontractor had spoken with owner, who assured him he would be paid); Stafford v. Barnard Lumber Co., 531 N.E.2d 202 (Ind. 1988) (same). Cf. Bush v. Kramer, 185 Neb. 1, 173 N.W.2d 367 (1969) (restitution for the value of pasturage for cattle owned by defendant and deceased husband, furnished under contract between claimant and husband alone, where evidence showed "substantial participation by the defendant in the cattle transaction").

d. Measure of recovery. Like restitution for mistaken improvements against innocent defendants, recovery under § 25 is invariably measured by the lesser of the cost incurred and the value imparted. Decisions discussing the distinction include Midcoast Aviation, Inc. v. General Elec. Credit Corp., 907 F.2d 732, 744-745 (7th Cir. 1990), and Idaho Lumber, Inc. v. Buck, 109 Idaho 737, 747-749, 710 P.2d 647, 657-659 (1985). Illustration 17 is based on Goldberg v. Ford, 188 Md. 658, 53 A.2d 665 (1947). Compare Haz-Mat Response, Inc. v. Certified Waste Services Ltd., 259 Kan. 166, 910 P.2d 839 (1996), in which a waste-disposal subcontractor "removed the waste from the storage tanks" as required by its contract, but the waste it collected was not disposed of by the general contractor as required by the prime contract; in consequence, the owner hired another general contractor to perform the work. *Haz-Mat* thus appears to be a case in which the value of the subcontractor's performance was destroyed by the defective performance of the contract intermediary, foreclosing a claim based on benefit to the defendant/owner. Illustration 18 is based on Silver Dollar Motel, Inc. v. Taylor Elec. Co., 761 P.2d 1006 (Wyo. 1988).

e. Statutory liens. Failure to perfect a potential lien does not preclude recovery in restitution in most jurisdictions. The reason in principle is that the lien is a remedial device "distinct from the obligation which it secures," Matlow v. Matlow, 89 Ariz. 293, 361 P.2d 648 (1961); the obligation being, in this context, the liability described in § 25. For representative discussion of the question see, e.g., Guarantee Elec. Co. v. Big Rivers Elec. Corp., 669 F.Supp. 1371, 1377-1380 (W.D. Ky. 1987); Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966). But cf. Green Quarries, Inc. v. Raasch, 676 S.W.2d 261, 267 (Mo. Ct. App. 1984) ("we will not allow quasi-contractual recovery where the subcontractor could have availed himself of the statutory remedy but did not").

f. Competing priorities. Inasmuch as the defaulting third person, C, is invariably insolvent, it has been suggested that if A is entitled to restitution from B, A will in effect be satisfying his claim against C in preference to C's remaining creditors. See Dawson, supra, 87 Harv. L. Rev. at 1447; Green Quarries, supra, 676 S.W.2d at 267. The objection would be sound if the situation were ever presented, but the problem does not appear to arise in practice. The assumption is that A's performance has left B obligated to C, so that A's restitution claim against B is a means of reaching an asset (B's debt to C) that properly belongs to C's creditors generally. Under the rule of this section, however, if C (or C's trustee in bankruptcy) has an enforceable claim against B, A's claim is already foreclosed by § 25(2)(b). While the decided cases commonly refer to C's bankruptcy—sometimes noting that A's claim against C has in fact been discharged—there is never any suggestion that C (or C's bankruptcy trustee) has a pending claim against B. More often than not, the circumstances of C's default and exit from the A—B—C transaction make it highly unlikely that C has left behind any viable claims against B.

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Illustration 19 is based on Knox v. Phoenix Leasing, Inc., 29 Cal.App.4th 1357, 35 Cal.Rptr.2d 141 (1994). Illustration 20 is based on Ninth Dist. Production Credit Ass'n v. Ed Duggan, Inc., 821 P.2d 788, 797 (Colo. 1991) (noting that "[t]he central point of distinction … is the extent to which the secured creditor was involved in the transaction by which the unsecured creditor supplied goods or services that enhanced the value of the secured collateral"). In Gulf Oil Trading Co. v. Creole Supply, 596 F.2d 515 (2d Cir. 1979), a U.S. creditor intending to foreclose a preferred ship mortgage approved a transaction by which the claimant supplied fuel to the mortgaged vessel, thereby enabling the vessel to proceed—on the creditor's instructions—from a U.S. port (where the supplier would have had a prior lien) to the Bahamas (where the supplier's claim was subordinated to the mortgage). On arrival in the Bahamas, the vessel was arrested and the mortgage foreclosed. In the absence of contract between the creditor and the supplier, the court held that the creditor had been unjustly enriched by the value of the fuel supplied to the vessel. Id. at 519-520.

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ADDENDUM 3:
Wang Elec., Inc. v. Smoke Tree Resort, LLC
230 Ariz. 314 (App. 2012)

(Highlighting added by counsel)

230 Ariz. 314
Court of Appeals of Arizona, Division 1, Department A.

WANG ELECTRIC, INC., an Arizona corporation, Plaintiff/Appellee/Cross–Appellant,
and
Aero Automatic Sprinkler Company, a Delaware corporation, Defendant/Appellee/Cross–Appellant,
v.
SMOKE TREE RESORT, LLC, an Arizona limited liability corporation, Defendant/Appellant/Cross–Appellee.
Beecroft, LLC, an Arizona Limited Liability Company; Adobe Paint, LLC, an Arizona Limited Liability Company; Adobe Drywall, LLC, an Arizona Limited Liability Company; Allied Acoustics, Inc., an Arizona Corporation, Defendants/Appellees,
v.
Smoke Tree Resort, LLC, an Arizona limited liability corporation, Defendant/Appellant.
Wang Electric, Inc., Plaintiff/Appellee,
v.
Adobe Drywall, LLC; Adobe Paint, LLC, Defendants/Appellants.
Beecroft, LLC; Adobe Paint, LLC; Adobe Drywall, LLC; K.A.I. Designs, Inc.; Smoke Tree Resort, LLC; Aero Automatic Sprinkler Co., Defendants/Cross–Appellees,
v.
Allied Acoustics, Inc., an Arizona corporation, Defendant/Cross–Appellant.

Nos. 1 CA–CV 11–0387, 1 CA–CV 11–0494
|
July 31, 2012.

Synopsis

Background: Subcontractors brought action against general contractor, tenant, and owner of property, seeking damages for breach of contract or unjust enrichment, and to foreclose mechanic's liens. The Superior Court, Maricopa County, Nos. CV2008-032417, CV2009-004871, and CV2009-004872, Jeanne Garcia, J., entered summary judgment in favor of subcontractors and against property owner as to unjust enrichment claims, and against subcontractors on claims for foreclosure of liens. Owner appealed and subcontractors cross-appealed.

Holdings: The Court of Appeals, Timmer, J., held that:

owner did not engage in improper conduct with regard to payment of contractor or subcontractors, as could allow subcontractors to recover unpaid monies from owner under unjust enrichment theory;

tenant was acting as property owner's agent in remodeling project, as would allow project subcontractors to enforce mechanic's lien against owner;

genuine issue of material fact as to whether electrical subcontractor timely served notice and claim of mechanic's lien on property owner precluded summary judgment in favor of owner as to subcontractor's foreclosure claim;

legal description of property in notice and claim of mechanic's lien substantially complied with statutory requirements; and

painting subcontractor's mechanic's lien against tenant's leasehold interest survived termination of lease and thus could be foreclosed against owner.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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OPINION

TIMMER, Judge.

***316** ¶ 1 These consolidated appeals stem from three consolidated lawsuits concerning a construction dispute among a property owner, a tenant, a general contractor, and six subcontractors involved in improving restaurant space at a Paradise Valley, Arizona resort. Smoke Tree Resort, LLC ("Smoke Tree"), the owner of the property, appeals from superior court judgments awarding damages to six subcontractors on their claims for unjust enrichment. Subcontractors Wang Electric, Inc. ("Wang"), Aero Automatic Sprinkler Company ("Aero"), and Allied Acoustics, Inc. ("Allied") cross-appeal from the superior court's judgment invalidating their mechanic's liens on Smoke Tree's property and dismissing their lien foreclosure actions. Subcontractors Adobe Drywall, LLC and Adobe Paint, LLC (collectively "Adobe") appeal from the court's judgment invalidating their mechanic's liens on the leasehold interest in the restaurant and dismissing their lien foreclosure actions. For the reasons that follow, we reverse and remand for further proceedings.

BACKGROUND

¶ 2 Smoke Tree entered a lease agreement in October 2007 with REM on Lincoln, LLC ("REM") for rental of restaurant space at Smoke Tree's resort property. The leasehold term was for ten years, and REM had the option to extend the term for an additional five years. The lease required REM to remodel the restaurant in accordance with plans approved by Smoke Tree. Although REM was charged with organizing the remodel, the lease required Smoke Tree to reimburse REM up to $840,000 in remodeling expenses. REM was required to pay all costs and expenses greater than $840,000.

¶ 3 In January 2008, REM hired K.A.I. Designs Inc. ("KAI") to serve as general contractor on the restaurant remodel. Their ***317 **48** agreement called for total construction costs of approximately $2,000,000 to be paid in monthly progress payments. KAI then entered in subcontract agreements with, among others, (1) Wang, to provide electric and lighting fixtures and installation for $240,140, (2) Aero, to provide fire suppression systems for $48,554, (3) Allied, to install an acoustical ceiling for $11,267.94, (4) Beecroft, LLC ("Beecroft"), to provide excavation services for $26,710, and (5) Adobe, to provide drywall and paint material and services for $62,127 (drywall) and $22,426 (paint). The subcontracts required KAI to pay the subcontractors and did not refer to REM or Smoke Tree.

¶ 4 As the work progressed, the subcontractors submitted periodic invoices to KAI. KAI then submitted these payment applications for approval first to REM and then to Smoke Tree. Once Smoke Tree approved the invoices, Smoke Tree issued payments directly to KAI for disbursement to the subcontractors, despite the lease language calling only for reimbursement of REM's costs. A declaration from David Aboud, the president of KAI, reflects Smoke Tree paid approximately $790,000 to KAI.[1]

[1] Adobe argues the declaration lacks foundation and is therefore insufficient to show that Smoke Tree paid any amounts to KAI. The record does not reflect that Adobe or any other subcontractor objected to the declaration before the superior court. Adobe has therefore waived this argument. *See* *Trantor v. Fredrikson,* 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶ 5 Near the end of April 2008, progress payments stopped. Wang, Aero, Beecroft, and Allied then filed mechanic's liens on Smoke Tree's property for the billed value of the work performed but not compensated (the "Uncompensated Work"). Adobe filed mechanic's liens on REM's leasehold interest in Smoke Tree's property for the billed value of Adobe's Uncompensated Work.

¶ 6 In December 2008 and February 2009, respectively, Wang and Adobe filed separate, later-consolidated lawsuits against REM, KAI, Smoke Tree, and the other subcontractors, among others. Each of the other subcontractors filed a cross-claim

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against REM, KAI, and Smoke Tree. Although the details of the claims varied, all six subcontractors sought damages for breach of contract against KAI, sought to foreclose their mechanic's liens, and in the alternative sought a money judgment against REM and Smoke Tree for unjust enrichment.

¶ 7 All subcontractors except Allied eventually moved for summary judgment against KAI on the contract claim and against Smoke Tree on the mechanic's lien foreclosure and unjust enrichment claims. KAI did not oppose the motions, but Smoke Tree responded and filed cross-motions for summary judgment. After briefing and argument, the court granted summary judgment in favor of Smoke Tree on each mechanic's lien claim, reasoning "that because the requirements for a mechanic lien were not strictly followed, there is no valid lien." But the court granted summary judgment in favor of each subcontractor and against Smoke Tree on the unjust enrichment claims, ruling "[i]t would be unjust for Smoke Tree to retain the benefits of improvements to its property without compensating the subcontractors for their work."[2]

[2] Allied later moved for summary judgment on its unjust enrichment claim, and Smoke Tree and Allied stipulated to entry of summary judgment for Allied in light of the court's earlier summary judgment rulings. The court also entered judgment against Allied on its mechanic's lien foreclosure claim.

¶ 8 After denying Smoke Tree's motion for reconsideration, the court entered judgment invalidating each mechanic's lien at issue and awarding each subcontractor a money judgment on the unjust enrichment claims for the billed value of the Uncompensated Work. The court also awarded prejudgment interest beginning as of December 22, 2009, the date the court entered its order granting summary judgment against Smoke Tree for unjust enrichment. Although the subcontractors requested attorneys' fees pursuant to ***318 **49** Arizona Revised Statutes ("A.R.S.") section 12–341.01 (West 2012),[3] the court found that no party had prevailed and, "in [its] discretion," declined to award fees or costs. Smoke Tree then moved for a new trial or modification of judgment to eliminate the prejudgment interest award, which the court denied. These timely appeals and cross-appeals followed.

[3] Absent material revision after the date of the events at issue, we cite a statute's current version.

DISCUSSION

I. Smoke Tree's Appeal

¶ 9 Smoke Tree first argues the superior court erred by entering summary judgment in favor of the subcontractors on their unjust enrichment claims rather than entering judgment for Smoke Tree. We review de novo the court's grant of summary judgment and affirm only if, viewing the facts in the light most favorable to the party against whom judgment was entered, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). Smoke Tree does not contend any genuine issues of material fact exist to preclude summary judgment. Instead, it argues it is entitled to judgment as a matter of law.

¶ 10 An unjust enrichment claim requires proof of five elements: "(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych,* 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (App.2011). In short, unjust enrichment provides a remedy when a party has received a benefit at another's expense and, in good conscience, the benefitted party should compensate the other. *Murdock–Bryant Constr., Inc. v. Pearson,* 146 Ariz. 48, 53, 703 P.2d 1197, 1202 (1985) (quoting *Pyeatte v. Pyeatte,* 135 Ariz. 346, 352, 661 P.2d 196, 202 (App.1983)). The remedy is flexible and available when equity demands compensation for benefits received, "even though [the party] has committed no tort and is not contractually obligated to the [other]." *Id.* Because consideration of the fourth element described above is dispositive, we turn to that element.

¶ 11 Smoke Tree argues that any enrichment was justified because the benefits received were specified under the lease with REM, and Smoke Tree did not act improperly. The subcontractors respond the enrichment was unjustified because Smoke Tree retained the benefit of unpaid labor and materials for tenant improvements it required, knowing the subcontractors expected payment. The superior court reasoned the enrichment was unjustified because "Smoke Tree approved the construction plans for the restaurant which was an integral part of Smoke Tree's Resort."

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¶ 12 The subcontractors rely on authority addressing situations in which a subcontractor is not paid for labor and materials by a general contractor, and payment is sought from the owner under a theory of unjust enrichment. These cases fall into two categories: ones in which the owner has fully paid the general contractor and ones in which the owner has not fully paid the general contractor. Our courts have held that recovery under a theory of unjust enrichment is not available in the former category, because the owner is not unjustly enriched if it fully paid its obligation. *A M Leasing Ltd. v. Baker,* 163 Ariz. 194, 198–99, 786 P.2d 1045, 1049–50 (App.1989); *Stratton v. Inspiration Consol. Copper Co.,* 140 Ariz. 528, 530–31, 683 P.2d 327, 329–30 (App.1984); *Advance Leasing & Crane Co. v. Del E. Webb Corp.,* 117 Ariz. 451, 453, 573 P.2d 525, 527 (App.1977).[4] But when the owner has failed ***319 **50** to fully pay its obligation, our courts have held that recovery for unjust enrichment is available because permitting the owner to retain the benefit without fully paying for it would be unjust. *Flooring Sys., Inc. v. Radisson Grp., Inc.,* 160 Ariz. 224, 227, 772 P.2d 578, 581 (1989); *Williamson v. PVOrbit, Inc.,* 228 Ariz. 69, 74, ¶¶ 27–28, 263 P.3d 77, 82 (App.2011); *Commercial Cornice & Millwork, Inc. v. Camel Constr. Serv. Corp.,* 154 Ariz. 34, 39–40, 739 P.2d 1351, 1356–57 (App.1987); *Costanzo v. Stewart,* 9 Ariz.App. 430, 432–33, 453 P.2d 526, 528–29 (1969). Neither category of cases addresses the viability of an unjust enrichment claim against an owner for improvements made by its tenant—the situation before us. Nevertheless, the subcontractors argue the present case falls within the latter category because Smoke Tree failed to fully pay KAI for the tenant improvements, and the subcontractors were not fully paid.

[4] Although the *Stratton* court rested its holding on the principle that unjust enrichment cannot apply against an owner when a contract exists between the general contractor and the subcontractor, 140 Ariz. at 530–31, 683 P.2d at 329–30, the court relied on *Advance Leasing,* which also reasoned an owner is not unjustly enriched when it pays its contractual obligation. 117 Ariz. at 453, 573 P.2d at 527. Subsequent cases have clarified that the holding in *Stratton* necessarily hinges on the fact the owner had fully paid the general contractor and was therefore not unjustly enriched. *Flooring Sys., Inc. v. Radisson Grp., Inc.,* 160 Ariz. 224, 226, 772 P.2d 578, 580 (1989).

¶ 13 Smoke Tree relies on the Colorado Supreme Court's decision in *DCB Construction Co., Inc. v. Central City Development Co.,* 965 P.2d 115 (Colo.1998), which involved a factual situation similar to the one here. In *DCB Construction,* an owner leased a building to a tenant for use as a gambling hall and authorized the tenant to make improvements as long as the owner approved all plans and retained the improvements upon lease termination. *Id.* at 117, 122. The tenant hired a contractor to make improvements, and the owner approved the plans. *Id.* at 117. The contractor did not place a lien on the premises. *Id.* at 117–18. The contractor and its subcontractors made significant improvements to the tenant's premises, but the tenant failed to pay for most of the work, defaulted on the lease, and vacated the building. *Id.* The contractor and subcontractors sued the owner for unjust enrichment. *Id.* at 118. After the owner and subcontractors settled, the matter proceeded to a bench trial, and the court found in favor of the contractor, awarding the contractor damages for monies unpaid by the tenant. *Id.*

¶ 14 The court of appeals reversed, and the Colorado Supreme Court affirmed that decision. *Id.* When considering whether it would be unjust for the owner to retain the benefit of the contractor's work without paying for it, the supreme court initially cited the general rule that when a non-owner contracts for improvements to the owner's property and then fails to pay, " 'the owner is not liable to the contractor or supplier unless he agreed to pay them.' " *Id.* at 121 (quoting 3 Dan B. Dobbs, *The Law of Remedies,* § 12.20(3) at 473 (2d ed. 1993)). This rule protects rights of choice and recognizes that ordinarily, an owner should not be effectively forced into a legal relationship with a third party. *Id.* The court then noted that Restatement of Restitution ("Restatement") § 110 (1937) provides, "[a] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other *merely* because of the failure of performance by the third person." *DCB Constr.,* 965 P.2d at 121. Relying on the general rule and Restatement § 110, the court reasoned that the owner could not be held liable for the tenant's improvements merely because it owned the property and the contractor was treated unjustly by the tenant. *Id.* According to the court, "an injustice that warrants the court's imposition of the remedy of restitution must rest not only in the loss to the contractor, but also in the conduct of the owner." *Id.* The court concluded that "injustice" necessarily contemplates "some form of improper conduct by the party to be charged" restitution. *Id.* at 121–22. Consequently, the court held that "for a tenant's contractor to attach liability upon an owner of property under an unjust enrichment claim, the

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contractor must be able to show that the landlord has engaged in some form of improper, deceitful, or misleading conduct." *Id.* at 123. Otherwise, the court reasoned, a landlord would be cast in the role as an insurer for any tenant who contracts for improvements to the leasehold. *Id.* at 122. The court decided the building owner's active role in construction of the improvements and its contractual right to retain the improvements did not make its retention of those improvements without payment to the contractor unjust. *Id.* at 123.

***320 **51** ¶ 15 We agree with and adopt the holding in *DCB Construction.* First, the holding aligns with our general rule that a subcontractor lacking privity of contract with an owner cannot recover a personal judgment against that owner for unpaid work regardless of the existence and enforceability of a mechanic's lien. *Keefer v. Lavender,* 74 Ariz. 24, 25–26, 243 P.2d 457, 458–59 (1952). Second, like the *DCB Construction* court, Arizona courts follow Restatement § 110. *Advance Leasing,* 117 Ariz. at 452–53, 573 P.2d at 526–27; *Creative Learning Sys., Inc. v. State,* 166 Ariz. 63, 65, 800 P.2d 50, 52 (App.1990). Third, hinging an owner's liability for tenant-contracted improvements on the owner's conduct comports with the Arizona-adopted principle that unjust enrichment should not be used to saddle entities with expenses they chose not to incur. *Blue Ridge Sewer Improvement Dist. v. Lowry & Assocs., Inc.,* 149 Ariz. 373, 377, 718 P.2d 1026, 1030 (App.1986). Other courts and authorities are in agreement.[5]

5 *See Hayes Mech., Inc. v. First Indus., L.P.,* 351 Ill.App.3d 1, 285 Ill.Dec. 599, 812 N.E.2d 419, 429 (2004) (holding contractor had no unjust enrichment claim against owner for unpaid tenant improvements absent improper conduct by owner); *Graves v. Berkowitz,* 15 S.W.3d 59, 64 (Mo.Ct.App.2000) (concluding landlord must bear some fault or have an agency relationship with tenant in order for contractor to have unjust enrichment claim against landlord for improvements made at tenant's behest).

¶ 16 Applying our holding to the record before us, we conclude the superior court erred by ruling that Smoke Tree's retention of the tenant improvements would be unjust unless it pays the amounts owed to the subcontractors. Although Smoke Tree required REM to make tenant improvements and agreed to reimburse REM for a substantial amount of its expenses, no evidence suggests Smoke Tree engaged in improper conduct, and the subcontractors do not allege improper conduct. For example, Smoke Tree did not directly engage KAI to construct tenant improvements and then withhold payment, knowing it would affect payment to the subcontractors. *Cf. Flooring Sys.,* 160 Ariz. at 226–27, 772 P.2d at 580–81 (concluding unjust enrichment available as remedy for subcontractor to collect monies owed by general contractor for tenant improvements when owner withheld final payment to general contractor because subcontractors had not been paid); *Costanzo,* 9 Ariz.App. at 432–33, 453 P.2d at 528–29 (holding owner liable for unjust enrichment when he hired contractor to improve home and assured subcontractor that money was available to pay subcontractor). The superior court reasoned the enrichment is unjust because Smoke Tree approved the improvement plans. But approving plans to alter property is a right typically retained by any property owner and cannot be deemed improper. *See DCB Constr.,* 965 P.2d at 122 (concluding owner's involvement with approving plans that would affect owner's property cannot be considered unjust). Finally, the lease terms requiring REM to improve the restaurant and obligating Smoke Tree to reimburse REM up to $840,000 was a matter between landlord and tenant—not landlord and tenant's subcontractors—and could not have misled KAI or the subcontractors. In short, if we hold that Smoke Tree is liable to the subcontractors for unjust enrichment under these circumstances, we would essentially make Smoke Tree and all similarly situated property owners unwitting guarantors of their tenants' contracts for improvements. A claim for unjust enrichment does not stretch this far.

¶ 17 For these reasons, we hold 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.[6] Applying this holding, the superior court erred by concluding Smoke Tree is liable to the subcontractors under a theory ***321 **52** of unjust enrichment. We therefore reverse the judgment insofar as it awards damages with interest against Smoke Tree and remand to the superior court with instructions to enter summary judgment in favor of Smoke Tree on the unjust enrichment claims. In light of our holding, we need not address Smoke Tree's challenge to the court's assessment of prejudgment interest.

6 This court has previously stated that "the doctrine of unjust enrichment has no application to the owner where an explicit contract exists between

the subcontractor and the prime contractor." *Stratton,* 140 Ariz. at 531, 683 P.2d at 330. We disagree with this sweeping language in favor of our holding today.

II. Cross-appeals

A. Mechanic's liens

¶ 18 All subcontractors except Beecroft[7] argue the superior court erred by entering summary judgment in favor of Smoke Tree on their complaints to foreclose the mechanic's liens. The court ruled without elaboration that the liens were invalid because the subcontractors failed to strictly follow the requirements for imposing them. We review the court's ruling de novo. *Orme Sch.,* 166 Ariz. at 309, 802 P.2d at 1008.

7 Beecroft did not appeal entry of summary judgment on its mechanic's lien foreclosure action. Therefore, we do not review the propriety of that summary judgment.

¶ 19 Arizona's mechanic's liens statutes, A.R.S. §§ 33–981 to –1008 (West 2012), protect laborers and materialmen (collectively, "Laborers"), who generally lack privity of contract with a property owner, by providing them with a lien on real property for the amount of labor and materials supplied and by allowing them to pursue remedies directly against the owner. *United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.,* 197 Ariz. 479, 484, ¶ 26, 4 P.3d 1022, 1027 (App.2000); *Stratton,* 140 Ariz. at 531, 683 P.2d at 330. A Laborer pursing lien rights must serve the owner with a written preliminary notice of the lien within twenty days of the date the Laborer commenced furnishing labor or supplying materials to the jobsite. A.R.S. § 33–992.01(B), (C). This notice provides the owner an opportunity to take measures to protect itself. A.R.S. § 33–992.01(C); *Delmastro & Eells v. Taco Bell Corp.,* 228 Ariz. 134, 139–40, ¶ 13, 263 P.3d 683, 688–89 (App.2011). To perfect and later foreclose a lien, the Laborer must record a notice and claim of lien with the appropriate county recorder after completion of work on the property and serve a copy on the owner. A.R.S. § 33–993(A). Unless the Laborer files an action to foreclose the lien, it expires after six months. A.R.S. § 33–998(A). With this framework in mind, we review the propriety of the summary judgments entered against the subcontractors.

1. Wang

a. REM as agent of Smoke Tree

¶ 20 A Laborer may record a lien on property only when it performed work or supplied materials at the "instance" of the property owner or the owner's agent. A.R.S. § 33–981(A). Smoke Tree asserts Wang's lien against its interest in the property is invalid because neither Smoke Tree nor anyone serving as its agent requested improvements to the restaurant. In a related argument, Smoke Tree contends Wang's lien is invalid because Wang never served REM as "owner" with a preliminary twenty-day lien notice. Wang counters REM was Smoke Tree's agent because the lease required REM to remodel the restaurant pursuant to plans and specifications approved by Smoke Tree. For this reason, Wang asserts it properly served Smoke Tree with a preliminary twenty-day lien notice and subsequently recorded a lien against Smoke Tree's ownership interest.

¶ 21 A Laborer may not enforce against an owner a lien for work or material requested by a tenant unless the tenant acted as the owner's agent. *DeVry Brick Co. v. Mordka,* 96 Ariz. 70, 71, 391 P.2d 925, 926 (1964); *Bobo v. John W. Lattimore Contractor,* 12 Ariz.App. 137, 139, 468 P.2d 404, 406 (1970). In *DeVry Brick,* the supreme court addressed whether such an agency relationship existed when a lease term required the tenants to make extensive improvements to the leased premises pursuant to plans approved by both owner and tenants. 96 Ariz. at 70–71, 391 P.2d at 925–26. The court held that this mandatory lease term "created an agency relation between the lessors and the lessees for the purposes of the lien laws," thereby permitting the materialmen in that case to foreclose their liens against the property owner's interest. ***322 **53** *Id.* at 72, 391 P.2d at 926; *see also Bobo,* 12 Ariz.App. at 140, 468 P.2d at 407 (holding agency created for purposes of lien statutes when lease requires tenant to make substantial improvements to leased property); *Fagerlie v. Markham Contracting Co.,* 227 Ariz. 367, 372, ¶ 18, 258 P.3d 185, 190 (App.2011) ("Arizona's 'lien statutes do not create actual agency, but merely make the contractor a statutory agent for the sole purpose of securing the lien rights of the workman.' ") (citation omitted).

¶ 22 Like the leases at issue in *DeVry Brick* and *Bobo,* the lease here required REM to extensively remodel the restaurant. Also, REM was obligated to make improvements in accordance with plans and specifications approved by Smoke Tree and use a contractor approved by Smoke Tree.

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Despite these similarities, Smoke Tree argues *DeVry Brick* and *Bobo* are inapplicable because the lease here explicitly provided that "no mechanic's or other lien for any ... work or materials [furnished to REM] shall attach to or affect [Smoke Tree's] interest in the [p]remises" and represented that the sole relationship between Smoke Tree and REM was as landlord and tenant. This disclaimer, however, contravenes the legislature's policy expressed in A.R.S. § 33–981(A) to permit liens against an owner's interest in property when work is performed or materials furnished at the instance of the owner or its agent. Because the lease establishes that REM served as Smoke Tree's agent for purposes of the lien statutes, the disclaimer cannot serve to invalidate Wang's lien. *See Liberty Mut. Fire Ins. Co. v. Mandile,* 192 Ariz. 216, 220, 963 P.2d 295, 299 (App.1997) (recognizing that contract provisions contrary to strong public policy are void). Consequently, and in light of our mandate to liberally construe lien statutes to protect Laborers' interests, *Fagerlie,* 227 Ariz. at 371, ¶ 13, 258 P.3d at 189, we conclude Smoke Tree could not defeat the statutory agency relationship with REM by including self-serving language to that effect in the lease.

¶ 23 Pursuant to the holdings in *DeVry Brick* and *Bobo,* we hold the improvements to the restaurant were made at the "instance" of Smoke Tree through REM, and Wang was entitled to have a lien against Smoke Tree's interest in the property. A.R.S. § 33–981(A). Additionally, Wang properly served Smoke Tree rather than REM with the preliminary twenty-day lien notice.[8]

[8] For these same reasons, we reject Smoke Tree's arguments that (1) Aero had no right to impose a mechanic's lien against Smoke Tree's interest in the property, and (2) Aero improperly served a preliminary twenty-day lien notice on Smoke Tree because REM was not Smoke Tree's agent for purposes of the lien statutes.

b. Timely service of lien

¶ 24 To perfect a mechanic's lien, a Laborer, within a statutory time period, must "make duplicate copies of a notice and claim of lien and record one copy with the county recorder ... and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement." A.R.S. § 33–993(A). Wang recorded its notice and claim of lien on September 23, 2008; approximately three months later it simultaneously served Smoke Tree with the lien and the complaint seeking to foreclose it. Smoke Tree argues Wang failed to comply with A.R.S. § 33–993(A) because appending the notice and claim of lien to the complaint and then serving both on Smoke Tree failed to constitute service "within a reasonable time" after recording the lien.

¶ 25 Smoke Tree relies on *Old Adobe Office Properties, Ltd. v. Gin,* 151 Ariz. 248, 727 P.2d 26 (App.1986). In *Old Adobe,* the Laborer recorded a notice and claim of lien and served it on the owner along with a foreclosure complaint one week before expiration of the lien's six-month validity period. *Id.* at 249–50, 727 P.2d at 27–28. The court considered whether the Laborer's conduct constituted service "within a reasonable time after the recording of the lien," or at least created a fact question for a jury. *Id.* at 252, 727 P.2d at 30. The court noted that what is "reasonable" depends on the circumstances of the particular case but then held the Laborer's service in that case was not reasonable as a matter of law. *Id.* The court explained:

> ***323 **54** A.R.S. § 33–998 provides that a lien recorded under the provisions of Article 6 "shall not continue for a longer period than six months after it is recorded, unless action is brought within such period to enforce the lien." Since the purpose of the notice requirement is to allow an owner an opportunity to protect himself and to investigate the claim, absent unusual circumstances, the notice requirement of § 33–993(A) will not be met merely by appending a copy of the notice and claim of lien to the complaint filed in an action to foreclose that very lien.

Id.

¶ 26 Smoke Tree characterizes the above-quoted language as meaning service of the notice and claim of lien with a complaint can *never* satisfy the "reasonable time" requirement of § 33–993(A), absent unusual circumstances. To the extent *Old Adobe* makes this holding, we disagree. The lien statutes do not mandate that any period of time pass between serving a lien and filing a foreclosure complaint. Thus, if the *Old Adobe* Laborer had served its complaint on the property owner along with the notice and claim of lien the day after recording the lien, service undoubtedly would have been within a reasonable time pursuant to § 33–993(A) regardless of the simultaneous service of the complaint. The pertinent issue in *Old Adobe* was whether taking this course of action almost six months after the Laborer recorded the lien was sufficient under A.R.S. § 33–993(A).

¶ 27 We cannot say as a matter of law that Wang's service of the notice and claim of lien approximately three months after recordation was not within a reasonable time. The record before us does not set forth any facts bearing on Smoke Tree's ability to investigate the claim or protect itself after service of the lien. Moreover, Smoke Tree does not offer any argument why service of the lien approximately three months after recordation was not reasonable. In light of the record developed thus far, summary judgment on this issue is not appropriate.[9]

9 Smoke Tree incorporates by reference its arguments concerning Wang to assert the same argument against Aero but fails to assert any facts or arguments specific to Aero. For the same reasons we reject Smoke Tree's arguments concerning the propriety of summary judgment against Wang on this issue, we also reject them as applicable to Aero on this record.

c. Acknowledgment of lis pendens

¶ 28 When a Laborer files a complaint to foreclose a mechanic's lien, it must also record a lis pendens to provide notice of the lawsuit. A.R.S. § 33–998(A) (citing A.R.S. § 12–1191). Smoke Tree argues Wang failed to comply with this requirement because the lis pendens it recorded was not acknowledged as required of an "instrument affecting real property." *See* A.R.S. § 33–411(A), (B) (West 2012). This court expressly rejected this argument in two recent decisions. *Fagerlie,* 227 Ariz. at 376, ¶¶ 45–48, 258 P.3d at 194; *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC,* 227 Ariz. 382, 390, ¶ 28 n. 9, 258 P.3d 200, 208 n. 9 (App.2011). We agree with the reasoning of these cases and therefore hold Wang was not required to include an acknowledgment in the lis pendens.

2. Aero

a. Preliminary lien notice

Smoke Tree incorporates by reference its arguments concerning Wang to assert the same argument against Aero but fails to assert any facts or arguments specific to Aero. For the same reasons we reject Smoke Tree's arguments concerning the propriety of summary judgment against Wang on this issue, we also reject them as applicable to Aero on this record.

¶ 29 As previously explained, to preserve lien rights, a Laborer must serve a preliminary twenty-day lien notice on the owner or reputed owner, among others, within twenty days after the Laborer first furnishes materials or services to the jobsite. A.R.S. § 33–992.01(B), (C). Smoke Tree contends Aero's notice identified REM as the owner, and therefore Aero could not impose a lien against Smoke Tree's interests. Aero counters it properly named Smoke Tree as the owner.

***324 **55** ¶ 30 Aero served three preliminary twenty-day lien notices. The first notice, dated February 20, 2008, named Smoke Tree as the owner or reputed owner/lessor. Aero served an amended notice on March 3, 2008 naming Robert McGrath, managing member of REM, as the owner. Four days later, Aero served another amended notice naming REM as the owner. The latter two notices each bore a notation that "[t]his notice is being amended to correct the name and/or address of the owner." All three notices were later attached to Aero's notice and claim of lien.

¶ 31 Smoke Tree's challenge to Aero's preliminary twenty-day lien notice is unclear. If Smoke Tree contends Aero never named Smoke Tree as owner in a notice, it is mistaken. To the extent Smoke Tree argues the amended notices extinguished the original notice naming Smoke Tree as the owner and thereby voided the later notice and claim of lien, we reject that argument. Section 33–922.01(B) requires service on the owner to permit it to investigate the claim and promote dialogue among affected parties to resolve payment issues and avoid "costly work stoppages, mechanics' lien foreclosure sales, and double payments by the owner.' " *Delmastro,* 228 Ariz. at 139–40, ¶ 13, 263 P.3d at 688–89 (citation omitted). Aero's service of the initial notice on Smoke Tree fulfilled that purpose. We are not aware of any authority, and Smoke Tree does not cite any, supporting a conclusion that a Laborer's amendment to a notice to name other reputed owners, thereby increasing the likelihood the true owner is served, extinguishes prior notices. Construing § 33–992.01(B) liberally to protect Laborers' interests, *Fagerlie,* 227 Ariz. at 371, ¶ 13, 258 P.3d at 189, we decide a Laborer may "cover its bases" by serving multiple preliminary twenty-day lien notices naming different owners and reputed owners as long as such service is timely. Because the initial preliminary twenty-day notice placed Smoke Tree on notice to investigate the claim, the purpose of the notice was fulfilled. Summary judgment against Aero on this basis was not appropriate.

b. Legal description in notice and claim of lien

¶ 32 A Laborer is required to state in a notice and claim of lien "[t]he legal description of the lands and improvements to be charged with a lien." A.R.S. § 33–993(A)(1). Aero provided the following description:

> THE R.E.M. RESTAURANT AT THE SMOKE TREE RESORT 7101 EAST LINCOLN DRIVE SCOTTSDALE, MARICOPA COUNTY, STATE OF ARIZONA. APN: 174 64 003 A—SMOKE TREE RESORT 865/15 CONTAINED IN EXHIBIT "A" AND INCORPORATED HEREIN BY THIS REFERENCE RECORDS OF MARICOPA COUNTY, STATE OF ARIZONA.

Smoke Tree argues this recitation fails as a "legal description" but does not explain how. Aero asserts listing the street address, the physical description of the property, and the county assessor parcel number, together with express incorporation of county records for that parcel number, was sufficient to comply with § 33–993(A)(1).

¶ 33 A Laborer must substantially comply with the legal description requirement in order to perfect a lien and later foreclose it. *Smith Pipe & Steel Co. v. Mead,* 130 Ariz. 150, 151, 634 P.2d 962, 963 (1981). The lien statutes do not define "legal description," so we ascribe plain meaning to the term. *W. Corrs. Grp., Inc. v. Tierney,* 208 Ariz. 583, 587, ¶ 16, 96 P.3d 1070, 1074 (App.2004). To do so, we refer to an established dictionary. *Id.* at ¶ 17. Black's Law Dictionary 976 (9th ed. 2009) defines "legal description" as "[a] formal description of real property, including a description of any part subject to an easement or reservation, complete enough that a particular piece of land can be located and identified. The description can be made by reference to a government survey, metes and bounds, or lot numbers of a recorded plat." Applying this definition, Aero's listing of the resort's street address and description of the restaurant were not sufficiently formal to comply with the requirement to list a legal description even though it identified the property. *See also Smith Pipe,* 130 Ariz. at 151, 634 P.2d at 963 (noting legislature amended § 33–993 in 1973 to remove language that ***325 **56** required description must be sufficient to identify the property in favor of current legal description requirement). But Aero's recitation of the assessor parcel number and the incorporation by reference of records associated with that parcel substantially complied with § 33–993(A) (1). We take judicial notice these publicly available records set forth the resort's legal description.[10] *See Jarvis v. State Land Dep't,* 104 Ariz. 527, 530, 456 P.2d 385, 388 (1969) (taking judicial notice of state agency records), *modified on other grounds,* 113 Ariz. 230, 550 P.2d 227 (1976). Summary judgment against Aero on this basis was therefore inappropriate.

[10] The records are available online at *Residential Parcel Information,* Maricopa County Assessor, http://mcassessor.maricopa. gov/Assessor/Parcel Application/Detail.aspx?ID=174–64–003–A (last visited July 11, 2012).

3. Adobe

a. Survival of lien against leasehold interest

¶ 34 Unlike the other subcontractors, Adobe seeks to foreclose a lien only against REM's leasehold interest in the property. Smoke Tree argues Adobe stands in REM's shoes, and because REM no longer has a leasehold interest in the property, and Adobe never imposed a lien against Smoke Tree's ownership interest, Adobe's lien rights are extinguished. Adobe counters its lien survives termination of the lease and may be foreclosed.

¶ 35 Adobe relies primarily on *Hayward Lumber & Investment Co. v. Graham,* 104 Ariz. 103, 449 P.2d 31 (1968), to support its position. In that case, a landlord leased unimproved land to a tenant, who purchased supplies from Laborers to improve the property. *Id.* at 104–05, 449 P.2d at 32–33. After 90 percent of the improvements were completed, the landlord terminated the lease and took possession of the property and improvements. *Id.* at 105, 449 P.2d at 33. The Laborers filed liens against the property and improvements. *Id.* In a subsequently filed lawsuit, the superior court ruled that because the tenant did not serve as the landlord's agent in making the improvements, the liens were ineffective. *Id.*

¶ 36 On appeal, the supreme court agreed that because the improvements were made solely at the instance of the tenant, the liens only could be foreclosed against the tenant's interests. *Id.* at 108, 449 P.2d at 36. But the court rejected the notion "that if no lien could attach to the [landlord's] interest in the realty, then there could be no lien at all, including any possible lien on the improvements thereon." *Id.* at 108–11, 449 P.2d at 36–39. The court examined A.R.S. § 33–981(A), which authorizes imposition of a lien on "any building, or other structure or improvement," and A.R.S. § 33–991(A) and (B), which provide such liens extend to the real property underlying the improvements, to conclude the legislature intended to permit Laborers to impose liens primarily on improvements and incidentally against the realty. *Id.* at 109–10, 449 P.2d at 37–38. The court then adopted decisions from courts in California and Oregon, which construed lien statutes similar to Arizona's, to conclude that when improvements are made to property solely at the instance of a tenant, Laborers may impose liens on the improvements even though they may not impose liens on the underlying realty. *Id.* at 110–11, 449 P.2d at 38–39. The court concluded "[i]t would be manifestly unjust to construe the mechanics' lien statute as denying a lien on improvements merely because such lien cannot extend to the land upon which the improvements are located." *Id.* at 111, 449 P.2d at 39. The court therefore reversed the judgment invalidating the liens against the improvements even though the tenant no longer had an interest in them. *Id.; see also id.* at 108, 449 P.2d at 36 (*citing English v. Olympic Auditorium, Inc.,* 217 Cal. 631, 640, 20 P.2d 946, 950 (Cal.1933) (holding Laborers' liens on building erected at tenant's behest and which tenant could not remove at will existed separately from land and survived lease termination)).

¶ 37 Smoke Tree argues *Hayward Lumber* is distinguishable because the improvements at issue were entirely erected by the tenant, while Adobe's improvements were made to a building owned by Smoke Tree. Because it is impossible to grant a lien against these improvements ***326 **57** without also effectively imposing a lien against Smoke Tree's ownership interest, Smoke Tree asserts Adobe's lien must fail.

¶ 38 We agree with Smoke Tree that *Hayward Lumber* is distinguishable because it involved construction of a building entirely at the tenant's instance. The court's focus was deciding whether the lien on the building could survive even though the Laborers could not impose liens on the underlying land. *Hayward Lumber,* 104 Ariz. at 108–09, 449 P.2d at 36–37. The court did not address the viability of a lien on improvements made within a structure owned by a landlord who did not order the improvements.

¶ 39 Nevertheless, *Hayward Lumber* provides guidance on the issue before us. The court reiterated the long-held principle that "only the lessee[']s interests could be used to satisfy the mechanics' liens" and emphasized its holding struck a balance in protecting both Laborers and landlord-owners. *Id.* at 108, 110–11, 449 P.2d at 36, 38–39 (citing *Demund Lumber Co. v. Franke,* 40 Ariz. 461, 14 P.2d 256 (1932)). In *Demund Lumber,* the supreme court held in pertinent part as follows:

> It is undoubtedly the law in Arizona that only the interest of the party who causes the building to be erected or the materials to be furnished can be ordered sold to satisfy mechanics' or materialmen's liens, and where the owner of premises has leased them, a person furnishing material or doing labor for the lessee on the premises may have a lien against the particular estate of the lessee, but can have none against the owner's estate in the property unless it appears that the lessee is actually an agent of the owner, or as a matter of law is estopped from denying such agency.

40 Ariz. at 463, 14 P.2d at 256; *see also Mulcahy Lumber Co. v. Ohland,* 44 Ariz. 301, 303–04, 36 P.2d 579, 579–80 (1934) (relying on *Demund Lumber* to hold Laborer with lien against tenant-requested improvements could not foreclose lien against landlord's interest after lease termination absent showing of agency or estoppel).

¶ 40 We derive two principles from *Hayward Lumber* and *Demund Lumber.* First, a Laborer's mechanic's lien imposed solely against a tenant's interest in improvements made to leased premises survives termination of the lease if the landlord has no ownership interest in the improvements. *Hayward Lumber,* 104 Ariz. at 110–11, 449 P.2d at 38–39. In light of modern-day lease practices in which parties agree that the landlord has a reversionary ownership interest in improvements, as Smoke Tree and REM agreed in their lease, the *Hayward Lumber* holding likely will apply only to a limited number of situations. Second, the lien extinguishes if imposed against improvements in which a landlord has an ownership interest *unless* the tenant acted as the landlord's agent or the landlord is estopped from denying the agency. *Demund Lumber,* 40 Ariz. at 463, 14 P.2d at 256.

¶ 41 Applying these principles to this case, we decide Adobe's lien survived REM's lease termination because, as previously explained, *see supra* ¶¶ 20–23, REM served as Smoke Tree's agent for the purposes of the lien statutes. Because REM's leasehold estate no longer exists, however, Adobe's lien necessarily is one against Smoke Tree's interests. *See Trace Constr., Inc. v. Dana Barros Sports Complex, LLC,* 459 Mass. 346, 357, 945 N.E.2d 833, 841 (Mass.2011) ("As a general matter, a lien on a leasehold is extinguished when the rights of the lessee expire.”).

b. Preliminary lien notices

¶ 42 Smoke Tree argues the superior court properly entered summary judgment against Adobe because it failed to serve Smoke Tree with a preliminary twenty-day lien notice. The record shows Adobe Paint served such a notice on Smoke Tree, so summary judgment was inappropriate against Adobe Paint on this basis.[11] But the record also shows Adobe Drywall served a preliminary twenty-day notice on McGrath, REM's managing member, and did not serve a notice on Smoke Tree. Adobe Drywall contends ***327 **58** this service is sufficient to now foreclose its lien.

11 Smoke Tree does not argue the effect, if any, of Adobe Paint's failure to serve REM with a preliminary twenty-day notice, and that issue is not before us.

¶ 43 Section 33–992.01(B) requires a Laborer who may later impose a lien to “serve the owner or reputed owner” with the preliminary twenty-day notice. Substantial compliance with this provision is a “necessary prerequisite to the validity of any claim of lien.” *Id.; MLM Constr. Co., Inc. v. Pace Corp.,* 172 Ariz. 226, 229, 836 P.2d 439, 442 (App.1992). The statute defines “owner” as the person “who causes a building, structure or improvement to be constructed, altered or repaired, whether the interest or estate of the person is in fee ... [or] as lessee.” A.R.S. § 33–992.01(A)(3). By serving REM's managing member, Adobe Drywall properly served the “owner” against whose interests it later imposed a lien. We are not aware of any authority requiring a Laborer to serve a preliminary twenty-day lien notice on a landlord in order to later impose a lien against the tenant's estate merely because the tenant may later lose its leasehold interest. Construing § 33–992.01(B) liberally to protect Laborers' interests, *Fagerlie,* 227 Ariz. at 371, ¶ 13, 258 P.3d at 189, Adobe Drywall is not barred from foreclosing its lien because it did not serve a preliminary twenty-day notice on Smoke Tree.

4. Allied

¶ 44 The summary judgment entered against Allied is procedurally unique. Specifically, the superior court entered judgment against Allied on its mechanic's lien foreclosure claim even though Smoke Tree never sought judgment against Allied and the parties did not stipulate to one. Neither party made any arguments concerning Allied's lien, and the court explained only that all the subcontractors' liens failed to comply with the lien statutes. On appeal, Allied simply joins the briefs of the other subcontractors without making any argument specific to it, and Smoke Tree asserts we have “no basis to reverse.” But we also have no basis to affirm. What's an appellate court to do? We reverse. Any judgment entered on Allied's mechanic's lien foreclosure claim must await a dispositive motion, stipulation, or trial.

B. Attorneys' fees

¶ 45 All subcontractors except Beecroft challenge the superior court's refusal to award attorneys' fees pursuant to A.R.S. § 12–341.01(A) because they prevailed on their unjust enrichment claims. In light of our decision reversing summary judgment on the unjust enrichment claims, the subcontractors are no longer the prevailing parties on these claims. Their challenges to the attorneys' fees ruling are therefore moot, and we do not address them.

ATTORNEYS' FEES ON APPEAL AND CROSS–APPEAL

¶ 46 All parties request an award of attorneys' fees pursuant to A.R.S. § 12–341.01(A) and/or A.R.S. § 33–998(B).

¶ 47 We deny Beecroft's request for fees pursuant to § 12–341.01(A) expended in the appeal, because Beecroft is not the successful party. We have discretion to award fees pursuant to § 12–341.01(A) in favor of Smoke Tree as against Beecroft because Smoke Tree is the successful party, and the unjust enrichment claim arises out of the contract between Beecroft and KAI. *See Schwab Sales, Inc. v. GN Constr. Co., Inc.,* 196 Ariz. 33, 37, ¶ 13, 992 P.2d 1128, 1132 (App.1998) (holding equipment lessor's unjust enrichment claim against general contractor arose from contract between general contractor and subcontractor-lessee who failed to make lease payments). We exercise our discretion to deny fees to Smoke Tree, however, because Beecroft only joined in arguments asserted by Adobe and did not cause Smoke Tree to expend any fees to separately address the summary judgment entered for Beecroft. Smoke Tree is entitled to taxable costs against Beecroft subject to its compliance with Arizona Rules of Civil Appellate Procedure (“ARCAP”) 21(a). A.R.S. § 12–341.

¶ 48 We deny the fee requests of Smoke Tree, Wang, Aero, and Allied. Sections 12–341.01(A) and 33–998(B) provide us discretionary authority to award fees. Because all these parties are partially successful and partially unsuccessful, we exercise our discretion to deny the requests. *See* ***328 **59** *Murphy Farrell Dev., LLLP v. Sourant,* 229 Ariz. 124, 134, ¶ 38, 272 P.3d 355, 365 (App.2012). Likewise, applying the "totality of the litigation test," none of these parties are the "successful party" on appeal entitled to taxable costs because all are equally successful and unsuccessful. *Id.* at 134–35, ¶ 38, 272 P.3d at 365–66. Because Adobe ultimately prevailed before this court, however, we grant Adobe's request for attorneys' fees pursuant to § 33–998(B) subject to its compliance with ARCAP 21(a). Any application should reflect fees expended only on Adobe's cross appeal. We also award Adobe its costs on cross-appeal as against Smoke Tree.

DISPOSITION

¶ 49 We reverse the entry of summary judgment in favor of the subcontractors on their claims for unjust enrichment and remand with directions for the court to enter summary judgment in favor of Smoke Tree on those claims.

¶ 50 We reverse the summary judgments entered against Wang, Aero, and Allied on their claims to foreclose mechanic's liens against Smoke Tree and remand for further proceedings.

¶ 51 We reverse the summary judgment entered against Adobe on its claim to foreclose mechanic's liens against Smoke Tree and remand with instructions to enter summary judgment in favor of Adobe on that claim. We further instruct the court to permit Adobe to apply for attorneys' fees on its mechanic's lien claims pursuant to A.R.S. § 33–998(B). We award Adobe its reasonable attorneys' fees and costs expended in its cross-appeal subject to compliance with ARCAP 21(a).

¶ 52 We deny Smoke Tree's request for attorneys' fees against Beecroft, but award Smoke Tree its taxable costs subject to compliance with ARCAP 21(a).

¶ 53 We deny all remaining requests for attorneys' fees and taxable costs.

CONCLUSION

¶ 54 For the foregoing reasons, we reverse and remand with instructions.

CONCURRING: MAURICE PORTLEY, Presiding Judge, and ANDREW W. GOULD, Judge.

All Citations

230 Ariz. 314, 283 P.3d 45, 640 Ariz. Adv. Rep. 15

ADDENDUM 4:
Dan B. Dobbs, *Law of Remedies* (1993)
Pages 473-74

(Highlighting added by counsel)

DOBBS LAW OF REMEDIES

DAMAGES–EQUITY–RESTITUTION

Second Edition

By

Dan B. Dobbs

Professor of Law
University of Arizona

Volume 3

Chapters 12–End
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PRACTITIONER TREATISE SERIES*

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tor, not the subcontractor. An additional reason is that if the owner has paid the general contractor the price due, the owner is not enriched in any legal sense; he will have received what was his due under the contract, no more.[17]

Landlord's benefit from tenant's improvements at the expense of contractors or materialmen. Sometimes an individual who is not the owner orders improvements on the owner's land, then fails to pay the contractor or supplier. In a Missouri case,[18] the owner's parents ordered improvements; in a Tennessee case the owner's daughter ordered them.[19] More commonly a tenant does so. The same problem can arise when the lessee of a chattel orders improvements on it which the lessor will enjoy when the lease is terminated.[20] Such cases are usually governed by the general rule that the owner is not liable to the contractor or supplier unless he agreed to pay them.[21] Consistent with that view, no statutory mechanic's lien attaches against the landlord's interest in such cases, either.[22] But it is easy to sympathize with the unpaid contractor or supplier, and a few decisions have allowed the unjust enrichment claim (or mechanic's lien) against the landlord-owner,[23] or have found that the tenant was the agent of the landlord or a joint venturer, or that the owner "enticed" the improver into the deal.[24]

In some such cases the owner may be enriched and the only ground for denying the claim is that the owner nevertheless has not contracted

17. See, e.g., Pella Windows and Doors, Inc. v. Faraci, 133 N.H. 585, 580 A.2d 732 (1990). In some opinions the judge may be assuming that the owner would be unjustly enriched if he got value in excess of the sums he paid; but this would not be unjust enrichment if the value he obtained was the value of performance promised by the general contract.

18. Dalton v. Bundy, 666 S.W.2d 443 (Mo.App.1984).

19. Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966).

20. Midcoast Aviation, Inc. v. General Elec. Credit Corp., 907 F.2d 732 (7th Cir. 1990) (airplane).

21. Dalton v. Bundy, 666 S.W.2d 443 (Mo.App.1984); Puttkammer v. Minth, 83 Wis.2d 686, 266 N.W.2d 361 (1978); Dawson, The Self-Serving Intermeddler, 87 Harv.L.Rev. 1409, 1454 (1974).

22. Hayward Lumber & Inv. Co. v. Graham, 104 Ariz. 103, 449 P.2d 31 (1968); Bell v. Tollefsen, 782 P.2d 934 (Okl.1989).

23. Idaho Lumber, Inc. v. Buck, 109 Idaho 737, 710 P.2d 647 (App.1985); cf. Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966) (daughter living in house ordered work done; later she took bankruptcy; in the contractor's suit against the parents living in the house, the court apparently only held that "unjust enrichment [can be] a remedy where there is no privity of contract," without passing on the merits of the particular claim).

24. Midcoast Aviation, Inc. v. General Elec. Credit Corp., 907 F.2d 732 (7th Cir. 1990). In *Midcoast* the owner of a plane worked out a complex deal with an "idea shop" under which the "idea shop" would be financed by the owner, who would also lease it a plane for rebuilding, with the idea that a fleet of such planes would be rebuilt and upgraded. The contractor doing the interior work sought and received assurances from the owner that it would finance the whole project; the owner made loans to the "lessee" of the plane to pursue the work, and other loans to pay off creditors, but the owner controlled the payouts, which did not include the plaintiff contractor. The owner was held liable on an unjust enrichment theory. The court approved an unjust enrichment liability of the plane's owner. Although the court made expansive statements about liability, the facts seemed to warrant a trier in finding either an implied-in-fact contract or something approaching an agency by the "idea shop."

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to pay for the improvements and the improver accepted the credit of entirely different persons. In other cases the owner may not be enriched at all. The landlord's residual interest in the lease is an important part of the landlord's bargain. If the tenant agreed to make improvements, and even if he were merely permitted to do so by the lease, the landlord is not unjustly enriched; he has obtained what he had a right to obtain under the lease, namely improved premises at the end of the term or upon termination of the lease.[25] The effect of those few cases imposing liability upon the owner may be to deprive him of his bargain with the tenant. It may be that in some of those cases the point was not raised in argument.[26]

Mechanics' and Materialmen's Liens and Other Solutions

Statutory liens against the owner. One element of the subcontractor problem is to protect the landowner against double recovery. Another element is to place the burden on one of the parties to secure payment for the subcontractor, laborer or supplier. The common law restitution rule leaves the burden on the subcontractor or worker to secure himself, but that is a burden not practical for many to bear. Mechanics' and materialmen's lien statutes in most states make it possible under some circumstances for subcontractors, workers and suppliers to impose liens against the landowner to secure their rights of payment.[27] The lien threat gives the owner incentive to be sure that if

25. If the tenant defaults and the lease is terminated before the end of the term, but improvements have been made, it is possible to imagine that the landlord is unjustly enriched. In such a case he might be likened to the owner who agrees to pay the general contractor but has not yet done so. If the owner is held liable in such a case, it does not matter whether liability runs to the general contractor or to a subcontractor, supplier, or laborer (by way of subrogation or garnishment). In the landlord's case, the landlord agrees to lease the land for a term for specified rent plus a residual interest in whatever improvements the tenant makes or is obliged to make. If the tenant gives up the premises before the term is up and the landlord accepts them, then to the extent that the landlord has premises valued in excess of the present value of the remaining rental due, he may be unjustly enriched. But even in that case, the unpaid supplier's only logical claim against the landlord would be to substitute himself for the tenant and claim the value of the remaining part of the term less the present value of rents due on it.

26. See Idaho Lumber, Inc. v. Buck, 109 Idaho 737, 710 P.2d 647 (App.1985). The court said that "if the landowner has given any consideration to any person for the improvements, it would not be unjust for him to retain the benefit without paying the furnisher." It seems not to have been argued that the landlord *had* paid for the improvements in the lease terms and rentals, since rental would presumably have been less if the tenant was expected to return the building in its original condition as a funeral home rather than a restaurant.

27. E.g., West's Ann.Cal.Civ.Code § 3110; N.Y.—McKinney's Lien Law § 3. The statutes deal with many problems of procedure, priority, notice, and other matters. The gist of the lien provision itself can be seen in these excerpts from New York and California statutes. The paraphrasing does not necessarily represent technical construction.

> A contractor, subcontractor, laborer, materialman, landscape gardener [and others] who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner, thereof, or of his agent, contractor or subcontractor, * * * shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements * * *.

N.Y.—McKinney's Lien Law § 3.

> Mechanics, materialmen, contractors, subcontractors, lessors of equipment,