IN THE SUPREME COURT OF IOWA

No. 20-0972

Linn County No. EQCV091488
Linn County No. LACV091167

BORST BROS. CONST., INC.,
Plaintiff-Appellee,

v.

FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
Plaintiff-Appellant/Cross-Appellee,

v.

THOMAS DOSTAL DEVELOPERS INC., and RANDY T. DOSTAL,
Appellees/Cross-Appellants,

and

KELLY CONCRETE COMPANY, INC., AFFORDABLE HEATING AND COOLING, INC., 5 STAR PLUMBING, INC., and BORST BROTHERS CONSTRUCTION, INC.
Defendants-Appellees.

BORST BROS. CONST., INC.,
Plaintiff-Appellee,

v.

FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
Plaintiff-Appellee,

v.

THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL
Defendants-Appellants,

and

KELLY CONCRETE COMPANY, INC., DARNELL HOLDINGS, LLC d/b/a DARNELL CONSTRUCTION, AFFORDABLE HEATING & COOLING, INC., 5 STAR PLUMBING, INC., BORST BROTHERS CONSTRUCTION, INC., and KEN-WAY EXCAVATING SERVICE, INC.
Defendants-Appellees.

Appeal from the Iowa District Court in and for Linn County
The Honorable Mary E. Chicchelly

BRIEF OF KELLY CONCRETE COMPANY, INC.

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(2) and (3)(a) this case should be transferred to the Court of Appeals. It involves the application of existing legal principles, including the application of standard rules of statutory construction. No party raises a constitutional issue. There are no known conflicts between rulings of the Court of Appeals and the Supreme Court on issues relevant to this case. This case like all cases, is certainly important to the parties. Kelly Concrete Company Inc. (hereinafter "Kelly") would be happy to argue this case before the Supreme Court. However, Contrary to the routing statement of Finance Company of America Commercial, LLC (hereinafter "the bank") the issues in this case are not of "broad public importance". The case is potentially important to that narrow class of litigants consisting of mortgage lenders and real estate subcontractors.

STATEMENT OF THE CASE

A. Nature of the Case

This consolidated appeal pertains to a pair of cases that were also consolidated for trial below. Both cases involve the aftermath of a residential real estate development that failed financially, leaving unpaid subcontractors and an unpaid bank loan. The District Court found that two subcontractors Kelly and Borst Brothers Construction, Inc. (hereinafter Borst) had valid

mechanics liens and that those liens have priority over the bank's mortgage lien. The bank challenges the existence of Borst and Kelly's liens and challenges the priority of those liens.

The developer of the failed development was Thomas Dostal Developers, Inc. (hereinafter Dostal) Dostal's principal, Randy T. Dostal signed a document purporting to establish a personal guarantee by Mr. Dostal. The bank challenges the District Court's findings in relation to this putative guarantee. Kelly has no interest in this issue and will not further brief it.

Finally, the bank disputes the District Court's finding that both Kelly and Borst were "prevailing parties" for purposes of the award of attorney fees. Notably, Borst does not challenge the "reasonableness" of the fees or the amount of fees established by the District Court.

B. Procedural Background

Of the two consolidated cases, the first-filed case was Linn County LACV091167.[1] In that case Borst claimed mechanics liens for work done in relation to five Dostal lots and sought to foreclose those liens. The lawsuit named as defendants all other then-known lien claimants, including the bank and Kelly. Notably, Borst's petition recited that Kelly's liens were posted

[1] Although this case was filed on the law docket, the District Court ruled that it should be tried in equity. (Order 11/15/18; App. 151) No party contested that ruling and both cases were tried as equitable actions.

prior to Borst's. Kelly's answer pled a cross claim and counterclaim wherein Kelly asserted its own mechanics lien, sought to foreclose it, and claimed its lien had priority over other liens. Kelly Answer Filed 10/12/18, App. 45. The bank moved to dismiss Borst's lawsuit. That motion was overruled. The bank does not now appeal that ruling.

Approximately six weeks after Borst's lawsuit was filed the bank filed suit to foreclose its mortgage lien on the Dostal property as EQCV091488. In addition to Dostal, this lawsuit also named as defendants all known potential lien holders, including Borst and Kelly. Kelly's answer to this lawsuit, as in LACV091167, again pled a cross claim and counterclaim wherein Kelly asserted its own mechanics lien, sought to foreclose it, and claimed its lien had priority over other liens. Kelly Answer filed 12/17/18, App. 191.

With its answer in EQCV091488 Kelly filed a motion to consolidate the two cases noting that both actions arose from common facts and both actions sought to litigate the existence and priority the same liens on the same property. The motion was unresisted and the Court granted the motion, consolidating the cases. Court's Order filed 2/4/19, App. 234.

The parties filed various pretrial motions, including motions for summary judgment. No party now assigns error to the District Court's rulings on those motions.

This matter was tried to the Court on February 3, 2020. On March 18, 2020, the District Court ruled that Kelly established mechanics liens on Dostal lots 5, 6, 7, and 8. Court Ruling of 3/18/20, App. 823. The Court ruled that these liens had priority over the other liens. *Id.* at App. 824. The Court further ruled that Borst had liens on Dostal lots 5, 6, 7, 8 and 10. *Id*. at App. pp. 822-823. Those liens were established as prior to all other liens except Kelly's. *Id.* at App. pp. 824-825. The Court recognized the existence of the bank's mortgage liens but held that the bank's lien was junior to the liens of Kelly and Borst. *Id.* Following the Court's Ruling, the bank filed a motion to reconsider per Iowa R. Civ. P. 1.904. The motion was denied. The bank then filed a notice of appeal. No cross-appeal was filed by Borst. Borst has not contested the District Court's conclusion that, as to Dostal lots 5, 6, 7, and 8, Kelly has the senior lien.

Judging from the bank's brief, its appeal of these rulings does not challenge the District Court's fact findings. It does challenge the Court's conclusions of law and the legal consequences flowing from the facts found.

At the time of the February 3, 2020 trial, the issue of attorney fees pursuant to Iowa Code §572.32 was reserved pending the Court's other rulings. *Id.* at p. 22 App. 825. Following the Court's March 18 ruling, attorney fee claims were submitted by the bank, Borst and Kelly. On August 24, 2020

the Court awarded the fees claimed to each of them. Court's order of 8/24/20. App. 974. Pursuant to §572.32 the fees incurred by the mechanics lien claimants are added to the amounts of the liens. Following this ruling, the bank filed a further notice of appeal.

The bank's brief does not contest the amounts of the awards. It asserts only that Kelly and Borst are not "prevailing" lien claimants as required by §572.32 and asserts that even if the liens of Kelly and Borst are valid the liens are junior to the bank's mortgage lien. Thus, it appears that the bank's attorney fee appeal is entirely dependent upon the bank's success (or lack thereof) on its appeal of the March 18, 2020 ruling.

The two appeals have now been consolidated by order of this Court.

STATEMENT OF FACTS

Kelly has no direct interest in the bank's disputes with Borst and Randy Dostal. This brief is concerned with the existence of Kelly's mechanics lien, the priority of that lien over other liens and the District Court's award of attorney fees. Therefore, this brief will confine itself to reciting the facts relevant to issues affecting Kelly. The facts of this matter appear to be largely

undisputed for purposes of this appeal.[2] The bulk of the facts relevant to this appeal appear in the stipulation of the parties filed February 3, 2020.

Dostal Developers was the owner/developer of a residential subdivision consisting of individual building lots. Dostal was in the process of erecting single-family homes on some of those lots. Kelly is a concrete contractor. It provided labor and materials on certain Dostal lots. See Trial Exhibits A through E App. pp. 689-706. Without dispute, Kelly was employed by Defendant Dostal Developers to provide materials and labor on lots 5, 6, 7 and 8 all of which were owned by Dostal Developers. Kelly's work on the lots began on September 11, 2017 as to lots 7 and 8; September 14, 2017 as to lot 6; and October 25 as to lot 5.[3] *Id.* These dates were not disputed.

The bank's mortgage liens were executed November 10, 2017 and were recorded on November 13, 2017. Stipulation filed February 3, 2020, at

[2] At trial, the bank did not concede the amounts of the various liens and did not concede the date Kelly last worked on the subject properties. However, no fact issue has been briefed by the bank. Based upon its brief, the bank seems to be content with the facts as found by the District Court. The bank's brief confines itself to contesting the legal consequences flowing from the facts found.

[3] Kelly also performed considerable work on lot 10. As to that lot the District Court found that Kelly's lien was defective because the Secretary of State failed to properly post the notice of commencement filed by Kelly. The Court found that Kelly had an obligation to ensure that the Secretary of State properly performed this ministerial duty. Kelly has not appealed this ruling.

paragraphs 6, 9, 12, 15 and 18, App. 735. Thus, it is undisputed that Kelly commenced work on all the subject lots prior to the execution and recording of the bank's mortgage liens.

The District Court found that the last day Kelly performed services with regard to the subject lots was January 15, 2018. (Ruling App. 824). See also Trial Transcript pp. 146 – 151 and exhibits F, G and H App. pp. 712-714. The bank does not appeal this fact finding.

As to each lot, Kelly filed its notice of commencement with the Secretary of State on February 1, 2018, 16 days after the last day of work. Kelly portion of stipulated facts ¶ ¶ 4, 10, 16, 22, and 28, App. 735. Kelly also filed each of its mechanics liens on February 1, 2018. *Id.* As to each lien, owner notices and proofs of service were filed on February 2, 2018. *Id.*

Kelly offered testimony showing that the amounts claimed on the liens was accurate and remained unpaid at the time of trial. Trial Transcript pp. 151-152. No contrary evidence was offered by anyone.

At the time of trial, Kelly (and other parties) reserved the right to address the issue of attorney fees pursuant to Iowa Code § 572.32(1). When the District Court ruled that Kelly's mechanics liens on lots 5, 6,7 and 8 were valid and had priority over the other liens, the Court also found, "the record will remain open for a determination of attorney fees on the mortgage

foreclosure, attorney fees under Iowa Code Chapter 572, receivership costs, and court costs." March 18, 2020 Ruling at App. 825. Accordingly, on April 20, 2020, Kelly filed an application to tax its attorney fees. Application of 4/20/20. App. 865. That application was supported by an affidavit incorporating an itemized bill. Subsequently, it was determined that the bill inadvertently contained an entry concerning another matter and a duplicate entry. Kelly consented to the adjustment of the attorney fee bill to account for these errors. See Ruling of 8/24/20, App. 977. As adjusted the bill showed that Kelly's attorney fees related to the prosecution of its lien claims were $30,997.44. *Id.* The Court awarded Kelly attorney fees in that amount. *Id.*

It appears from the bank's brief that the bank does not now contest the amount of that award. It contests only the court's finding that Kelly is a "prevailing plaintiff" as required by Iowa Code §572.32(1) and the Court's finding that Kelly's lien of attorney fees has priority over the bank's lien.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THE MECHANICS LIENS OF KELLY WERE VALID AND ENTITLED TO PRIORITY OVER THE LIENS OF THE BANK AND BORST

A. Preservation of issue

Kelly agrees that the validity and priority of the various liens was raised and litigated below and thus was preserved for appeal.

B. Standard of Review

Mechanics lien actions are tried in equity. Iowa Code § 572.26. For most purposes equitable cases are reviewed de novo. See Iowa R. App. P. 6.907. In a de novo review the appellate court examines the entire record and adjudicates anew the fact issues properly presented below. E.g., In re Marriage of Steenhoek, 305 N.W.2d 448, 453 (Iowa 1981). The appellate court gives weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but is not bound by them. Iowa R. App. P. 6.904(3)(g).

In this case the bank does not attack any of the District Court's fact findings. Instead, the bank takes issue with the District Court's construction of certain statutes and the application of those statutes to the undisputed facts of this case. Appellate courts review questions of statutory construction for correction of errors at law. State v. Tarbox, 739 N.W.2d 850, 852 (Iowa 2007);

Estate of Ryan v. Heritage Trails Assocs., Inc., 745 N.W.2d 724, 728 (Iowa 2008).

C. Construction of Iowa Code §372.13A

As noted by the District Court, a mechanic's lien is purely statutory in nature. Baumhoefener Nursery, Inc. v. A & D Partnership, II, 618 N.W.2d 363, 366 (Iowa 2000) (citing Gallehon, Schemmer & Assocs., Inc. v. Fairway-Bettendorf Assocs., 268 N.W.2d 200, 201 (Iowa 1978)). The mechanic's lien statute is liberally construed to promote restitution, prevent unjust enrichment, and assist parties obtaining justice. Carson v. Roediger, 513 N.W.2d 713, 715 (Iowa 1994).

Iowa Code §§ 372.13, 372.13A and 372.13B set forth special provisions relating to the mechanics lien rights of a "subcontractor" with regard to "residential" property.

The statute defines "subcontractor" to mean, "every person furnishing material or performing labor upon any building, erection, or other improvement, except those having contracts directly with the owner. "Subcontractor" include[s] those persons having contracts directly with an owner-builder. Iowa Code § 572.1(11). The term "owner-builder" means (among other things) a titleholder who employs a subcontractor to furnish material or perform labor on a structure the owner intends to offer for sale

with no immediate intent on the part of the builder to occupy the structure. Iowa Code § 572.1(9). "Residential construction" means construction on single-family or two-family dwellings occupied or used, or intended to be occupied or used, primarily for residential purposes…" Iowa Code § 572.1(10).

The District Court determined that the properties in question here are "residential" as defined by Iowa Code § 572.1(10). March 18, 2020 Ruling at App. 822. The Court also concluded that Dostal Developers was an owner-builder as defined by the Code. *Id.* at App. 812. Neither the bank nor Kelly dispute either of these findings. The District Court also concluded that Dostal Developers was an owner-builder as defined by the code. Thus, the parties do not dispute that for purposes of these liens Kelly is a "subcontractor" as defined by Iowa Code § 572.1(11) and performed services on Dostal's residential properties.

For residential properties, before a preliminary notice of a mechanics lien may be filed someone must file a "notice of commencement" pursuant to Iowa Code §372.13A. Pursuant to subsection (1) the initial obligation to file the notice of commitment falls on the general contractor or owner-builder. That entity is required to file the notice of commencement within 10 days after the commencement of work on the project. If the general contractor or owner-

builder neglects its obligation to file the notice of commencement then the subcontractor may file its own notice of commencement. The timing of the subcontractor-filed notices of commencement is the subject of this dispute. The bank contends that the District Court misconstrued the timing provisions of §372.13A.

Amazingly, the bank argues for its construction of §372.13A without ever citing the actual language of the statute. The bank describes the statute. The bank makes reference to legislative history. But the bank asks the court to declare the meaning of the statute without actually quoting the language of the statute.

Iowa Code §372.13A states, in relevant part:

> 1. Either a general contractor, or an owner-builder who has contracted or will contract with a subcontractor to provide labor or furnish material for the property, shall post a notice of commencement of work to the mechanics' notice and lien registry internet site no later than ten days after the commencement of work on the property. …
>
> 2. If a general contractor or owner-builder fails to post the required notice of commencement of work to the mechanics' notice and lien registry internet site pursuant to subsection 1, within ten days of commencement of the work on the property, a subcontractor may post the notice in conjunction with the posting of the required preliminary notice pursuant to section 572.13B. A notice of commencement of work must be posted to the mechanics' notice and lien registry internet site before preliminary notices pursuant to section 572.13B may be posted. (Emphasis supplied)

Iowa Code §372.13B states, in relevant part:

> A subcontractor shall post a preliminary notice to the mechanics' notice and lien registry internet site. A preliminary notice posted before the balance due is paid to the general contractor or the owner-builder is effective as to all labor, service, equipment, and material furnished to the property by the subcontractor.

Rather than actually attempting to construe the statute the bank's argument merely assumes away the issue. The bank asserts, at page 27 of its brief, "Under… [§572.13A(2)] if the general contractor or owner builder fails to post a notice of commencement, the subcontractor may post a notice of commencement within 10 days of the subcontractor commencing work on the property." **The statute says nothing of the kind.** The bank makes no reference to the statutory language to explain how it arrives at this conclusion. A reading of the statute shows that the bank's 10-day requirement for subcontractors is both logically impossible and contrary to the plain words used by the legislature.

Subsection (2) plainly says that a subcontractor may file its notice of commencement "in conjunction" with the preliminary lien notice. The statute does not define "in conjunction". Where the legislature has not defined its terms, statutes are construed according to standard English language usage. E.g. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015). The standard English dictionaries hold that the idiom "in conjunction" means: "with", "in

combination with" or "together". See Merriam-Webster Unabridged Dictionary.[4] Thus, the legislature is telling us that a subcontractor may file its notice of commencement "in combination with" or "together with" the preliminary lien notice. This is exactly what occurred with Kelly's liens.

Contrary to the bank's assertion, subsection (2) says nothing about the commencement of the subcontractor's work. Rather, it refers to the general contractor's duty under subsection (1) to post the notice of commencement of any work on the project within 10 days.

The bank's invented 10-day limitation on a subcontractor's right to file the notice is not only contrary to the statutory language, as shown immediately above but also creates a statutory inconsistency. Specifically, the bank's construction would leave some subcontractors in a legally impossible situation. It would deprive some subcontractors of all mechanics lien rights. According to the bank, subsection (2) works this way: The bank admits that the subcontractor has no right to file a notice of commencement until after the general contractor/owner-builder has failed to file the notice of commencement required by subsection (1). The general contractor owner/builder only fails in its duty under subsection (1) when more than 10

[4] This reference is to the online version of the Merriam-Webster Unabridged Dictionary found at www.merriam-webster.com/dictionary.

days have elapsed after the commencement of work on the project. No subcontractor can know if the general contractor/owner-builder has failed in its duty until after 10 days from the beginning of the project has elapsed. While the bank admits this is true it says that no subcontractor can establish a valid lien if it fails to file within the first 10 days after commencement of its own work. Thus, according to the bank, the first subcontractor on the project can never, under any circumstances, acquire a valid mechanics lien. For example, the first subcontractor on a house construction job may be the concrete contractor called to pour the house foundation. If the concrete subcontractor commences work on March 1 and if that work is the beginning of the project, then no one (general contractor or subcontractor) has a right to file a notice of commencement prior to March 1. However, under the plain language of subsection (2) that concrete subcontractor only acquires a right to post its own notice of commencement "if the general contractor or owner-builder fails to post the required notice within 10 days "pursuant to subsection 1…" In our hypothetical project which commenced on March 1 the general contractor or owner-builder has not failed in its duty under subsection 1 until after March 10. Thus, our hypothetical concrete contractor cannot file a notice of commencement prior to March 11. Unfortunately (according to the bank) the first possible filing date of March 11 is also too late. According to the bank

our hypothetical concrete subcontractor needed to file its notice of commencement before the expiration of 10 days. Our poor hypothetical subcontractor can simply never establish a mechanics lien because, according to the bank, its notice of commencement will always be either too early or too late.

The bank claims that its anti-textual interpretation of the statute is required because the purpose of the amended statute was to "solve the problem of mechanics liens popping up unexpectedly…" Appellant brief at P. 26. There is no such "problem" for this or any other bank. Without a doubt, this bank knew that its loan customer was and owner-builder. (The loans in question were construction loans and the customer was "Dostal Builders".) The mechanics lien registry is open and public to all. If the bank wanted to protect itself against liens "popping up" it could easily do so by checking the mechanics lien registry to see whether a notice of commencement had been filed by the owner-builder. Finding that there was none, the bank then only needed to ascertain whether work had actually commenced on the property. It could easily do so by the simple expedient of having its agent look at the property. According to the record in this case the bank loaned Dostal developers over $900,000. Banks contemplating loans of this size to be secured by a mortgage routinely (universally?) look at the property prior to

making the loan. Without a doubt, this bank either knew work had started on this project before it funded the loans, or it easily could have known that.

It seems unlikely in the extreme that the bank chose to loan over $900,000 on this property without first looking at the property, but assuming for the sake of argument that it chose to do so it seems that the bank is asking this court to shift the risk of the bank's lack of diligence to an unsuspecting tradesman. If, on the other hand, we assume that this bank performed the same due diligence performed by all other banks, the invention of a 10-day requirement for subcontractors does nothing more than provide the bank with a "trap for the unwary" which it can spring on unsuspecting tradesman in order to "sneak" its lien ahead of their mechanics liens.

More than just the dictionary definition of "in conjunction" prohibits the bank's construction of the statute. In statutory construction, the word "shall" imposes a duty. The word "must" states a requirement. The word "may" merely confers a power. Iowa Code § 4.1(30). Thus, by using the word "shall" in § 372.13A(1) the legislature imposed a duty on general contractors/owner-builders to post a notice of commencement within 10 days of the project's start. By contrast subsection (2) imposes no duties on the subcontractor. Rather by stating that a subcontractor "may" file a notice of commencement after the general has failed in its subsection (1) duty, the

legislature conferred a power on the subcontractor. Stated differently, what the bank claims is a subcontractor's duty is actually a discretionary power.

The legislature did, however, say when the subcontractor should exercise that power. Subsection (2) says that "A notice of commencement of work must be posted to the mechanics' notice and lien registry internet site before preliminary notices pursuant to section 572.13B may be posted." As noted, according to Iowa Code § 4.1(30) the word "must" is used to state a requirement.

Therefore, applying the standard canons of statutory construction we see that subcontractors are permitted but not required to file a notice of commencement after the general/owner-builder has failed in its duty to file the notice within the first 10 days of the project. After the expiration of that 10-day period, the subcontractor acquires the power to file a notice. The legislature contemplated that that notice would be filed together (in conjunction) with the preliminary lien notice of §572.13B. The subcontractor and the Secretary of State are both informed by the statute that the Secretary of State will not show the preliminary lien on the lien registry unless the notice of commencement is also filed.

Without doing violence to the statutory language, there is no other possible construction of §572.13A(2).

D. Application of Iowa Code §372.13A to Kelly's Liens

It is undisputed that Dostal Builders failed to file its notice of commencement within 10 days of the commencement of the project. It appears in the record that Dostal's notice of commencement was never filed. Therefore Iowa Code § 372.13A(2) became operative. The bank admits that Kelly's notice of commencement and its preliminary liens were each filed on February 1, 2018. Thus, the bank has admitted that Kelly filed its notice of commencement "in conjunction with the posting of the required preliminary notice pursuant to section 572.13B," as required by Iowa Code § 372.13A(2)

Having exercised its right to file a notice of commencement "in conjunction with the preliminary lien notice" pursuant to § 372.13A(2), Kelly could validly post its preliminary notice of lien pursuant to Iowa Code §372.13B.[5]

[5] At pages 32 through the top of 38 the bank takes the District Court to task for citing Standard Water v. Jones, 888 N.W.2d 673, 677 (Iowa Ct. App. 2016) "for the proposition subcontractors do not need to identify themselves." This argument is not addressed in the body of this brief because the District Court did not cite Standard Water for the proposition alleged by the bank. The court made a single passing reference to Standard Water at the top of Page 19 of its ruling. App. 822. In explaining the provisions of the statute, the Court noted that the statute calls for the preliminary notice (not the notice of commencement) to be mailed to ordinary property owners but not to owner-builders. The Court speculates that this is because the subcontractors are presumably already known to an owner-builder and cites Standard Water by analogy. Neither this discussion nor the citation to Standard Water is necessary to the court's ruling.

E. Kelly's Liens Are Entitled To Priority

As we have seen above, once the owner-builder failed to post its notice of commencement within 10 days after the project started, Kelly became empowered to file its own notice of commencement per §372.13A(2). The plain language of that code section makes it clear that filing of that notice is merely a power – not a requirement until such time as Kelly decided to post its preliminary notice of lien pursuant to §372.13B. Once Kelly decided to file the preliminary notice of lien, the statute required Kelly to post a notice of commencement "in conjunction with" the posting of the section 572.13B lien notice. Kelly did exactly that.

As found by the District Court, Kelly last worked on the Dostal lots on January 15, 2018. It is undisputed that Kelly filed its notices of commencement and preliminary lien notices 16 days later, on February 1, 2018.

Iowa Code §572.18(1) provides that when a subcontractor posts its lien notice within 90 days after the date on which it last provided material or labor, that lien is then superior to all other liens which attached to the property except those liens in existence at the time the claimant's work commenced.

Kelly's work on the lots began on September 11, 2017 as to lots 7 and 8; September 14, 2017 as to lot 6; and October 25, 2017 as to lot 5. Kelly's

lien is therefore superior to all liens except those (if any) perfected prior to September/October 2017. The bank's liens were not executed until November 10, 2017 and were not perfected by recording until November 13, 2017—a month after Kelly's work commenced. Kelly's liens are therefore senior to the bank's liens.

The bank attempts to avoid this simple truth. While admitting that Kelly's preliminary lien notices were, in fact, posted on the MNLR on February 1, 2018, the bank argues that the notices were not "properly posted." It says that the liens were not properly posted by reason of the same arguments discussed at subheading C above. The bank's arguments under this sub-heading are wrong for the reasons that they were wrong under subheading C. Those arguments need not be repeated here.

Also, in support of its lien priority argument the bank cites Iowa Code §572.18(2). That code section offers no comfort to the bank. It provides, "Construction mortgage liens shall be preferred to all mechanics' liens of claimants who commenced their particular work or improvement subsequent to the date of the recording of the construction mortgage lien. (Emphasis supplied).

Without dispute Kelly commenced its work prior to the date the bank's mortgages were recorded. Specifically, as noted above Kelly commenced

work on all of the Dostal lots on or prior to October 25, 2017. The bank's mortgages were not recorded until November 13, 2017.

Per Iowa Code §572.18(1) Kelly has the senior lien. That seniority is not altered by Iowa Code §572.18(2) or any other authority cited by the bank.

II. THE DOSTAL GUARANTY ISSUE

The bank's second brief point appears to relate only to the bank's attempt to enforce an alleged guaranty against Randy T. Dostal. Kelly is not a party to that portion of this controversy. For that reason, Kelly does not respond to Division II of the bank's brief.

III. THE DISTRICT COURT CORRECTLY FOUND THAT KELLY WAS A "PREVAILING PARTY" AND IS THEREFORE ENTITLED TO RECOVER ATTORNEY FEES.

A. Preservation of Error

It appears that the bank disputes the award of attorney fees only on the ground that Kelly is not (or should not be) a "prevailing party" as that term is used in Iowa Code §572.32. Because the bank disputes the validity of Kelly's mechanics lien it necessarily follows that the bank disputes the award of attorney fees. To this limited extent Kelly agrees that the bank has preserved error on this issue.

B. Standard of Review

The bank misstates the standard of review on this issue. It claims a de novo standard. That is not correct. The bank's brief argues that the District Court erroneously recognized Kelly's lien and erroneously established Kelly's priority based upon the statutory interpretation issues briefed at Division I above. Those issues are matters of statutory construction. Appellate courts review questions of statutory construction for correction of errors at law. State v. Tarbox, 739 N.W.2d 850, 852 (Iowa 2007); Estate of Ryan v. Heritage Trails Assocs., Inc., 745 N.W.2d 724, 728 (Iowa 2008).

To the extent that there is a fact issue within this brief point, the correct standard of review is for abuse of discretion. Specifically, the Supreme Court has held, "The amount [of fees] awarded is vested in the district court's broad, but not unlimited discretion. Only when the district court bases its decision of the amount of the award on clearly unreasonable or untenable grounds will this court reverse." Schaffer v. Frank Moyer Const., Inc., 628 N.W.2d 11, 22 (Iowa 2001) (internal citations omitted). Schaffer construed a prior version of Iowa Code §572.32. The prior version made an award of attorney fees mandatory for successful lien claimants but was interpreted to give the District Court discretion as to the amount. The current version of the statute makes the award of fees, not just the amount, discretionary on the part of the District

Court. It is apparent that this statutory change expanded the District Court's discretion. For that reason, we urge that the correct standard of review continues to be a review for abuse of discretion.

C. Discussion

Iowa Code §572.32(1) provides, "In a court action to enforce a mechanic's lien, a prevailing plaintiff may be awarded reasonable attorney fees." The bank makes no attempt on appeal to dispute the reasonableness of the amount awarded to Kelly for fees. The bank does however dispute Kelly's status as a "prevailing party".

The Supreme Court has determined that when a mechanics lien claimant is ultimately entitled to enforce its lien it is a successful party for purposes of the statute. See Schaffer v. Frank Moyer Const., Inc., 628 N.W.2d 11, 23 (Iowa 2001). Conversely, if the lien claimant is not entitled to enforce its lien then the claimant is deemed not to be successful and is therefore not entitled to an award of fees. Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402, 407 (Iowa Ct. App. 1994).[6] The District Court found that

[6] A 1999 rewrite of this code section changed the terminology from "successful" plaintiffs to "prevailing" plaintiffs. Arguably this change of verbiage could lead to a change of application in certain narrow circumstances. For example, if a lien claimant claims a lien of $100,000 but the lien is ultimately only established in the amount of $10, the plaintiff may be said to have been "unsuccessful" notwithstanding the fact that it

Kelly's liens on lots 5, 6, 7 and 8 were enforceable in the amounts claimed by Kelly. The court found that the amounts claimed by Kelly were reasonable for the enforcement of those four liens. Thus, according to the precedents Kelly was a "prevailing plaintiff".

In the unlikely event that the bank prevails on its statutory construction argument (see Division I above) and prevails to such an extent that Kelly is left without an enforceable lien, then Kelly agrees, it will not be entitled to recover attorney fees. If, on the other hand, this court determines that Kelly shall continue to have enforceable mechanics liens on lots 5, 6, 7 and 8 then Kelly will be entitled to the fees awarded by the District Court and in addition will be entitled to an award of fees incurred by reason of the bank's appeal. The statute contemplates the award of attorney fees on appeal. See Schaffer v. Frank Moyer Const., Inc., 628 N.W.2d 11, 23 (Iowa 2001). Typically, because of the need to develop a factual record regarding the amount of fees, the appellate court remands the matter to the District Court for the initial assessment of appellate attorney fees. *Id.*

The bank is wrong in arguing that the priority of the liens affects the award of attorney fees. As shown by Schaffer, *id*. and Nepstad, *supra*, the test

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"prevailed" in the sense of establishing its lien. This hypothetical distinction between "successful" and "prevailing" is irrelevant to the current proceeding.

of "success" for awarding fees is the enforceability of the claimant's lien, not its priority.

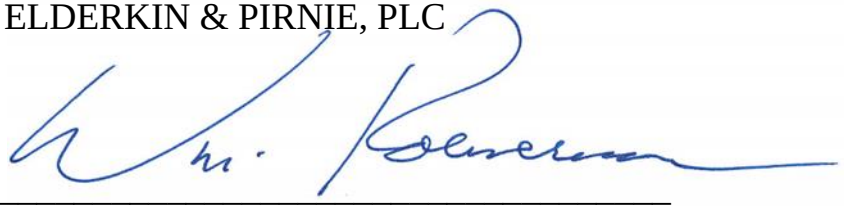
CONCLUSION

This Court should affirm the District Court's rulings with regard to the enforceability and priority of Kelly's liens. This Court should also affirm the District Court's award of attorney fees to Kelly, but on the subject of fees, this Court should further remand the case to the District Court with instructions to assess the amount of reasonable appellate attorney fees to be awarded to Kelly.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.903(2)(i), Appellee states its desire to be heard in oral argument.

ELDERKIN & PIRNIE, PLC

By: 

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 6,317 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

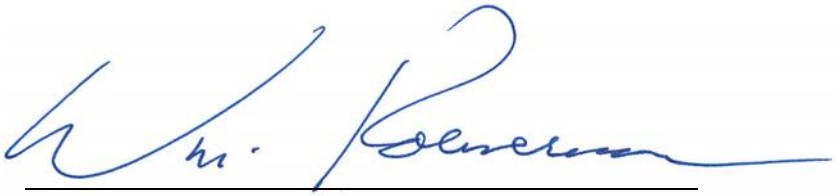
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ William H. Roemerman — 2021-02-17
Signature — Date

Certificate of Filing and Service

I certify the preceding Appellee's Brief was filed with the Supreme Court of Iowa by electronically filing the same with the Iowa Supreme Court Clerk on February 17, 2021.

I further certify I served the preceding Appellee's Brief on attorneys of record for all other parties by electronically filing this document in accordance with the Chapter 16 Rules on February 17, 2021.

By: 

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