IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARKHAM CONTRACTING CO. INC., and Arizona corporation	)	Court of Appeals
	)	Division One
	)	No. 1 CA-CV 12-0195
Plaintiff/Appellee/ Cross-Appellant,	)	
	)	Maricopa County
	)	Superior Court
vs.	)	No. CV2008-015602
	)	
FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation,	)	
	)	
	)	
Defendant/Appellant/ Cross-Appellee.	)	
	)	

PLAINTIFF/APPELLEE CROSS-APPELLANT'S ANSWERING BRIEF

Thomas L. Hudson (014485)
Eric M. Fraser (027241)
OSBORN MALEDON, P.A., No. 00196000
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9301
thudson@omlaw.com
efraser@omlaw.com

Karen A. Palecek (011944)
PALECEK & PALECEK, P.L.L.C.
6263 North Scottsdale Road, Suite 310
Scottsdale, Arizona 85250
(602) 522-2454
kpalecek@paleceklaw.com

Attorneys for Plaintiff/Appellee/Cross-Appellant

TABLE OF CONTENTS

(Note: Click View and Navigation Pane to View Bookmarked Links)

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other Authorities

INTRODUCTION[*]

Markham Contracting Co., Inc. ("**Markham**") performed substantial construction work on a townhome project, but was never fully paid. Accordingly, it brought an action in the Superior Court to foreclose on its mechanic's lien. New South Federal Savings Bank ("**New South**"), the construction lender for the project, had a deed of trust on the property which also gave it a lien on the property.

When two lienholders assert competing rights in the same property, the "tie" is broken on the basis of when each lien attached to the property; first in time, first in right. In this case, New South's deed of trust has a priority date of June 20, 2005. Accordingly, if Markham's lien attached before June 20, 2005 then Markham's lien takes priority. In Arizona, a mechanic's lien takes priority when labor commences. At its core, then, this dispute turns on an issue of fact: whether labor commenced on the project before June 20, 2005.

The evidence at trial demonstrated that the construction lender never bothered to inspect the property before making its loan, but that had it done so it would have been obvious that labor commenced before June 20, 2005. After

---

[*] Record citations are cited with R followed by the record number, trial Exhibits with TE followed by Exhibit number, and trial transcripts, all of which are from 2011, with the month and day, AM/PM designation followed by page and line number, e.g., 7/11PM 12:14-14:1. Material items are included in Appellee's Separate Appendix.

hearing the extensive evidence during a four-day trial, the Superior Court, with an advisory jury, found that fifteen different types of work—each of which independently gives Markham's lien priority—began before June 20. On appeal, New South argues that ***some*** of the work began after June 20, that ***some*** of the work was not sufficiently visible, that ***some*** of the work was not performed pursuant to a single contract with the owner, and that Markham's attorney should have testified. Although New South's arguments on those points lack merit, they largely miss the point: the judgment must be affirmed if at least one of Markham's activities satisfied the lien statute before June 20, 2005. On that issue, it cannot seriously be contended that the Superior Court abused its discretion.

STATEMENT OF FACTS AND CASE

New South presents the version of the case the Superior Court and advisory jury rejected. On appeal, however, the court should "view the evidence and all reasonable conclusions drawn therefrom in a light most favorable to upholding" the Superior Court. *Nace v. Nace*, 104 Ariz. 20, 23, 448 P.2d 76, 79 (1968).

I. Construction Began on the Lindsay Park Townhome Project Before the Priority Date of New South's Deed of Trust

In 2003, Rodney Morris and his entity Lindsay Park Townhomes, LLC started the Lindsay Park Townhomes Project (the "**Project**"), a 165-unit townhouse development in Mesa, Arizona. The construction industry at the time was "crazy."[1] Work was "exploding"[2] and would sometimes begin "without having a fully executed contract," and before all of the plans had been approved.[3] Construction lenders also began to cut corners, and during the next several years it only got worse.[4]

In this context (in November 2004), Morris asked Markham to submit a bid to DelMar Development (one of Morris's other entities), which it did.[5] Markham

[1] 7/14PM at 85:2.

[2] *Id.* at 53:17.

[3] *Id.* at 84:24-85:5.

[4] 7/15AM at 79:10-18 ("drive by" appraisals).

[5] 7/15PM at 7:5-9; TE2; 7/14AM at 16:12-13.

then submitted several revised bids in 2005.[6] Although there were changes from bid to bid, the April and July versions were substantially similar in many respects,[7] and Markham was selected to be a site work contractor for the Project.[8] Its July 2005 bid was then incorporated into a contract dated June 28, 2005 between Markham and an entity called OWCP17, LLC ("**OWCP17**").[9]

During this time, from around March 2005 until the contract was signed and continuing thereafter, Markham worked on the project. As requested, Markham began by locating utilities on the property via the "blue staking" process—a "requirement of construction" that involves utility companies locating utility lines and marking their locations with highly-visible paint.[10] Although utilities blue stake without charge, the brightly colored paint does not just magically appear. Markham personnel had to arrange for and supervise the work,[11] which began in March 2005 and continued every two weeks throughout the relevant period.[12]

---

[6] TE9, TE17, TE21, TE30, respectively.

[7] TE21; TE30; 7/14AM at 77-78 (describing similarities between bids).

[8] 7/15AM at 61:20-62:1.

[9] TE30.

[10] *See* notes 44-45, *infra*.

[11] *See* note 52, *infra*.

[12] *See* note 44, *infra*.

Around late March 2005, Markham was asked to do the "pothole" work on the site, which involves digging holes to help locate utilities.[13] The potholing work required the use of traffic barricades around the property; Markham arranged for barricade plans to be drawn up and approved, and then to have the barricades positioned on the street.[14]

Markham was also asked to remove trash from the site, which it did in April or May.[15] After it cleared the debris, Markham dug a v-ditch to prevent further dumping.[16] In addition, Markham was asked to establish a construction job trailer on the site, which also required clearing a pad for that job trailer.[17] The project also required a rock access ramp/track-out in order to knock mud from the tires of the construction vehicles, and Markham built one.[18] Markham also established a temporary water source, pre-wet system, and temporary power source for the project.[19] In addition, Markham cleared and grubbed the site and began staking and surveying it.[20]

---

[13] *See* notes 46-48, *infra*.

[14] *See* notes 49-50, *infra*.

[15] *See* notes 53-54, *infra*.

[16] *See* note 55, *infra*.

[17] *See* note 57, *infra*.

[18] *See* note 58, *infra*.

[19] *See* note 56, *infra*.

[20] *See* notes 59-60, *infra*.

Anyone who had bothered to visit the property during this busy period would have seen the common indicia of construction: construction workers performing various activities, construction vehicles and equipment coming and going, construction barricades on the street, holes and stakes in the ground, and a site covered in the familiar markings indicating the location of utilities in bright paint (e.g., "High Visibility Safety Yellow," Ariz. Admin. Code. § R14-2-106). There was no evidence that any agent of New South ever actually visited the project before lending money for construction, but had it done so there would have been no doubt that labor had already commenced.

Although New South notes (at 5) that in April certain governmental approvals had not yet been obtained, much of the work Markham was performing during this period did not require permits or approvals.[21] Similarly, although there were issues related to properly abandoning a portion of the property, that process did not prevent Markham from engaging in these activities.[22] Moreover, during this time Markham obtained permits from the City of Mesa and other entities.[23]

---

[21] 7/14PM at 92:13-94:4 (describing work Markham could do without a permit); 40:20-21 ("We were asked to proceed, to get as much of the work done as we could up to permit.").

[22] 7/14PM at 25:11-26:3 (listing work Markham could do before abandonment).

[23] 7/15AM at 14:15-15:7 (describing permits obtained between March and June of 2005).

Had New South bothered to look, it would have discovered that permits had been issued for the project.[24]

All of these activities were directed to the Project. Accordingly, and consistent with the "crazy" nature of the construction industry at the time,[25] the early labor that predated the final contract was subsequently "rolled into" one single contract with OWCP17.[26] For example, the final contract incorporated a bid with a line item for trash haul off, indicating it was "Based on Field Conditions as of 4/4/05 at 4 pm."[27] It also includes line items for clearing, pre-wet, barricades, and "General conditions," the last of which expressly includes supervision, the job trailer, and other items.[28]

II. Markham's Preliminary Lien Notice in July 2005

Markham expected to furnish over $2.7 million in labor and materials to the Project.[29] It sought to reduce the risk of non-payment by asserting a lien against the property. Although it could have filed one sooner, Markham filed a

---

[24] *See* Argument § 11.A.2.c.

[25] 7/14PM at 53:17, 84:24-85:5.

[26] 7/14AM at 80:12-81:2 ("those numbers are rolled into the final written contract"); *accord* 7/14PM at 22:9-13.

[27] TE30 at MCI1151.

[28] *Id.* at MCI1151, MCI1155.

[29] TE90.

preliminary twenty-day notice pursuant to A.R.S. § 33-992.01 on July 26, 2005.[30] This twenty-day notice protected the investment in labor and materials Markham furnished beginning twenty days earlier, i.e., on or after July 6, 2005. A.R.S. § 33-992.01(E) (limiting lien to labor "furnished within twenty days prior to the service of the notice and at any time thereafter").

Markham completed extensive work on the Project, including demolition; earth work; drainage; cut and fill; concrete work for curbs, gutters, and sidewalks; street lights; masonry and fences; water lines; sewer lines; drainage work; and changing the irrigation system.[31] $412,629.81 of Markham's bills went unpaid.[32]

On April 1, 2008, after not being fully paid, Markham recorded and served its Notice and Claim of Lien.[33] The Notice and Claim of Lien states that labor commenced "on or about" July 7, 2005.[34] That uncertainty resulted in part from Markham's subsequent reliance on hourly employee timecards, which did not account for the "subcontractors or salaried personnel, or anyone else who is performing work pursuant to that project" before July 7.[35]

---

[30] *Id.*

[31] 7/15AM at 62:14-74:6 (describing scope of work).

[32] R1 at 10 ¶ 37.

[33] *Id.*, Exhibit 1 thereto.

[34] The Complaint uses the same phrase for the same reason. *See* R1 at 9 ¶ 32.

[35] 7/15AM at 18:1-12.

III. Markham's Lien Foreclosure Action

Markham filed this action in July 2008, naming New South (the construction lender for the project) and several other defendants with interests in the property.[36] The claims against all other defendants were resolved without the need for a trial, leaving New South as the only remaining defendant contesting Markham's lien claim. First American Title Insurance Co. substituted in for New South.[*]

At trial, New South contended that its deed of trust recorded on June 30, 2005 took priority over Markham's Lien, notwithstanding the abundant evidence demonstrating that labor had commenced before the June 20 priority date for New South's lien. During trial, New South also asked the Superior Court to decide the fact-intensive issue of when labor commenced as a matter of law, and sought to force Markham's trial counsel to testify because she had signed the Complaint and the Notice and Claim. The Superior Court rejected these efforts.[37]

After listening to the evidence during the four-day trial, an advisory jury returned seven interrogatories. It determined that Markham's lien had priority over New South's deed of trust and that Markham had performed fifteen different types of work on the project before June 20, 2005: hauling trash off, potholing, blue

---

[36] R1.

[*] Because First American stands in the shoes of New South, this brief refers to the appellant as New South.

[37] R364; R385; R386; R401.

staking, placing job trailers, pad clearing for job trailers, erecting an access ramp/track-out, constructing a v-ditch, clearing and grubbing, obtaining permits, installing a pre-wet system, placing barricades, staking/surveying, on-site supervising, installing a temporary power source, and establishing a temporary water source.[38] The jury also returned interrogatories finding that Markham's work before June 20, 2005 was performed pursuant to its contract with OWCP17, and that OWCP17 affirmed the actions of Rodney Morris.[39] The Superior Court adopted the advisory jury's findings and entered judgment in Markham's favor on October 4, 2011, including attorneys' fees and prejudgment interest.[40] The Superior Court subsequently denied New South's renewed motion for judgment as a matter of law and motion for new trial.[41]

[38] R403.

[39] R403 (Interrogatory 7 relates to an issue not raised on appeal).

[40] R403 (adopting advisory jury's findings); R425 (judgment).

[41] R468; R472.

ISSUES PRESENTED

1. Markham's lien takes priority over New South's deed of trust if Markham's work on the Project began before June 20, 2005. In light of the substantial evidence presented at trial showing that fifteen different types of work began before June 20, 2005, was it clearly erroneous for the Superior Court to find that Markham's lien was superior? *See* Argument §§ I and II.

2. Arizona's ethical rules generally prohibit an attorney from serving as a witness in the same case. *See* ER 3.7. In light of that, was it a clear abuse of discretion for the Superior Court to exclude Markham's trial counsel from testifying at trial regarding legal documents she signed, the contents of which are not in dispute? *See* Argument § III.

3. Markham is entitled to prejudgment interest at the statutory rate of 18% if its claim was liquidated. Markham supported its claim with copies of the contract, invoices, and pay applications, which are evidence of and prima facie proof of the reasonable value of its lien. In light of that, did the Superior Court err in awarding prejudgment interest to Markham? *See* Argument § IV.

4. Markham is entitled to attorneys' fees. Markham voluntarily excluded more than $20,000 from its fee application. In light of the extensive briefing and hearing on this issue, did the Superior Court clearly abuse its discretion in awarding $271,977.81 in fees? *See* Argument § V.

STANDARD OF REVIEW

The Superior Court's factual findings, including those made with the assistance of an advisory jury, should not be set aside on appeal "unless they are clearly erroneous or not supported by substantial evidence." *Sholes v. Fernando*, 228 Ariz. 455, 458 ¶ 6, 268 P.3d 1112, 1115 (App. 2011) (internal quotation marks and citation omitted); *see also* Ariz. R. Civ. P. 52(a) ("due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."). "To be clearly erroneous, a decision must [be] more than just maybe or probably wrong; it must . . . strike [the reviewing body] as wrong with the force of a five-week-old, unrefrigerated dead fish." *In re Van Dox*, 214 Ariz. 300, 304 ¶ 15 n.3, 152 P.3d 1183, 1187 n.3 (2007) (internal quotation marks and citation omitted). This Court may draw reasonable inferences to support the judgment. *Sholes*, 228 Ariz. at 458 ¶ 6, 268 P.3d at 1115. Conclusions of law are reviewed de novo. *Id.*

To the extent New South is challenging the Superior Court's denial of its Motion for New Trial (R445) and the Superior Court's exclusion of Ms. Palecek's testimony (R364), those rulings are reviewed for an abuse of discretion. *Pullen v. Pullen*, 223 Ariz. 293, 296 ¶ 10, 222 P.3d 909, 912 (App. 2009) ("The trial court has broad discretion" over a motion for a new trial) (citations omitted); s*ee State v. Armstrong*, 218 Ariz. 451, 458 ¶ 20, 189 P.3d 378, 385 (2008) ("We review evidentiary rulings for an abuse of discretion.").

ARGUMENT

I. The Superior Court Correctly Concluded That Markham's Lien Took Priority over New South's Deed of Trust

New South concedes (at 2) that Markham's lien has priority if labor commenced on or before June 20, 2005. *See* A.R.S. § 33-992(A) (mechanic's lien takes priority at "the time the labor was commenced.") Contrary to its contention, however, abundant evidence supports the Superior Court's finding that some labor triggering Markham's lien rights commenced on or before this date.

A. Under Settled Arizona Law, Markham's Lien Takes Priority if Any Labor Commenced on or Before June 20, 2005

The priority date for a mechanics' lien under Arizona's statute is triggered by one simple thing: the commencement of labor. *See* A.R.S. § 33-992(A) ("the time the labor was commenced"); *see also* A.R.S. § 33-992(E) (same). The term "labor" is expansive, and includes "site preparation" work. *Wooldridge Constr. Co. v. First Nat'l Bank of Ariz.*, 130 Ariz. 86, 93, 634 P.2d 13, 20 (App. 1981). Moreover, labor by anyone on the project triggers the priority date for ***all*** laborers. *See Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 520, 8 P.2d 256, 259 (1932) ("The one who furnishes the last item of material or does the last work on the building, structure, or improvement is in just as good shape as the one who did the first work or furnished the first material. Their right of lien relates to the same date."). In other words, the statute's simple text, "the time the labor was commenced," governs the priority date, without any extra-statutory restrictions. A.R.S. § 33-

992(A). Accordingly, if there is substantial evidence showing that ***any*** labor triggering Markham's lien rights began before June 20, the Court should affirm.

B. Extensive Evidence Supports Labor Commencing Before June 20, 2005

In this case, after hearing the evidence and weighing credibility, the advisory jury and the Court found that before June 20, Markham had begun work on ***fifteen*** specific types of work.[42] It cannot be said these findings are clearly erroneous given the record:

- **Blue staking.** Three different witnesses agreed that Markham had the property blue staked before June 20.[43] Documents were introduced showing a blue stake request in March, which was updated roughly every two weeks thereafter.[44] Blue staking is the beginning of the construction process and must be done before other construction commences.[45]

---

[42] R403.

[43] Micah Aronson: 7/14AM at 35:25-36:9 (Blue stake request called in on March 19th; blue staking "would have been within 48 hours, so it would be within two or three days, they'd be out there."), 40:25-41:20 (Blue staking occurred "[a] couple days after" March 21st meeting"); Robert Mata: 7/14PM at 55:16-23 ("I want to say March maybe"), 71:7-12 ("Blue staking has to be done prior to" potholing, which occurred on "March 29th."); Michael Markham, Jr.: 7/14PM at 93:13-16 ("You can do blue staking without a permit."); 7/15AM at 14:15-20 (blue staking was being performed "between March and June of 2005"); *see also* 7/15PM at 15:17-20 (Morris asked Markham "to have Blue Stake blue stake the project").

[44] TE12 (initial blue stake request and update forms dated roughly once every two weeks); Micah Aronson: 7/14AM at 33:10-16 ("Every two weeks.").

[45] *See* A.R.S. § 40-360.22(A) (blue staking required before "begin[ning] any excavation"); Michael Frank: 7/14PM at 31:5-9 ("Blue stake is an actual construction process . . . you cannot displace the earth . . . without locating any

- **Potholing.** Trial exhibits showed an invoice for potholing dated March 29, 2005,[46] and a permit for potholing paid and issued to Markham on March 28, 2005.[47] In addition, three witnesses testified that potholing occurred before June 20.[48]

- **Traffic barricades.** Three witnesses testified that barricades had been erected around the property before June 20, or that barricades would have had to have been in place before starting other pre-June 20 work.[49] In addition, a trial exhibit showed a barricade plan (dated April 14, 2005) identifying "MARKHAM" as the contractor.[50]

---

underground utilities"); *see also id.* at 39:17-40:5 (blue staking could be done before plans approved by the City of Mesa).

[46] TE19 at MCCI0637-38; *see also* 7/15AM at 43:15-44:5 (Travis Bix describing Exhibit 19 as being dated 3/29/05 for potholing); 7/14PM at 70:23-71:8 (Robert Mata describing Exhibit 19 as a soft dig (potholing) invoice dated March 29th);

[47] TE18; *see also* 7/14PM at 95:11-96:23 (Michael Markham, Jr. describing Exhibit 18 as including potholing).

[48] Micah Aronson: 7/14AM at 45:20-24 ("potholing work in March of 2005"), 49:5 ("It was done March 29th."); Robert Mata: 7/14PM at 70:8-10 ("I want to say April"), 79:21-80:1 (suggesting potholing was done before or during the "March or April" time period); Travis Bix: 7/15AM at 43:22-44:1 (confirming March 29); *see also* 7/14AM at 50:20-21 ("Rod Morris directed us to proceed with the potholing.").

[49] Micah Aronson: 7/14AM at 50:25-51:12 ("there should have been two barricade plans, because we wouldn't have been out there in March without a barricade"), 45:20-46:16 ("first, we needed barricade plans" as part of the "permitting process"), 46:20-25 ("I met with the representative from the barricade company"); Michael Markham, Jr.: 7/14PM at 96:16-17 ("we also had a barricade sub[contractor] out there performing the barricade work for us" during the potholing); Rodney Morris: 7/14PM at 95:22-23 ("you have to have barricades up"); 7/15PM at 26:2-6 ("Q. . . . did Markham also have to do barricading work with regard to the potholing work that they performed on the project? / A. I believe they did.").

[50] TE23; *see also* 7/14AM at 50:1-11.

- **Permits.** The evidence at trial, as confirmed by a witness, included two permits issued before June 20.[51]

- **On-site supervision.** The evidence showed that Markham personnel were on-site supervising work that was performed by others before June 20.[52]

- **Trash removal.** Trial testimony established that Markham had removed trash before June 20.[53] The contract for the project also listed field conditions for trash removal on "4/4/05 at 4 pm."[54]

- **V-ditch Construction.** Although the precise date of v-ditch construction was not discussed at trial, its timing in relation to other

---

[51] TE18 (City of Mesa permit issued to "MARKHAM CONTRACTING CO INC," paid 3/28/05, issued 3/28/2005); TE26 at MCCI0588, MCCI0590 (Arizona Department of Environmental Quality Notice of Intent Certificate received 5/6/2005, approved 5/6/2005, with barricade plan labeled "Markham"); *see also* Michael Markham, Jr.: 7/15 AM at 14:15-15:7 (describing permits obtained between March and June of 2005: "We did a dust control permit, there was a right-of-way permit, and a few other permits we were working on forwarding through the process. . ."); 7/14 PM at 95:11-15 (explaining that Exhibit 18 is a permit which "was paid for by Markham Contracting").

[52] Rodney Morris: 7/15PM at 26:15-18 ("Markham Contracting had people present during the potholing"); Micah Aronson: 7/14 PM at 18:20-23 (noting the "supervision that is required of Markham" for blue staking); 19:12-16 ("So our guys will go out to the job site, they'll meet them, they'll show them, and then they'll have a meeting with them, kind of talking through what we're trying to accomplish, and then they'll identify those markings.").

[53] Micah Aronson: 7/14AM at 58:20-25, 59:7-10 ("April or May"); *see also id.* at 20:18-24 ("site cleanup, all of the trash removal" before plans were approved by the City of Mesa), 25:11-13 ("We could do the cleanup, the trash removal" before abandonment); 7/15PM at 19:14-17 ("Q. Now, you did ask Markham or some contractor to remove trash and some dumped dirt on the property; correct? / A. Yes.").

[54] TE30 at MCCI1151.

pre-June 20 activities permitted the factfinder to conclude it too happened before June 20.[55]

- **On-site construction infrastructure.** The evidence established that before June 20 Markham had established a temporary water system, pre-wet system, and temporary power system.[56]

- **Job trailer.** Trial testimony established that Markham had cleared a pad for and placed a construction job trailer on the site before June 20.[57]

- **Access ramp/track out.** New South's own witness testified about the installation of an access ramp/track out on the property.[58]

---

[55] Micah Aronson: 7/14AM at 59:10-23 (v-ditch was built after April or May, but "before the job trailers"); *cf.* Robert Mata: 7/14PM at 61:4-15 (no reason to disagree with Micah); *see also* Micah Aronson: 7/14PM at 25:11-26:3 (v-ditching can be done before abandonment); 7/14AM at 59:13-17 ("we built like a berm or we call it a V-ditch . . . so people wouldn't be able to get onto the site and dump more material, so this site would remain clean.").

[56] Michael Markham, Jr.: 7/15AM at 14:15-22 ("Markham did—I believe we had a water meter set up on the projects" between March and June of 2005); Rodney Morris: 7/15PM at 27:3-5 ("Q. And you obtained a water source for the project during March and June of 2005; correct? / A. I believe there was a water source."), 27:6-12 ("Q. And I think in your deposition, you thought there might be temporary power to the site during March and June of 2005. / A. Possibly, but I can't say yes or no."); Robert Mata: 7/14PM at 57:18-20 ("And come to find out, they had to use a generator to start with or something. They had a generator sitting there."); *see also* 7/14PM at 92:13-22 ("setting up a water meter" can be done without a permit).

[57] Micah Aronson: 7/14AM at 55:14-16 (instructed to clear trailer pads "in April"), 7/14PM at 26:7-9 ("I think this was dated June 22nd. I think the job trailers were already previously installed."); *see also id.* at 20:18-24 ("built the trailer pad" before plans were approved by City of Mesa); 7/14AM at 54:13-19 (on April 6, 2005, "talked about they wanted to get the job trailer put in"); Michael Markham, Jr.: 7/14PM at 93:23-94:2 ("You can do a pad for a job trailer [without permits]. Like I said, you can set up a job trailer so you have something ready to go."), 92:13-25 (placing "job trailer" does not require permit).

- **Clearing and grubbing.** The Superior Court heard testimony about when clearing and grubbing on the property occurred in relation to other activities, providing evidence that it occurred prior to June 20.[59]

- **Staking and surveying.** Testimony at trial also suggested that staking and surveying had occurred on the property before June 20.[60]

New South's only witness, on the other hand, had no documents to support his recollection because he threw away his documents relating to the Project.[61] Tellingly, New South completely ignores—and apparently concedes—that overwhelming evidence supports the Superior Court and advisory jury's specific findings that blue staking, potholing, traffic barricades, and on-site supervision had all begun prior to June 20. Moreover, and contrary to New South's suggestion, construing the evidence in Markham's favor shows that substantial evidence

---

[58] Rodney Morris: 7/15PM at 26:19-27:2 ("Q. Between March and June of 2005, do you also agree that you authorized an access ramp to the property to be built? Correct? / A. There may have been—I remember some discussions about a ramp. I don't recall if it was Markham and/or Wrangler, but I believe we built one access ramp."); *see also* 7/14 PM at 59:4-6 ("By law, by DEQ, we have to have track-out rock, so when people drive out of the site, they don't track dirt out on the road."); *see also* Maricopa County Air Pollution Control Reg. R. 310 §§ 208 (dust-generating operation), 214 (gravel pad required).

[59] Robert Mata: 7/14PM at 74:9-15 (Before dirt-moving phase); 74:20-75:15 (before pads, prewet); Michael Frank: 7/14PM at 39:17-40:5 (before plans approved by City of Mesa).

[60] Micah Aronson: 7/14AM at 55:17-20 ("We were talking with the surveyors" in April); 7/14PM at 25:11-15 ("survey staking for the property" could be done before property was abandoned); Michael Markham, Jr.: 7/14PM at 94:3-4 ("Surveying you can do without a permit.").

[61] Rodney Morris: 7/15PM at 27:10-28:19 ("we cleaned out our storage room.").

supports the Superior Court's findings that labor had commenced before June 20 for other activities—as the above demonstrates. "To the extent the parties presented facts from which conflicting inferences could be drawn, it was for the trial court, not this court, to weigh those facts." *Sholes*, 228 Ariz. at 458 ¶ 6, 268 P.3d at 1115 (internal quotation marks, citation and internal ellipsis omitted).

C. New South's Effort to Give Certain Documentary Evidence Conclusive Effect, Ignores the Actual Import of Those Documents, and That the Trial Court Considered Them as Evidence in the Overall Context of This Case

New South contends (at 15-27) that instead of weighing all the evidence, the Superior Court should have decided the priority issue as a matter of law because certain documents—the Notice and Claim of Lien (the "**Claim Notice**"), the Complaint, the twenty-day notice, and the work contract—include "sworn statements" concerning when work began. Contrary to New South's contention, however, the evidence presented at trial did not "contradict" the documentary evidence because none of the documents proved as a matter of law that labor commenced after June 20, 2005. Accordingly, and in light of the other extensive evidence, it would have been error for the Superior Court to grant New South judgment as a matter of law.

1) The Claim Notice and the Complaint Do Not Establish a Precise Commencement Date

The Claim Notice and Complaint both give approximate "on or about" commencement dates.[62] Given the evidence at trial and the flexibility of the term "on or about," the Superior Court had discretion to decide whether the work that occurred before June 20 commenced "on or about" July 7. Contrary to New South's contention, "on or about" does not mean necessarily ***on*** July 7, or even on July 6 or July 5, but rather ***around*** that time.

One of the definitions from Black's Law Dictionary merely replaces "on" and "about" with synonyms: "on or about" means "at or around." *Black's Law Dictionary* 1198 (9th ed. 2009). Most definitions center around the concept that "on or about" means "approximately." *See, e.g., id.* ("approximately"); *Missouri v. King*, 747 S.W.2d 264, 276 (Mo. Ct. App. 1988) ("The phrase 'on or about' a date means approximately that date."); *Walton v. Denhart*, 359 P.2d 890, 893 (Or. 1961) ("The words 'on or about' do not, as to time, mean 'exactly,' but 'approximately,' and as so construed grant a reasonable time for performance after the date mentioned."). *Oregon v. Lee*, 276 P.2d 946, 950 (Or. 1954) ("on or about" is "synonymous with approximately").

[62] R1, Ex. 1 thereto; R1 at 9 ¶32.

Indeed, the primary reported decision from Arizona on this issue,[63] and the case upon which New South heavily relies, cites a line of cases defining "on or about" as meaning a date with "approximate certainty." *Gittner-Louviere Eng'g v. Super. Ct.*, 115 Ariz. 409, 412, 565 P.2d 915, 918 (App. 1977). But the "approximate certainty" rewording merely adds an additional pair of synonyms ("approximate" for "about" and "certainty" for "on"). It leaves open the question of just how "approximate" the date may be, which is the same question as how close "about" means in "on or about." New South's quotation of this case is also misleading because it omits the two sentences which undercut its argument. *Id.* ("Nowhere in the record is there any testimony under oath which suggests a conclusion that the trespass did not occur until December of 1974. In fact, the [plaintiff] had stated under oath to the contrary."). Moreover, the "approximate certainty" definition was the basis for the jury instruction,[64] and the Superior Court clearly understood the Arizona law on the topic.[65]

The lone case New South identifies that limits the phrase to "one or two days," *United States v. McCown*, 711 F.2d 1441, 1450 (9th Cir. 1983), involved a

---

[63] The Court of Appeals also recently addressed this issue in a memorandum decision, but ARCAP 28(c) prevents Markham from citing or discussing it.

[64] R399 at 5 (Final Jury Instructions: "The phrase 'on or about' means a date in close proximity to the one mentioned.").

[65] 7/19 at 9:21-22 (Court: "On or about. The phrase 'on or about' means a date in close proximity to the one mentioned.").

dispute over whether the phrase "on or about" made an indictment defective for lack of specificity. The "one or two days" range in the case was merely a dictum because there was no actual dispute over whether a particular event fell within the range. *See id.* As noted above, in other contexts courts view the phrase as being more flexible. *See also United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987) ("on or about June 1984" includes July or August); *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993) (three weeks within "on or about" period); *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir. 1983) (event occurring on September 11 not fatal variance from indictment charging "on or about November 1").

New South also suggests (at 2) that Markham simply "changed its story." But the evidence showed that Markham initially looked to when the first hourly employee filed a timecard, which did not account for "subcontractors or salaried personnel, or anyone else who is performing work pursuant to that project" before July 7.[66] And, contrary to New South's suggestion (at 22), the Superior Court was not required to construe on or about to mean "three or four *months* earlier," but rather a period of days—that any labor commenced before June 20.

New South's fundamental problem is that the documents do not provide certainty, and the fact that they are sworn does not change that fact. The words

[66] 7/15AM at 18:1-12.

"on or about" are no broader or narrower regardless of whether they are sworn under oath or written on a bar napkin. Accordingly, and in the context of this case, the Superior Court correctly resolved the "on or about" issue as a question of fact. *Cf. Nebraska v. Long*, 594 N.W.2d 310, 316 (Neb. Ct. App. 1999) ("[T]he issue of whether [the defendant] possessed the guns on or about June 17, 1997, was a question of fact which the jury resolved . . . , and it is not this court's function to replace the jury's view of the evidence with its own.").

2) The Twenty-Day Notice Is Irrelevant to Commencement of Labor

New South's contention (at 20) that Markham's twenty-day preliminary notice of lien has anything to do with priority is mistaken, and is another example of New South trying to dress a factual argument in legal clothes.

Providing such a notice allows a claimant to make claims for work performed after the date of the notice, and also twenty days prior to the notice. Importantly, the statute specifically contemplates that notice may be given more than twenty days after commencement. *See* A.R.S. § 33-992.01(E) ("If . . . a person . . . elects not to give a preliminary twenty day notice as provided in subsection B of this section, that person is not precluded from giving a preliminary twenty day notice not later than twenty days after furnishing other labor . . ."). The only consequence of giving notice later than twenty days after work has commenced is that the claimant may only recover for the work he performed after

the period beginning twenty days prior to the notice date. *Id.* ("The person, however, is entitled to claim a lien only for such labor . . . furnished within twenty days prior to the service of the notice and at any time thereafter.") It does not affect the lien's priority date.

So, for example, if a claimant begins work on January 1 and gives notice on January 20, then the claimant may recover for all of the work. If, however, the claimant fails to give notice within twenty days and instead gives notice on January 25, the ***lien is still valid***. The only consequence is that the claimant may recover only for the work performed beginning January 4 (i.e., excluding the first few days of work). Regardless of when the claimant gives notice, however, the lien's priority dates back to the commencement of labor (January 1 in this example) under A.R.S. § 33-992(A). Providing notice late does not change the ***priority*** date.

Moreover, the twenty-day notice Markham provided does not even state when labor commenced. The only date on the notice is the date it was executed. Because the document does not purport to establish the commencement date, it should not be used for that purpose.

3) The Construction Contract Does Not Establish the Commencement Date

New South argues (at 21-22) that the construction contract between Markham and OWCP17 conclusively establishes that labor commenced on June 28, 2005. It does not.

Lien priority is governed by statute, not contract, and the relevant period under the statute is "the time the labor was commenced." A.R.S. § 33-992(A). Although a contract may be one piece of evidence from which the factfinder may infer the actual commencement date, there is nothing that would obligate the factfinder to give such evidence priority over other conflicting evidence.

This issue is also not one of contract interpretation. Markham admits that the contract was dated June 28. The contract does not establish when labor ***actually*** commenced, nor does it override the statutory framework which pegs the priority date as the actual date of commencement. Moreover, this is not an action to enforce the contract, nor could it be. New South is not a party to the contract, and it lacks the privity necessary to enforce the contract. Accordingly, its effort to, in effect, enforce the contract against Markham ***in the context of a lien foreclosure action*** makes no sense.

For public policy reasons, the mechanics' lien statutes are interpreted in favor of protecting workers who may not otherwise get paid by developers. *See, e.g., United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479,

484 ¶ 26, 4 P.3d 1022, 1027 (App. 2000) ("Arizona's lien statutes are remedial and to be liberally construed to effect their primary purpose of protecting laborers and materialmen."); *Wylie*, 39 Ariz. at 515, 8 P.2d at 258 ("[O]ur Legislature intended that laborers and materialmen, who contribute of their labor and means to enhance the value of the property of another, should be jealously protected."). Accordingly, the parties cannot simply agree to an alternate, fictitious date that replaces the accurate, true date of commencement. *Cf.* A.R.S. § 33-1008 (making unenforceable a contract term that waives or impairs a lien claim unless it follows a specific form). Allowing such agreements to supersede the statute would lead to workers not getting paid, a result the statute was created to avoid.

Indeed, if the situation were reversed—e.g., the contract stated that work began on March 1, 2005 when in fact no labor commenced until June 28—New South would almost certainly be urging the Court to look at the actual facts, rather than the contract. Ensuring that such gamesmanship with construction contracts does not occur is one reason the relevant date is "***the time labor was commenced***," A.R.S. § 33-992 (emphasis added), not the date in the contract. The Superior Court did not abuse its discretion by considering and weighing all of the evidence relevant to when labor commenced, including the contract. *See Sholes*, 228 Ariz. at 458 ¶ 6, 268 P.3d at 1115.

II. New South's Remaining Arguments on Priority Misconstrue the Law and Evidence in New South's Favor

In addition to its argument about the documentary evidence, and implicitly recognizing that labor on the project began before June 20, New South also argues (at 31-44) that the Superior Court's priority finding is clearly erroneous because (1) no work before June 20 was sufficiently "apparent" to qualify as "commence[ment]" under § 33-992(B), and (2) none of the pre-June 20 work was done pursuant to the contract with OWCP17. These arguments fail because they misapply the law and ignore the substantial evidence supporting the Superior Court's findings (even if the law were as New South claims).

A. New South's Effort to Discount the Pre-June 20 Labor Relies on the Wrong Subsections of A.R.S. § 33-992 and Gets the Facts Wrong

New South's "commence[ment]" argument (at 31-40) is flawed for at least three reasons: (1) New South failed to raise this issue below, (2) it rests on the lien provisions applicable to "professional services," and (3) there was ample evidence from which the Superior Court could conclude that the labor New South concedes occurred before June 20 was sufficiently "apparent" to trigger Markham's lien rights, even under its misinterpretation of § 33-992.

1) New South Waived its Arguments About Whether Work Had Commenced

New South failed to raise the issue of commencement below. Accordingly, the Court should not consider this issue on appeal, particularly because it depends

on the factual issue of whether Markham's pre-June 20 work was "apparent." *See J.H. Mulrein Plumbing Supply Co. v. Walsh*, 26 Ariz. 152, 161, 222 P. 1046, 1049 (1924) ("This court has not infrequently announced its adherence to what, with but few exceptions, is now an almost universal rule that the court will not on appeal consider for the first time a question not raised in the lower court, and which might have been heard and determined there.") (citation omitted).

2) Under the § 33-992 Provisions Applicable Here, Arizona Does Not Require Work to Be Visible to Constitute Commencement

As explained in Argument § I.A, *supra*, a mechanic's lien priority date depends upon one thing: the date ***any*** labor commenced. The "apparent" requirement relied upon by New South is applicable only to professional service liens under § 33-992(B), not Markham's lien for labor under § 33-992(A).

a. Markham's Lien Is Controlled by § 33-992(A) Pursuant to Which Labor Need Not Be Apparent to Trigger Markham's Priority Rights

The lien priority statute, § 33-992 includes five subsections. Subsection A, the general provision, provides that the "liens provided for in this article [6, Mechanics' and Materialmen's Liens], except as provided in subsection B . . . are preferred to all liens . . . attaching ***subsequent to the time labor was commenced or the materials were commenced to be furnished*** . . . ." (Emphasis added). Subsection A does not include any "apparent" requirement.

Subsections B, C, and D govern professional services such as engineering and architect services. In contrast to Subsection A, Subsection B requires such services to be "apparent" (e.g., soil engineering test holes) to attach, with Subsection C clarifying that "[i]f no labor commences" (i.e., no labor other than professional services commences), "a registered professional may record and foreclose on a lien at any time after the registered professional's work has commenced if the registered professional's work has added value to the property." Subsection D, in turn, makes clear that if there are other mechanics liens on the property (i.e., if the project goes beyond professional services), other laborers will not be disadvantaged relative to those providing professional services: "Liens for professional services shall attach not before but at the same time, and shall have the same priority, as other liens provided for in this article."

Lastly, Subsection E governs site improvement work, but only if, and unlike in this case, the "improvement at the site is ***not*** provided for in ***any*** contract for the construction of any building or other structure . . . ." (emphasis added). The Legislature even amended Subsection E in 2001 to ensure those doing site preparation had the same lien priority as other laborers. *See* Laws 2001, Ch. 64, § 1; Az. S. F. Sheet, 2001 Reg. Sess. S.B. 1468.[67] The amendments "addresse[d] the situation by allowing work for site preparation to be given the ***same priority***

[67] The Fact Sheet is included in the Appendix at Tab S.B. 1468.

date as the date on which contracted construction begins or materials are delivered."[68] To achieve this goal, the amendment "stipulated that a lien arising from an improvement at a construction site ha[s] the same priority as the commencement of work performed or materials furnished under the general contract."[69] *See also* Laws 2001, Ch. 64, § 1 (noting the addition of the third sentence in Subsection E, which provides that "[a] lien arising from work or labor done or materials furnished for each improvement at the site attaches to property for priority purposes at the time labor was commenced or materials were commenced to be furnished pursuant to the contract between the owner and original contractor for that improvement to the site.").

In this case, Markham's site-improvement work was set forth in a "contract for the construction of any building or structure," thereby making Subsection A, rather than Subsection E, applicable. For example, Markham's contract included "offsite lighting" and "masonry" work,[70] i.e., building "streetlights" and "a very decorative front entryway."[71] Accordingly, it provided for the building of "any structure." *See Black's Law Dictionary* 1559 (9th ed. 2009) (defining "structure"

---

[68] *Id.* at 1 (emphasis added).

[69] *Id.* at 1.

[70] TE30 at MCCI1144.

[71] 7/15AM 70:9-71:6.

to mean "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together").

b. Contrary to New South's Suggestion, Subsections B and D Do Not Apply in This Case

Rather than acknowledge Subsection A, New South attempts to import (at 31-34) Subsection B's requirement that it must be "apparent to any person inspecting the property that construction, alteration or repair of any building or other structure or improvement has commenced." By its plain terms, however, Subsection B ***does not apply to mechanics' liens***, but rather is limited to "***professional services***". (emphasis added). Recognizing as much, New South maintains (at 31-32) that yet another Subsection, Subsection D, imports Subsection B's "apparent" requirement into Subsection A. That interpretation cannot be correct for several reasons.

First, § 33-992 makes explicit when one Subsection is intended to affect another. *See, e.g.*, A.R.S. § 33-992 (A) ("The liens provided for in this article except as provided in subsection B of this section . . . are also preferred to all liens . . . ."). Neither Subsection B or D, however, in any way purport to modify Subsection A. Accordingly, because the Legislature included the "apparent" restriction in Subsection B and chose not to include that restriction in Subsection A, New South cannot ask the Court to rewrite Subsection A. *See Ezell v. Quon*, 224 Ariz. 532, 541 ¶ 41, 233 P.3d 645, 654 (App. 2010) ("when

statutes or rules set forth a requirement in one provision but do not include it in another, we assume the absence of the requirement was intentional.") (internal quotation marks and citation omitted).

Second, as set forth above, Subsection D is designed to ensure that if there are other liens, then those providing professional services have the same priority date as other laborers, which is consistent with *Wylie v. Douglas Lumber Co.*, 39 Ariz. at 520, 8 P.2d at 259 (holding that the liens for all persons performing work on a project relate back to the same date). Subsection D does not import the requirements of Subsection B into Subsection A.

To support its request to deviate from the statute's plain language, New South relies exclusively on cases from California and Utah. But most of those cases, like Subsection B, involve ***architects*** working off-site, who try to take a priority date before ***any*** on-site construction had begun at the site. *See Walker v. Lytton Sav. & Loan Ass'n*, 465 P.2d 497, 498 (Cal. 1970) (architects); *D'Orsay Int'l Partners v. Super. Ct.*, 20 Cal. Rptr. 3d 399, 400 (Cal. Ct. App. 2004) ("design related services"); *Tracy Price Assocs. v. Hebard*, 266 Cal. App. 2d 778, 781 (1968) ("architectural services"); *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1220 (Utah Ct. App. 1989) ("off-site design work"). *Cf. Wooldridge*, 130 Ariz. at 92, 634 P.2d at 19 (declining to

follow "cases from other jurisdictions, several of which have determined that earthwork is insufficient to establish a priority position.").

Moreover, the only Arizona case to discuss notice to those visiting the construction site declined to adopt New South's "notice" requirement, and instead adopted a broad interpretation of commencement of labor, which includes preparatory work. *See Wooldridge*, 130 Ariz. at 93, 634 P.2d at 20. This Court should not deviate from Arizona's existing law.

c. Visible Work Had Commenced Before June 20, 2005

New South is also wrong on the facts. Construing the evidence in Markham's favor shows that anyone visiting the Project before June 20, 2005 would have seen significant construction activity, construction personnel, and other indicia of construction. The Superior Court found that there would have been traffic barricades on the street surrounding the project, several potholes in the land, blue stake lines and symbols across the property, a pre-wet system, a construction job trailer, a cleared pad for that job trailer, a gravel access ramp/track-out, construction of a v-ditch in the ground, clearing and grubbing of the land, trash being hauled off, staking and surveying marks and activity, a temporary power source, a temporary water source, and Markham employees on-site supervising those activities. It would have been obvious to anyone visiting the property that the site was in the early stages of construction; if even one activity would suffice to

put someone on notice "of impending construction," then the judgment must be affirmed. *Id.* at 92, 634 P.2d at 19.

Tellingly, there was absolutely no evidence that the lender New South ever actually visited the Project to confirm construction had not commenced before making the construction loan. Even New South's own witness could not recall whether any on-site inspection took place.[72] This was in 2005, after all, when the real estate market in Maricopa County was "exploding"[73] and "people [were] doing drive-by appraisals."[74] As Michael Markham, Sr. put it, "[i]t was all there visible, they just ignored it."[75]

New South does not dispute—and apparently concedes—that visible labor had commenced by the time Markham cleared a pad for a job trailer, placed a job trailer on the pad, built a rock access ramp/track-out, cleared and grubbed the land, constructed a v-ditch, and installed a temporary power source and water source. Instead, it again focuses on a small subset of the activities. But even those activities also would have put visitors on notice that labor had commenced.

---

[72] 7/15PM at 34:4-35:1 (New South's witness Rodney Morris testifying that he doesn't recall whether an inspection took place).

[73] 7/14PM at 53:17.

[74] 7/15AM at 79:10-17.

[75] *Id.* at 82:12-13.

For example, New South takes issue with blue staking constituting commencement. This Court has held that marking a property for blue staking constitutes "labor" under the lien statutes. *See Fagerlie v. Markham Contracting Co., Inc.*, 227 Ariz. 367, 373-74 ¶¶ 27, 31, 35, 258 P.3d 185, 191-92 (App. 2011).[**] Testimony at trial established that the blue stake marks were plainly visible and covered the entire site.[76] Indeed, the marks were intentionally made with bright, highly visible colors. *See* Ariz. Admin. Code. § R14-2-106 (*e.g.*, "High Visibility Safety Yellow," "Safety Alert Orange"). These bright markings were refreshed every two weeks.[77] A company that requests blue staking must intend to excavate in that area within 15 days or else it may be liable for damages. A.R.S. § 40-360.22(J) (blue staking requests may only be made "for the purpose of excavating within [15 days]"). Anyone visiting the site immediately would have known that digging was imminent.

[**] The Court was interpreting "labor" in the phrase "[c]essation of labor for a period of sixty consecutive days," A.R.S. § 33-993(C)(2), but "labor" in § 33-992 should mean the same thing as it does in § 33-993. *See Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) ("A court also should interpret two sections of the same statute consistently, especially when they use identical language.") (citation omitted).

[76] 7/14AM at 34:2-4 ("physical markings with paint on the entire site").

[77] TE12 (blue stake update forms dated roughly every 14 days); 7/14AM at 33:10-16 ("Every two weeks."); *see also* A.R.S. § 40-360.22(J) (markings "valid for fifteen working days" and must be renewed if excavation is to continue).

New South's argument that utility companies made the bright markings misses the point: No one would have visited the site and thought the utilities painted the land on their own accord. Someone had to request the markings just before digging; in this case, Markham requested the blue staking and supervised it.

New South's suggestion that the Superior Court lacked discretion to find the potholing apparent is likewise nonsense. New South emphasizes (at 37) that the process took only seven hours, as if the duration were relevant (and that nearly a full day's work is insufficient). But it is not.

The barricades around the property also would have alerted anyone who visited the property that construction had begun. *See Fagerlie*, 227 Ariz. at 375 ¶ 40, 258 P.3d at 193 ("Labor to complete the contract could include maintenance of the barricades and work done within them."). Contrary to New South's suggestion, the record supports the Superior Court's finding that there were barricades on-site, rather than just plans for them.[78] The Superior Court also could have readily inferred that there were barricades on-site because (1) there were plans for barricades, and (2) work had begun which required the use of barricades. New South's own witness even admitted that the potholing work required barricades.[79]

---

[78] *See* 7/14PM at 96:16-17 ("And we also had a barricade sub[contractor] out there performing the barricade work for us.").

[79] *See* 7/15 PM at 26:2-6 ("I believe they did.").

For its argument that Markham's trash removal is insufficient, New South cites (at 35) *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982). But *Calder Bros.* does not stand for the general position that cleanup work does not constitute commencement. In that case, the owner of a building "hired two young men on an hourly basis" to help with ordinary maintenance, as well as a painter, none of whom filed a mechanics' liens. *Id.* at 923. After that, in an entirely separate transaction and after a mortgage had been recorded, the owner hired three corporations to do more significant work on the property. Those companies recorded mechanics' liens and tried to have their work relate back to the work of the painter and the two unnamed "young men" who had performed ordinary maintenance work. *Id.* The court rejected that argument because "[n]othing in the plans suggested that the painting and maintenance work was part of an improvement project envisioned by the new owners." *Id.* at 924. Nothing in the opinion suggests that the work would not have constituted commencement had the three companies performed the work pursuant to the overall project for which they were hired.

The permits Markham secured also provided constructive notice because their existence is publicly available and easily searchable. For example, the listing for the permit in Exhibit 18 is available from the city of Mesa's official website,

and can easily be located with nothing more than the address of the project.[80] A prudent lender concerned with priority for its deed of trust easily could have checked whether any permits had been issued for the project.[***]

New South's contention (at 35) that trash removal citation is not lienable because A.R.S. § 33-992(E) identifies "removal of improvements" and "vegetation" is misplaced. Subsection E does not purport to list all lienable improvements; it expressly notes that its list is "For purposes of this subsection." A.R.S. § 33-992(A) covers all liens under Article 6 of Title 33, A.R.S. Other sections of that Article include liens for "labor[ing] upon a lot" and "clearing" land. A.R.S. §§ 33-983, 33-987. *Cf. Wooldridge*, 130 Ariz. at 92-93, 634 P.2d at 19-20 (rejecting attempt to narrow scope).

---

[80] The permit database is available at https://buildingandcode.mesaaz.gov/tm_bin/tmw_cmd.pl?tmw_cmd=StatusQueryFormBSD&tmw_query=PublicCase. The relevant permit can be found by searing for 2565 E Southern (typing "2565" into the "Number," "E" into the "Prefix" field, and "Southern" into "Street."). Because the permit was issued so early in the project's development, it is on the final page.

[***] Pursuant to Arizona Rule of Evidence 201(b), the Court may take judicial notice of the list of permits; information contained on an official government website is a proper subject of judicial notice. *State v. Rojers*, 216 Ariz. 555, 560 ¶ 26, 169 P.3d 651, 656 (App. 2007) (information on "publicly available" website of the Phoenix Police Department are "a proper subject for judicial notice"). Judicial notice is proper on appeal, particularly "to add facts necessary to affirm the trial court." *Id.* ¶ 25 (quoting 1 Joseph M. Livermore, Robert Bartels, & Anne Holt Hameroff, *Arizona Practice: Law of Evidence* § 201.0 (4th ed. 2007)).

New South tries to make Markham's work out to be merely preparatory, as though that does not count. But, as the old proverb wisely notes, "a journey of a thousand miles begins with a single step." *Lacentra Trucking Inc. v. Flagler Fed. Savs. & Loan Ass'n of Miami*, 586 So. 2d 474, 476 (Fla. Dist. Ct. App. 1991) (holding that "surveying, flagging and staking a construction site" constitutes "actual commencement") (citation omitted). It is true that much of Markham's work on the Project was in some sense preparatory. Markham is "basically a grading/paving underground company."[81] On this Project, Markham erected fencing, installed sewer and water lines, storm drains, modified irrigation systems, and performed other related tasks, but did not build any buildings.[82] New South does not dispute that Markham's labor, much of which was critical site preparation work, gives rise to a lien. Nor could it. Rather, it implies that so-called "preparatory" work is not sufficient to constitute commencement because it is not visible. But the evidence showed that it was, and in Arizona "site preparation" work is sufficient to constitute commencement. *See Wooldridge*, 130 Ariz. at 92, 634 P.2d at 19 (rejecting argument "that earthwork and site preparation never provide notice of impending construction of a building sufficient to trigger an investigation of that possibility").

[81] 7/14AM at 14:14-16.

[82] *Id.* at 19:13-23:10.

For these reasons, and particularly in light of New South's failure to address whether seven types of work constitute commencement, there was sufficient evidence for the Superior Court to conclude that Markham performed visible work on-site that would have put visitors on notice of "impending construction" before June 20. *Id.*

B. New South's "Pursuant to the Contract" Argument Misstates the Law and Ignores the Substantial Evidence Supporting the Superior Court's Findings

New South argues (at 40-44) that Subsection E creates "separate direct contracts with a property owner," and that "site improvement work done outside the contract would have a different priority date than work done pursuant to the contract." This argument fails for three independent reasons. First, Markham's lien is governed by Subsection A, not Subsection E. Second, Arizona follows a "single project" rule, meaning that all work on a single project relates back to a single date. Third, even if each contract established a different priority date, the Superior Court's finding that the work was performed pursuant to a single contract is not clearly erroneous.

1) Contrary to New South's Contention, Markham's Lien Priority Is Governed by A.R.S. § 33-992(A)

The Court may quickly dispose of New South's "pursuant to the contract" argument as it relies on the wrong lien priority provision. As noted above in

Argument § II.A.2, Markham's lien is governed by § 33-992(A). New South's § 33-992(E) argument thus misses the point.

2) Arizona Follows a "Single Project" Rule

Moreover, even if Subsection E applies, the date of Markham's lien preference would remain the same in this case. Importantly, New South's theory runs contrary to the "single project" rule long followed by Arizona's courts. Under that rule, "[t]he one who furnishes the last item of material or does the last work on the building, structure, or improvement is in just as good shape as the one who did the first work or furnished the first material. Their right of lien relates to the same date." *Wylie*, 39 Ariz. at 520, 8 P.2d at 259.

Significantly, and ignored by New South, just last year a federal court, in a well-reasoned opinion, held that in light of the 2001 amendments, labor performed under any contract for the same project relates back to the same date under § 33-992(E). *See In re Mortgages Ltd.*, 459 B.R. 739, 744-47 (Bankr. D. Ariz. 2011). As Judge Haines explained, Subsection "(E) is clear and absolutely unambiguous that all the liens arising from the same kind of improvement that is not construction of a building have the same priority . . . ." *Id.* at 747. In particular, "[t]he statute's use of the term '***original***' clearly indicates that the statute contemplates there might be a subsequent independent contract for that same improvement, but that it does not get its own priority date simply because it was provided for by a separate

contract." *Id.* (emphasis added); *see also* A.R.S. § 33-992(E) ("A lien arising from work or labor done or materials furnished for each improvement at the site attaches to property for priority purposes at the time labor was commenced or materials were commenced to be furnished pursuant to the contract between the owner and ***original*** contractor for that improvement to the site.") (emphasis added). Accordingly, contracts governed by Subsection E "would share the same relation back rule among themselves, and their priority would date from the commencement of labor under the original contract. In other words, paragraph (E) adopts a project basis, rather than a contract basis, for its relation-back rule, suggesting that the relation-back rule for paragraph (A) would work the same." *In re Mortgages Ltd.*, 459 B.R. at 747; *cf. Wooldridge*, 130 Ariz. at 93, 634 P.2d at 20 (a single date governs the priority "for *all* of the liens provided for in the article on mechanic's liens"). New South simply misreads Subsection E.

New South's contention (at 41 n.7) that "Markham should not be permitted" to make this argument on appeal is misplaced because (1) Markham repeatedly raised this issue below,[83] (2) *In re Mortgages Ltd.* had not yet been decided before trial, and (3) this Court "may affirm on any ground supported by the record." *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 403 ¶ 25, 10 P.3d 1181, 1190 (App. 2000).

[83] *See* R190 at 7-13 (summary judgment response); R243 at 2-6 (summary judgment reply); R459 at 8-11 (response to Rule 50(b) motion)

New South also incorrectly suggests (at 41 n.7) that an Arizona court addressed this issue in *Allied Contract Buyers v. Lucero Contracting Co.*, 13 Ariz. App. 315, 476 P.2d 521 (1970). *Lucero* addressed the distinction between an "original contractor" and a subcontractor, a distinction which mattered at the time in the context of deadlines for recording and serving the notice and claim of lien under A.R.S. § 33-993. *See id.* at 317, 476 P.2d at 523; and companion case, *Ray Suiter & Son Construction Co. v. Allied Contract Buyers*, 13 Ariz. App. 318, 319, 476 P.2d 524, 525 (1970). That distinction has since been eliminated from § 993(A), *cf. Ray Suiter*, 13 Ariz. App. at 319, 476 P.2d at 525 (providing historical statutory text), and plays no role in determining lien priority under § 33-992. Moreover, the issue resolved in that case, "whether or not [evidence supports] the trial court's determination that [laborer] Lucero dealt with Allied Contract Buyers as a sub-contractor," *Lucero*, 13 Ariz. App. at 316, 476 P.2d at 522, is irrelevant to the § 33-992 priority issue in this case; the issue here turns on when labor commenced, not any subcontractor/contractor distinction.

3) The Work Was Completed Pursuant to a Single Contract

Even if, however, Arizona followed a single contract rule, all of Markham's work was performed under one contract. When asked in ***three different ways***, the advisory jury expressly found that all of the work was done under a single contract with the owner, OWCP:

- "Was the work done by Markham Contracting prior to June 20, 2005 performed pursuant to a contract that was separate from the contract with OWCP 17, LLC? Answer: No."[84]

- "Was the work done by Markham Contracting prior to June 20, 2005 performed pursuant to Markham's contract with OWCP 17, LLC? Answer: Yes."[85]

- "Do you find the following work was part of the project under Markham's July proposal attached to the August 4, 2005 OWCP 17, LLC contract?" (All 15 items marked "Yes").[86]

The Superior Court adopted those conclusions and they were supported with substantial evidence. In light of the environment in mid-2005, these findings cannot be said to be clearly erroneous. Indeed, at the time, it was common to start work "before [they] had even approved plans."[87] The Lindsay Park project was started "on an at-risk permit," which means the plans had not yet been fully approved.[88] And the major home builders "set up . . . project-specific individual LLC's for every site"; initially the workers "don't know who the . . . final entity that they're putting on the contract is going to be."[89] It is understandable, therefore, why work had commenced before the contract had been fully executed. *Cf. Performance Funding, L.L.C. v. Ariz. Pipe Trade Trust Funds*, 203 Ariz. 21, 24

[84] R403, Interrogatory No. 2.

[85] *Id.*, Interrogatory No. 3.

[86] *Id.*, Interrogatory No. 5.

[87] 7/14PM at 84:10-11.

[88] *Id.* at 84:15-23.

[89] 7/15AM at 13:18-23.

¶ 10, 49 P.3d 293, 296 (App. 2002) ("[W]e interpret the [lien] statutes in a manner consistent with the realities of the construction industry.") (internal quotation marks and citation omitted).

The work was still performed pursuant to the contract because the early work was "rolled into the final written contract."[90] For example, the contract includes the pre-wet system, clearing, barricades, and trash haul off (specifically based upon conditions as of April 2005), as well as a line item for general conditions which includes on-site supervision, the job trailer, site maintenance, and other items.[91] The same is true even if some items are invoiced separately. Testimony at trial explained that some parts of the project are billed on a "time and material" basis when the cost is uncertain, and then the contract is "adjust[ed]" and it is included in the "contingencies."[92] Indeed, there was specific testimony that the potholing work, which had been performed on an hourly basis, was included in the final contract.[93] Moreover, the utility work that Markham performed under the

[90] 7/14AM at 80:16-81:2.

[91] TE30 at MCCI1151-55; *see also* 7/14PM at 19:17-24 (supervision of blue staking work included in incidentals or general conditions line item).

[92] 7/14AM at 80:18-81:2.

[93] *Id.* at 83:5-6 ("The potholing would have been included in Markham's contractual work."); 82:4-7 ("Potholing? That should have been—that could be included in the contract. That would have been when we finalized the negotiation of the contract, that's when the dollars would be adjusted accordingly.").

contract ***required*** the potholing work.[94] Although New South emphasizes a discrepancy in the job numbers and recipients of the pay applications, such discrepancies happened in the industry and they do not affect the validity of the contract.[95]

In addition, and except for a couple of unrelated items, the final plans were "pretty much the same" as they were on April 5, 2005, before much of the work began.[96] For example, both of them include line items for "Trash haul off," including the notation, "Based on Field Conditions as of 4/4/05 at 4 pm."[97] There was testimony at trial that even after work commences, the plans continue to change.[98] The plans form "a living document. It's constantly evolving."[99]

New South also suggests (at 44) the work could not have been performed under the contract because of an issue with abandonment. But the evidence left the Superior Court free to conclude that much of the work Markham was responsible

---

[94] *Id.* at 82:21-24 ("Q: [Would] the work that Markham was going to perform, that utility work, require some potholing? A. Right.").

[95] *See* 7/14PM at 108:7-11 ("Q. And does that happen sometimes where the contractor has been told to do work on the contract and it's paid from a different entity, not necessarily who you contract with? / A. Yes.").

[96] Micah Aronson: 7/14AM at 77:21-23.

[97] TE30 at MCCI1151; *see also* 7/15PM at 29:23-31:6 ("It's also in there as well.")

[98] 7/14AM at 80:1-4 ("plans continue to change even after work commences on the project").

[99] *Id.* at 80:10-11.

for started before abandonment, including cleanup, trash removal, surveying, prewetting, and building a v-ditch.[100] New South has not shown that any of these findings are clearly erroneous.

III. The Superior Court Acted Well Within Its Discretion by Excluding Karen Palecek's Testimony

Markham's trial counsel signed the Claim Notice and the Complaint in this action. The Superior Court rejected New South's attempt to force her to testify about those documents, the substance of which was never disputed. It would have been unethical for her to testify and there was no reason for her to do so.

Arizona's ethical rules generally prohibit an attorney from serving as a witness, and for good reason. *See* ER 3.7. The Supreme Court has explained that "[t]he standards of the profession . . . suffer" when attorneys are required to serve as an ordinary witness rather than strictly as an officer of the court. *Hickman v. Taylor*, 329 U.S. 495, 513 (1947). As the pertinent comment explains, "[c]ombining the roles of advocate and witness" leads to prejudice and may involve a conflict of interest. ER 3.7 cmt. 1. In light of that, the Superior Court had the discretion to exclude Ms. Palecek's testimony.

Although New South emphasizes that it offered not to request Ms. Palecek's withdrawal, such a generous gift was not New South's to give. The ethical rules place the burden of compliance on the attorney at issue, not the opposing party.

[100] 7/14PM at 25:11-26:3

See id. cmt. 6 ("Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved."). Ms. Palecek, not New South, had to determine whether, if called, withdrawal was necessary. But Ms. Palecek's withdrawal was not the only option: it was entirely proper for the Superior Court to exclude any testimony from Ms. Palecek. *See, e.g.*, *Smith v. Wharton*, 78 S.W.3d 79, 84 (Ark. 2002) ("trial court erred in allowing the attorney to testify as a witness"); *Aghili v. Banks*, 63 S.W.3d 812, 819 (Tex. App. 2001) (affirming exclusion of attorney's testimony by affidavit).

The Arizona Supreme Court has expressly recognized "the obvious dangers inherent in" a party calling the adverse party's attorney as a witness. *Sec. Gen. Life Ins. Co. v. Super. Ct.*, 149 Ariz. 332, 335, 718 P.2d 985, 988 (1986). The official comment to the ethical rule also warns about the practice. *See* ER 3.7, cmt. 6 ("The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party.").

New South argues Ms. Palecek should have been required to testify because she signed the Complaint and Claim Notice. By New South's logic, she should have testified about when construction began because those documents were inconsistent with Markham's other evidence. New South is overreaching by arguing that an attorney should be required to testify in an ordinary case like this one simply because she signed the ***complaint***. The rest of New South's position

merely rehashes its tired argument that the documents are somehow inconsistent with a commencement date before June 20. There is no dispute that the Claim Notice was validly served and recorded. The only issue is the factual significance of the date. As Markham has explained at length, the documents are entirely consistent with the rest of the evidence that establishes a commencement date before June 20. *Cf. Leonardo v. Leonardo*, 297 A.D.2d 416, 418 (N.Y. App. Div. 2002) (disqualification unnecessary "where the validity of the agreements is not disputed").

An attorney may be called as a witness by an adverse party only if her testimony is actually ***necessary***. ER 3.7. In Arizona, the testimony is necessary only if it is (1) "relevant and material," and (2) "unobtainable elsewhere." *Sec. Gen.*, 149 Ariz. at 335, 718 P.2d at 988. New South has failed to articulate how Ms. Palecek's testimony is relevant or material. Ms. Palecek's preparation of the Claim Notice is irrelevant and immaterial because neither the substance of the Claim Notice nor its preparation are in dispute. The document itself was admitted into evidence and was referenced by New South during trial.[101] *Cf. United States v. Dupuy*, 760 F.2d 1492, 1498 (9th Cir. 1985) (affirming denial of defense's request to call prosecutor as witness because "there was 'no compelling need'" to do so when testimony "would be 'cumulative at best'").

[101] TE75; 7/15AM at 29:5-8, 30:6, 30:14.

Any testimony about the only relevant question—when labor ***actually*** commenced—is best obtained elsewhere. New South has not alleged that Ms. Palecek was involved at all in the commencement of labor on the project. And the Superior Court heard testimony from several witnesses concerning the actual commencement date, including Micah Aronson, Travis Bix, Michael Frank, Robert Mata, Michael Markham, Jr., Michael Markham Sr., and Rodney Morris. New South also solicited testimony that the information about the dates on the documents comes from Markham.[102] Not only was the evidence easily obtained elsewhere, but those alternate sources were far better sources for the information. *See Chappell v. Cosgrove*, 916 P.2d 836, 840 (N.M. 1996) (attorney not "necessary witness" when other witnesses could testify about the transaction in question); *United Food & Commercial Workers v. Darwin Lynch Adm'rs, Inc.*, 781 F. Supp. 1067, 1069-70 (M.D. Pa. 1991) (attorney not "necessary witness" to interpret contract he drafted because information available from other witnesses).

New South does almost nothing to meet its high burden of showing the Superior Court clearly abused its discretion. It cites only one case in support of its position (and another in a tangential footnote). But that case involved a dispute about the conclusions and opinions reached by an attorney and recorded in a

[102] 7/15AM at 29:1-4 ("And if Ms. Palecek signs a mechanics' lien on behalf of your company, the information that's included in that mechanics' lien is provided by your company. / A. Yes."), 29:18-22 (regarding the commencement date, "[s]omebody at Markham has to give her that information.").

relevant document. The court found that the adverse party had "no reasonable substitute for obtaining that information." *Ariz. ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 554 (D. Ariz. 2011). There is no such dispute here; both parties agree that the document states that labor commenced "on or about July 7." In addition, *Frito-Lay* concerns ***discovery***, not whether the attorney will be required to testify at trial. *Id.* at 551. It is that dual relationship of simultaneous advocate and witness that gives rise to the ethical and evidentiary issue. The Superior Court correctly excluded Ms. Palecek's testimony.

IV. There Is No Basis for Reducing the Prejudgment Interest Award

The Superior Court correctly awarded prejudgment interest to Markham. In Arizona, an unpaid contractor is entitled to prejudgment interest if the claim is liquidated. "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Ariz. Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 496, 484 P.2d 639, 649 (1971) (internal quotation marks and citation omitted). The evidence in this case was sufficient to calculate the value of the claim without reliance upon opinion or discretion. The Notice stated the value of the claim, which was supported by copies of the contract and invoices and pay

applications.[103] The contract "constitutes prima facie proof" of the reasonable value and the invoices "are evidence of the costs and the reasonable value" in a lien foreclosure action. *Lenslite Co. v. Zocher*, 95 Ariz. 208, 213, 388 P.2d 421, 424 (1964); *accord United Metro*, 197 Ariz. at 486 ¶ 41, 4 P.3d at 1029. When, as here, the evidence includes a contract and invoices and no party has disputed the value of the claim, then the claim is liquidated and does not rely upon opinion or discretion.

Notably, New South has never challenged, nor does it challenge now, the amount of the principal. Rather, New South suggests (at 46-48) that a claim on a lien foreclosure is not liquidated because the lienor may only recover the "reasonable value" of its services. That argument contradicts settled law. Arizona courts have expressly held that prejudgment interest is available in lien foreclosure actions. *Envtl. Liners, Inc. v. Ryley Carlock & Applewhite*, 187 Ariz. 379, 385, 930 P.2d 456, 462 (App. 1996); *accord C S & W Contractors, Inc. v. Sw. Sav. & Loan Ass'n*, 175 Ariz. 55, 62, 852 P.2d 1239, 1246 (App. 1992), *vacated on other grounds*, 180 Ariz. 167, 883 P.2d 404 (1994).

The Superior Court also properly calculated the prejudgment interest rate. Under Arizona's prompt pay statute, an unpaid contractor is entitled to

[103] TE75 at MCR 3 (Notice and Claim), MCR 8-45 (contract and invoices). *See also* TE32-53 (invoices); TE54-56 (pay applications). The total amount of the claim was scaled proportionally by the number of lots for which each defendant was responsible.

prejudgment interest at a rate of 18%. *See* A.R.S. § 32-1129.01(Q) ("at the rate of one and one-half per cent a month," which is 18% per year). The prompt pay statute defines "owner" very broadly, and includes not just the owner in fee simple, but also a vendee, lessee, "or another interest or estate less than fee." A.R.S. § 32-1129(A)(4). Although no Arizona cases have interpreted the meaning of "owner," by the statute's very terms it is to be interpreted expansively, to cover all interests in the property.

New South argues (at 47), with virtually no elaboration, that the statute does not apply because "New South has never been an 'owner' as defined in the prompt pay statute." Moreover, New South's suggestion that New South did not "cause" any of the improvements to be constructed ignores that it provided the financing, but for which project would not have moved forward. New South concedes (at 47) that OWCP17 was an owner, and cannot escape the fact that upon foreclosure New South became an owner subject to Markham's lien and the prompt-pay interest with which it came.

It would completely undermine the purpose of the prompt-pay statute and invite manipulation if one lien holder could wipe out a laborer's prompt pay rights in this manner. Indeed, it would be easy for developers to form one LLC to make and foreclose upon a construction loan if doing so would eliminate any prompt-pay interest claim.

New South also relies (at 47-48) upon *Environmental Liners*, 187 Ariz. at 386, 930 P.2d at 463, for the proposition that the prompt pay statute does not apply. *Environmental Liners* stands for no such thing. There, a contract between the contractor and the lessee specified 21% interest on late payments. In the context of a malpractice action, the plaintiff contended that the contractor would have collected prejudgment interest at the contract rate from the lessor, with whom he was not in privity. The court held that the ***contractual*** rate does not extend to the lessor. The case does not address ***statutory*** interest under the prompt pay statute, which had not yet been enacted,[104] and which makes privity of contract unnecessary. Under the prompt pay statute, both the lessee and the lessor (as well as one who actually acquires the property) would be considered "owners." A.R.S. § 32-1129(A)(4).

Finally, New South argues that the interest calculation started on the wrong day. The Superior Court, however, did not abuse its discretion in calculating the prejudgment interest. The prompt pay statute was intended to ensure timely payments to contractors. There can be no dispute that Markham was entitled to payment in 2006 and was not paid promptly. These statutes are "to be liberally construed" in order to "protect[] laborers and materialmen." *United Metro*, 197 Ariz. at 484 ¶ 26, 4 P.3d at 1027. Markham was entitled to the full amount of

[104] The statute was enacted in 2000. *See* 2000 Ariz. Legis. Serv. Ch. 233, § 4.

prejudgment interest and is allowed to collect on that full amount by foreclosing on its lien. Again, to hold otherwise would invite manipulation from developers who could shift property from one LLC to another via foreclosure or otherwise in an effort to eliminate prompt-pay interest.

V. Attorneys' Fees

Markham prevailed on its lien foreclosure action after taking it all the way through trial. The Superior Court properly awarded Markham $271,977.81 in attorneys' fees.[105] Markham is entitled to those fees under A.R.S. § 33-998(B). Markham filed its complaint on June 24, 2008 and received a judgment on October 4, 2011, more than three years later. In those three years, Markham fully litigated this case through four rounds of summary judgment briefing and a four-day trial. It submitted 67 pages of detailed billing records in support of its application for attorneys' fees.[106] The Superior Court accepted full briefing and held a hearing on this issue.[107] In addition, Markham voluntarily subtracted more than $20,000 dollars in fees it incurred in connection with other lots in the townhome project and unrelated claims and parties.[108] The Superior Court properly exercised its discretion in awarding Markham's fees.

---

[105] R425.

[106] R410.

[107] R406 to R410; R415 to R422; R424.

[108] *See* R410, Ex. A thereto (subtracted fees highlighted); R420 (same).

Notably, New South does not dispute the propriety of awarding attorneys' fees to Markham, other than arguing that Markham should not have been the successful party below. Rather, it simply disputes the ***amount*** of the fee award. A trial court has broad discretion when awarding fees. "The trial court's decision on the amount of fees to award is reviewed under the abuse of discretion standard." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 521 ¶ 21, 212 P.3d 853, 859 (App. 2009) (internal quotation marks and citation omitted). It should not be disturbed "if there is any reasonable basis" for the award. *Hale v. Amphitheater Sch. Dist. No. 10 of Pima County*, 192 Ariz. 111, 117 ¶ 20, 961 P.2d 1059, 1065 (App. 1998).

Relying on *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983), New South' focuses solely upon whether any of the fees were incurred in allegedly unrelated activities. But *China Doll* emphasizes that "where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories." *Id.* at 189, 673 P.2d at 933. In this case, however, Markham prevailed on all legal theories. *China Doll* also "recognize[s] that an appellate court is somewhat unsuited" for the fact-intensive inquiry of shifting through a detailed fee application and objections thereto. *Id.* When a party's success on its central claim entitles it to an award of fees, a trial court has considerable discretion in awarding fees when that claim "is

intertwined with one for which fees are not awardable." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 194, 877 P.2d 284, 293 (App. 1994). An "appellate court is usually reluctant to overturn [the trial court's] ruling" on this type of theory "[b]ecause of the trial court's proximity to the matter and its better familiarity with the parties, the suit, and the issues." *Id.* When the claims, facts, and legal issues are intertwined and overlapping, it is not an abuse of discretion to award fees on related claims. *Modular Mining Sys.*, 221 Ariz. at 522-23 ¶¶ 23-25, 212 P.3d at 860-61.

New South references (at 51) "an extensive, 36-page exhibit" listing all of its "*hundreds*" of disputed entries. Markham responded to them in a 49-page spreadsheet of its own,[109] and the court heard argument about them. A careful review of all of these voluminous objections and responses is precisely the type of activity that is committed to the Superior Court's discretion. New South cannot show that the Superior Court abused its discretion.

New South highlights six disputed entries in its brief (at 51). All but one of those entries is for $55 or less. This Court need not concern itself with such a de minimis issue. *See Envtl. Liners*, 187 Ariz. at 385 n.7, 930 P.2d at 462 n.7 (argument that interest was overstated by less than $45 "is therefore *de minimis* and we decline to discuss it further"). Even those six disputed entries, which

[109] R420; *see also* R419 (cross-referenced arguments about fees).

presumably are the most egregious examples, involve tasks that overlap and are intertwined with Markham's successful claims. For example, consideration of an unjust enrichment claim early in the case (eight days after filing the complaint) is precisely the type of related activity for which Markham can recover: the parties and facts would have been identical to or substantially similar to those of the successful lien foreclosure action. Similarly, sending certified copies of the claim of lien is a prerequisite to foreclosing on the lien.

Markham is not trying to recover all of its fees in this case. To the contrary, it already combed through its itemized fees and subtracted more than $20,000 in entries. The Superior Court has broad discretion in awarding fees and its award should not be disturbed.

REQUEST FOR FEES

Pursuant to ARCAP 21, A.R.S. § 12-341, A.R.S. § 32-1129.01(S), and A.R.S. § 33-998(B), Markham requests its attorneys' fees and costs on appeal.

. . .

. . .

. . .

. . .

. . .

. . .

. . .

CONCLUSION

For the above reasons, the Court should affirm in all respects except as to postjudgment interest for the reasons set forth in Markham's Opening Brief on Cross Appeal.

RESPECTFULLY SUBMITTED this 28th day of July, 2012.

OSBORN MALEDON, P.A.

By /s/ Thomas L. Hudson

Thomas L. Hudson
Eric M. Fraser
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Karen A. Palecek
PALECEK & PALECEK, P.L.L.C.
6263 North Scottsdale Road, Suite 310
Scottsdale, Arizona 85250
(602) 522-2454
kpalecek@paleceklaw.com

Attorneys for Plaintiff/Appellee/Cross-Appellant

APPENDIX OF KEY STATUTES

A.R.S. § 33-992

A.R.S. § 33-992.01

Arizona Revised Statutes Annotated Currentness
Title 33. Property
Chapter 7. Liens
Article 6. Mechanics' and Materialmen's Liens (Refs & Annos)
➞➞ § 33-992. Preference of liens over subsequent encumbrances; professional services liens

A. The liens provided for in this article, except as provided in subsection B of this section or unless otherwise specifically provided, are preferred to all liens, mortgages or other encumbrances upon the property attaching subsequent to the time the labor was commenced or the materials were commenced to be furnished except any mortgage or deed of trust that is given as security for a loan made by a construction lender as defined in § 33-992.01, subsection A, paragraph 1, if the mortgage or deed of trust is recorded within ten days after labor was commenced or the materials were commenced to be furnished. The liens provided for in this article except as provided in subsection B of this section are also preferred to all liens, mortgages and other encumbrances of which the lienholder had no actual or constructive notice at the time the lienholder commenced labor or commenced to furnish materials except any mortgage or deed of trust that is given as security for a loan made by a construction lender as defined in § 33-992.01, subsection A, paragraph 1, if the mortgage or deed of trust is recorded within ten days after labor was commenced or the materials were commenced to be furnished.

B. A notice and claim of lien for professional services shall not attach to the property for priority purposes until labor has commenced on the property or until materials have commenced to be furnished to the property so that it is apparent to any person inspecting the property that construction, alteration or repair of any building or other structure or improvement has commenced.

C. If no labor commences on a property or no materials are furnished to the property, a registered professional may record and foreclose on a lien at any time after the registered professional's work has commenced if the registered professional's work has added value to the property. If labor or materials are furnished to the property, the priority of the registered professional's lien is governed by subsection B of this section.

D. Liens for professional services shall attach not before but at the same time, and shall have the same priority, as other liens provided for in this article.

E. If any improvement at the site is not provided for in any contract for the construction of any building or other structure, the improvement at the site is a separate work and the commencement of the improvement is not commencement of the construction of the building or other structure. The liens arising from work and labor done or professional services or materials furnished for each improvement at the site shall have a separate priority from liens arising from work and labor done or professional services or materials furnished for the construction of the building or other structure. A lien arising from work or labor done or materials furnished for each improvement at the site attaches to property for priority purposes at the time labor was commenced or materials were commenced to be furnished pursuant to the contract between the owner and original contractor for that improvement to the site. For purposes of this subsection, "improvement at the site" means any of the following on any lot or tract of land or the street, highway or sidewalk in front of or adjoining any lot or tract of land:

1. Demolition or removal of improvements, trees or other vegetation.

2. Drilling of test holes.

3. Grading, filling or otherwise improving.

4. Constructing or installing sewers or other public utilities.

5. Constructing or installing streets, highways or sidewalks.

Arizona Revised Statutes Annotated Currentness
Title 33. Property
Chapter 7. Liens
Article 6. Mechanics' and Materialmen's Liens (Refs & Annos)

➡➡ § 33-992.01. Preliminary twenty day notice; definitions; content; election; waiver; service; single service; contract

A. For the purposes of this section:

1. "Construction lender" means any mortgagee or beneficiary under a deed of trust lending funds all or a portion of which are used to defray the cost of the construction, alteration, repair or improvement, or any assignee or successor in interest of either.

2. "Original contractor" means any contractor who has a direct contractual relationship with the owner.

3. "Owner" means the person, or the person's successor in interest, who causes a building, structure or improvement to be constructed, altered or repaired, whether the interest or estate of the person is in fee, as vendee under a contract to purchase, as lessee, or other interest or estate less than fee. Where an interest or estate is held by two or more persons as community property, joint tenants or tenants in common, any one or more of the persons may be deemed the owner.

4. "Preliminary twenty day notice" means one or more written notices from a claimant that are given prior to the recording of a mechanic's lien and which are required to be given pursuant to this section.

B. Except for a person performing actual labor for wages, every person who furnishes labor, professional services, materials, machinery, fixtures or tools for which a lien otherwise may be claimed under this article shall, as a necessary prerequisite to the validity of any claim of lien, serve the owner or reputed owner, the original contractor or reputed contractor, the construction lender, if any, or reputed construction lender, if any, and the person with whom the claimant has contracted for the purchase of those items with a written preliminary twenty day notice as prescribed by this section.

C. The preliminary twenty day notice referred to in subsection B of this section shall be given not later than twenty days after the claimant has first furnished labor, professional services, materials, machinery, fixtures or tools to the jobsite and shall contain the following information:

1. A general description of the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished and an estimate of the total price thereof.

2. The name and address of the person furnishing labor, professional services, materials, machinery, fixtures or tools.

3. The name of the person who contracted for the purchase of labor, professional services, materials, machinery, fixtures or tools.

4. A legal description, subdivision plat, street address, location with respect to commonly known roads or other landmarks in the area or any other description of the jobsite sufficient for identification.

5. The following statement in bold-faced type:

In accordance with Arizona Revised Statutes § 33-992.01, this is not a lien and this is not a reflection on the integrity of any contractor or subcontractor.

Notice to Property Owner

If bills are not paid in full for the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being improved may be placed against the property. You may wish to protect yourself against this consequence by either:

1. Requiring your contractor to furnish a conditional waiver and release pursuant to Arizona Revised Statutes § 33-1008, subsection D, paragraphs 1 and 3 signed by the person or firm giving you this notice before you make payment to your contractor.

2. Requiring your contractor to furnish an unconditional waiver and release pursuant to Arizona Revised Statutes § 33-1008, subsection D, paragraphs 2 and 4 signed by the person or firm giving you this notice after you make payment to your contractor.

3. Using any other method or device which is appropriate under the circumstances.

D. The preliminary notice given by any claimant shall follow substantially the following form:

Arizona Preliminary Twenty Day Lien Notice

In accordance with Arizona Revised Statutes § 33-992.01, this is not a lien. This is not a reflection on the integrity of any contractor or subcontractor.

	This preliminary lien notice has
The name and address	been completed by (name and address
of the owner or reputed	of claimant):
owner are:	Date: _____
	By: _____
	Address: _____
The name and address	You are hereby notified that the
of the original	claimant has furnished or will
contractor are:	furnish labor, professional
	services, materials, machinery,
	fixtures or tools of the following
	general description:
The name and address of	
any lender or reputed	
lender and assigns	
are:	In the construction, alteration or
	repair of the building, structure
	or improvement located at:
The name and address	
of the person with	

whom the claimant

has contacted are:

And situated upon that certain lot(s) or parcel(s) of land in _____ County, Arizona, described as follows:

An estimate of the total price of the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished is: $_____

(The following statement shall be in bold-faced type.)

Notice to Property Owner

If bills are not paid in full for the labor, professional services, materials, machinery, fixtures or tools furnished, or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being improved may be placed against the property. You may wish to protect yourself against this consequence by either:

1. Requiring your contractor to furnish a conditional waiver and release pursuant to Arizona Revised Statutes § 33-1008, subsection D, paragraphs 1 and 3 signed by the person or firm giving you this notice before you make payment to your contractor.

2. Requiring your contractor to furnish an unconditional waiver and release pursuant to Arizona Revised Statutes § 33-1008, subsection D, paragraphs 2 and 4 signed by the person or firm giving you this notice after you make payment to your contractor.

3. Using any other method or device that is appropriate under the circumstances.

(The following language shall be in type at least as large as the largest type otherwise on the document.)

Within ten days of the receipt of this preliminary twenty day notice the owner or other interested party is required to furnish all information necessary to correct any inaccuracies in the notice pursuant to Arizona Revised Statutes § 33-992.01, subsection I or lose as a defense any inaccuracy of that information.

Within ten days of the receipt of this preliminary twenty day notice if any payment bond has been recorded in compliance with Arizona Revised Statutes § 33-1003, the owner must provide a copy of the payment bond including the name and address of the surety company and bonding agent providing the payment bond to the person who has given the preliminary twenty day notice. In the event that the owner or other interested party fails to provide the bond information within that ten day period, the claimant shall retain lien rights to the extent precluded or prejudiced from asserting a claim against the bond as a result of not timely receiving the bond information.

Dated: _____ _____

(Company name)

By: _____

(Signature)

_____

(Title)

(Acknowledgement of receipt language from Arizona Revised Statutes § 33-992.02 shall be inserted here.)

E. If labor, professional services, materials, machinery, fixtures or tools are furnished to a jobsite by a person who elects not to give a preliminary twenty day notice as provided in subsection B of this section, that person is not precluded from giving a preliminary twenty day notice not later than twenty days after furnishing other labor, professional services, materials, machinery, fixtures or tools to the same jobsite. The person, however, is entitled to claim a lien only for such labor, professional services, materials, machinery, fixtures or tools furnished within twenty days prior to the service of the notice and at any time thereafter.

F. The notice or notices required by this section may be given by mailing the notice by first class mail sent with a certificate of mailing, registered or certified mail, postage prepaid in all cases, addressed to the person to whom notice is to be given at the person's residence or business address. Service is complete at the time of the deposit of notice in the mail.

G. A person required by this section to give notice to the owner, to an original contractor, to the construction lender, if any, and to the person with whom the claimant has contracted need give only one notice to the owner, to the original contractor, to the construction lender, if any, and to the person with whom the claimant has contracted with respect to all labor, professional services, materials, machinery, fixtures or tools furnished for the building, structure or improvement, unless the actual estimated total price for the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished exceeds by twenty per cent or more the total price in any prior original or subsequent preliminary notice or unless the labor, professional services, materials, machinery, fixtures or tools are furnished under contracts with more than one subcontractor, in which case notice requirements shall be met for all additional labor, professional services, materials, machinery, fixtures or tools.

H. If a notice contains a general description required by subsection C of this section of the labor, professional services, materials, machinery, fixtures or tools furnished up to the date of notice, it is not defective because after the date the person giving notice furnishes labor, professional services, materials, machinery, fixtures or tools that are not within the scope of the general description, or exceed by less than twenty per cent the estimated total price thereof.

I. Within ten days after receipt of a written request from any person or the person's agent intending to file a preliminary twenty day notice, which request shall identify the person, the person's address, the jobsite and the general nature of the person's labor, professional services, materials, machinery or tools to which the preliminary twenty day notice shall apply, or within ten days of the receipt of a preliminary twenty day notice, the owner or other interested party shall furnish the person a written statement containing the following information:

1. The legal description, subdivision plat, street address or location with respect to commonly known roads or other landmarks in the area, or any other description of the jobsite sufficient for identification.

2. The name and address of the owner or reputed owner.

3. The name and address of the original contractor or reputed contractor.

4. The name and address of the construction lender, if any, or reputed construction lender.

5. If any payment bond has been recorded pursuant to § 33-1003, a copy of the bond and the name and address of the surety company and bonding agent, if any, providing the payment bond.

J. Failure of the owner or other interested party to furnish the information required by this section does not excuse any claimant from timely giving a preliminary twenty day notice, but it does stop the owner from raising as a defense any inaccuracy of the information in a preliminary twenty day notice, provided the claimant's preliminary twenty day notice of lien otherwise complies with the provisions of this chapter. If the information is received by the claimant after the claimant has given a preliminary twenty day notice and the information contained in the preliminary twenty day notice is inaccurate, the claimant shall, within thirty days of the receipt of this information, give an amended preliminary twenty day notice in the manner provided in this section. An amended preliminary twenty day notice shall be considered as having been given at the same time as the original preliminary twenty day notice, except that the amended preliminary twenty day notice shall be effective only as to work performed, materials supplied or professional services rendered twenty days prior to the date of the amended preliminary twenty day notice or the date the original preliminary twenty day notice was given to the owner, whichever occurs first. If a payment bond has been recorded in compliance with § 33-1003 and the owner or other interested party fails to furnish a copy of the bond and the other information as required by this section, the claimant shall retain lien rights to the extent precluded or prejudiced from asserting a claim against the bond as a direct result of not timely receiving a copy of the bond and the other information from the owner or other interested party.