IN THE IOWA SUPREME COURT

SUPREME COURT NO.
20-0972

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

and

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

APPEAL FROM THE DISTRICT COURT FOR LINN COUNTY
THE HONORABLE MARY E. CHICCHELLY

APPLICATION FOR FURTHER REVIEW
(DATE OF FILING OF COURT OF APPEALS DECISION: AUGUST 18, 2021)

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QUESTIONS PRESENTED FOR FURTHER REVIEW

I. DID THE COURT OF APPEALS ERR WHEN IT FOUND THE MECHANIC'S LIENS OF BORST AND KELLY WERE VALID AND ENTITLED TO PRIORITY OVER FACO'S MORTGAGE LIENS?

II. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT BORST AND KELLY WERE PREVAILING PARTIES AND ENTITLED TO RECOVER ATTORNEY FEES?

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals incorrectly held that a subcontractor can create a lien for work that occurred prior to the subcontractor posting a Notice of Commencement on the public Mechanic's Notice and Lien Registry ("MNLR") as required by the new mechanic's lien statute under Iowa Code Chapter 572. The result is that mortgagees and other lienholders will have no way of knowing whether a subcontractor is lying in the weeds with a potential mechanic's lien that will prime their mortgages.

This case therefore represents an important opportunity for the Iowa Supreme Court to settle the issue of a subcontractor's obligations under the new Notice of Commencement requirements created by Iowa Code Chapter 572. Further, this case involves important legal principles and the interplay between Iowa Code Chapter 572 (the mechanic's lien statute) and the rights of mortgagees who are strangers to the underlying mechanic's lien dispute. As the case involves substantial issues of first impression following the recent amendments to Iowa Code Chapter 572, and impacts the rights of mortgagees, the case is of broad public importance and further review of the Iowa Court of Appeals' decision is warranted. *See* Iowa Rule of Appellate Procedure 6.1103(1)(b)(2, 3, and 4). In addition, the Court of Appeals' decision is at odds with the Court of Appeals' holding in *Standard Water Control*

Systems, Inc. v. Jones, 888 N.W.2d 673, 676 (Iowa Ct. App. 2016). *See* Iowa R. App. P. 6.1103(1)(b)(1).

Simply put, the Iowa Supreme Court should hold, consistent with the statute, that no party can create a lien for work that was performed before the Notice of Commencement is posted to the MNLR. Further, in the instant case, because all of the Notices of Commencement were made of record following the recording of the Petitioner's mortgages, those mortgages are entitled to priority, the attorney fee awards in favor of the subcontractors should be vacated, and the case remanded for an award of attorney fees in Petitioner's favor.

BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

I. THE COURT OF APPEALS ERRED WHEN IT FOUND THE MECHANIC'S LIENS OF BORST AND KELLY WERE VALID AND ENTITLED TO PRIORITY OVER FACO'S MORTGAGE LIENS.

A. The Parties.

As the underlying district court decision generated a number of appeals in a consolidated case, a brief identification of the remaining parties is in order. From Linn County Case No. LACV091167, Finance of America Commercial, LLC ("FACo") is the Appellant, and appealed the determination of the district court that mechanic's liens posted to the Iowa Secretary of State's MNLR after the recording of FACo's mortgages are valid and entitled to priority. The case involved the competing lien claims of FACo, Borst Bros. Const. Inc. ("Borst") and Kelly

Concrete Company, Inc. ("Kelly"). FACo's claims in Linn County Case No. EQCV0914888 are no longer at issue given the Court of Appeals' decision in its favor on the personal guaranty issue. Also, below, the district court entered an award of attorney's fees in favor of Borst and Kelly which the Court of Appeals affirmed.

B. Procedural History.

The case started in September 2018 when Borst commenced a mechanic's lien foreclosure action in the Iowa District Court for Linn County (Case No. LACV091167). (Petition; App. 12-44). FACo answered and counterclaimed against Borst that Borst's liens were unenforceable and that FACo is entitled to attorney fees for defending against invalid lien claims. *See* Iowa Code § 572.32(2). FACo further counterclaimed against all of the lien claimants that: (1) the lien claims are unenforceable, (2) or to the extent enforceable, the liens are junior and inferior to the liens of FACo, and (3) also prayed for an award attorney fees to FACo pursuant to section 572.32(2). FACo pled similar claims with respect to Kelly's counterclaim/cross-claim.

Despite being captioned as a "law" case, the case proceeded in equity. (Order 11/15/18; App. 151-152).

After a pretrial motion for summary judgment was overruled, the consolidated case was tried to the Court on February 3, 2020 in a one-day bench trial. (Tr. Ruling, p. 2; App. 805). Thereafter, the district court ruled that Kelly established mechanic's

liens on Lots 5, 6, 7, and 8 and Borst had established mechanic's liens on Lots 5, 6, 7, 8, and 10. (Tr. Ruling, p. 21; App. 824). Further, the district court ruled that Kelly's liens were entitled to priority over Borst's liens and both Kelly and Borst's liens have priority over FACo's previously recorded mortgages. (Tr. Ruling, p. 22; App. 825). The district court then granted the attorney fee claims of the prevailing lien claimants. (Ruling on Attorney Fee Claims; App. 974-980).

The Court of Appeals decision will be addressed below.

C. Pertinent Dates.

A brief chronology will assist the Court in understanding the import of FACo's mortgages, the Notices of Commencement, and Preliminary Notices.

On June 15, 2017, Borst entered into a contract with Thomas Dostal Developers, Inc. for Borst to furnish labor and/or materials to Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 2; App. 739).

July 3, 2017, was the first day Borst furnished labor and/or materials to Hawks Point Seventh Addition. (Borst Stipulated Facts, ¶ 3; App. 739); (Tr. Ruling, p. 11; App. 814).

Kelly commenced the work that was the subject of its liens on September 11, 2017 (Kelly Stipulated Facts, pp. 7, 9; App. 741, 743), except for Lot 5 which commenced on October 25, 2017 (Kelly Stipulated Facts, p. 9; App. 743), and Lot

6 which commenced on September 14, 2017, (Kelly Stipulated Facts, p. 9; App. 743).

On November 10, 2017, Thomas Dostal Developers, Inc. entered into a commercial loan transaction pursuant to which it obtained five loans. (Parties' Stipulated Facts, ¶ 3; App. 737); (Tr. Ruling, p. 9; App. 812).

Between November 10, 2017, and December 20, 2017, FACo recorded its mortgages. (Tr. Ruling, p. 9; App. 812).

On December 18, 2017, Kelly completed the work related to its lien. (Kelly Stipulated Facts, p. 10; App. 744).

On December 19, 2017, Borst completed the work related to its lien. (Borst Stipulated Facts, ¶ 4; App. 739); (Tr. Ruling, p. 11; App. 814).

On February 1, 2018, after FACo had recorded its mortgages, Kelly posted its Notice of Commencement of Work, its Preliminary Notice and its mechanic's lien to the MNLR. (Kelly Stipulated Facts, pp. 7-8, 10; App. 741-742, 744).

On February 2, 2018, after FACo had recorded its mortgages, Borst posted its mechanic's lien on the MNLR. (Borst Stipulated Facts, ¶ 5; App. 740). This lien was MNLR #04681-1. (Tr. Ruling, p. 11; App. 814).

On February 2, 2018, Borst posted its Notice of Commencement of Work on the MNLR. (Borst Stipulated Facts, ¶ 7; App. 740); (Tr. Ruling, p. 11; App. 814).

On November 8, 2018, Borst posted its Preliminary Notice on the MNLR. (Borst Stipulated Facts, ¶ 8; App. 740); (Tr. Ruling, p. 11; App. 814).

D. Discussion of the Merits of Reversal of the Court of Appeals.

The Court of Appeals' decision in the instant matter, can best be summarized as follows. The Court of Appeals' decision turns on its isolated reading of excerpts of Iowa Code Chapter 572 at the expense of applying the statute as a whole. The Court of Appeals determined that only a general contractor or owner-builder has an obligation to post a Notice of Commencement. Slip op. at 6. The Court of Appeals decided that a subcontractor, like Kelly and Borst, *may* post the Notice of Commencement, but is not required to. *Id.* (quoting Iowa Code § 572.13B) (emphasis in original).

The appellate court discounted FACo's argument that such a holding eviscerates the purpose of Iowa Code Chapter 572, which was promulgated to give third parties prior notice of work that may result in liens on property. The Court of Appeals evidently accepted that FACo, as a mortgage lender, is not entitled to notice of potential liens despite the Iowa Legislature establishing a law precisely intended to give the public notice of such potential liens. Slip Op. at 7.

The Court of Appeals reasoned that "[a] plain reading of these provisions leads us to a different conclusion." Slip Op. at 7. In the Court of Appeal's view, a

subcontractor has no obligation to post a Notice of Commencement, thus leaving mortgage lenders like FACo in the dark about potential senior liens. Slip Op. at 7.

As a predicate matter, the Court of Appeals and district court agree the FACo mortgage liens were made of record between November 10, 2017, and December 20, 2017, and that "'each and every Notice of Commencement was posted to the MNLR after December 20, 2017.'" Slip Op. at 9.

Yet, the Court of Appeals did not address a number of issues which are set forth in the statute. Specifically, the Court of Appeals failed to address the language of section 572.13A(1) which provides "[a] notice of commencement of work is effective only to any labor, service, equipment, or material furnished to the property subsequent to the posting of the notice of commencement of work." Likewise, the Court of Appeals did not address the subcontractor's obligation to provide a Preliminary Notice in conjunction with a Notice of Commencement. Iowa Code § 572.13A(2) ("a notice of commencement of work must be posted before the preliminary notice…may be posted"). Certainly, the Court of Appeals did not acknowledge the statutory command that a precondition to priority is proper posting to the MNLR. *See* Iowa Code § 572.18(1) ("for which notices were properly posted to the mechanics' notice and lien registry internet site pursuant to sections 572.13A and 572.13B The Court of Appeals ignored the Legislature's explanation for the

amendments to the Chapter. Finally, the Court of Appeals relied upon case law which has been superseded by the new statute.

This Court is not bound by the lower courts' legal conclusions. The standard of review on a mechanic's lien action is ordinarily *de novo*. Iowa Code § 572.26 (defining action as one in equity); *Ringland-Johnson-Crowly v. First Cent. Serv. Corp.*, 255 N.W.2d 149, 151 (Iowa 1977).

This case boils down to issues of statutory interpretation. "[O]ur ultimate goal is to ascertain and give effect to the intention of the legislature." *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989). "We look first to the language of the statute itself, reading the statute as a whole. In doing so, we accord the language its plain and obvious meaning as well as its most sensible and logical construction. Additionally, we will not construe a statute in such a way that would produce impractical or absurd results." *State v. Meyer*, 705 N.W.2d 676, 677 (Iowa Ct. App. 2005) (internal citations omitted).

FACo's argument can be summarized as follows. Under the language of the "new" version of Chapter 572, for a subcontractor's lien to attach to residential property, both a Notice of Commencement and a Preliminary Notice must first be registered on the MNLR. That is the only reading that comports with the purpose of the statute, which is to give the public (and mortgage lenders like FACo) prior notice of liens that may impact an interest in real property. In this case, no lien claimant

timely posted a Notice of Commencement or Preliminary Notice, which left FACo uniformed about the purported liens.

Moreover, even if valid mechanics' lien claims existed, which FACo denies, FACo is still entitled to priority because its mortgage liens were recorded before the parties Notices of Commencement and Preliminary Notices were posted. Finally, the Court of Appeals ignored the policy determination made by the Legislature, which was expressed in the amendments to Chapter 572, that public Notice of the Commencement of work be provided through the MNLR.

1. The New Terminology of Chapter 572.

In 2012, the Iowa Legislature changed how a mechanic's lien is created on residential construction property[1] by amending Iowa Code Chapter 572. The rewrite included the creation of an online registry (the MNLR) available to the public on which potential mechanic's lienholders must post both a Notice of Commencement *and* a Preliminary Notice (in the case of subcontractors) in order for a mechanic's lien to eventually attach to property. *See* generally, Iowa Code § 572.13A(5) (Notice of Commencement) and § 572.13B(5) (Preliminary Notice).

The statutory language is clear. First, in order to create a valid lien on residential construction property, "a general contractor, or builder-owner who has

[1] The district court below found the instant project concerned residential construction, (Tr. Ruling, p. 19; App. 822), and no party disputed that conclusion in this appeal.

contracted with a subcontractor … shall post a notice of commencement of work to the mechanics' notice and lien registry internet site no later than 10 days after commencement of work at the property." *Id.* Iowa Code § 572.13A(1). These public posting requirements ensure that any other party, including the owner of the property, or anyone who may have, or may later take, an interest in the property, is aware that mechanics liens could encumber the property.

Section 572.13A(2) then gives subcontractors the opportunity to protect their interests in the property if the general contractor or owner-builder fails to do so. *Id.* § 572.13A(2). Under that Section, if the general contractor or owner-builder fails to post a Notice of Commencement, the subcontractor may protect its interest in the property by posting a Notice of Commencement within 10 days of the subcontractor commencing work on the property. Again, this ensures that property owners and third parties are aware of the subcontractor's work and the possibility of future mechanics liens the subcontractors may have. The 10-day requirement ensures that the subcontractor does not perform significant work without first making the public aware of the work.

Subcontractors also have a separate responsibility under the new Chapter 572. Under section 572.13B(1), "[a] subcontractor shall post a preliminary notice to the mechanics' notice and lien registry internet site." Such a notice is effective as to all labor, service, equipment and material furnished to the property by the subcontractor

if the Preliminary Notice is posted before the balance is due to be paid to the general contractor. *Id.* A subcontractor may post a Notice of Commencement "in conjunction with the posting of the required Preliminary Notice pursuant to Section 572.13B," but the Notice of Commencement still must be posted within 10 days of the subcontractor commencing work. *See* Iowa Code § 572.13A(2). Moreover, the Notice of Commencement must be posted before the subcontractor can post its Preliminary Notice. *Id.* A subcontractor who fails to post a Preliminary Notice pursuant to section 572.13B shall not be entitled to a lien and remedy. *See* Iowa Code § 572.13B(4). In any event, a subcontractor may not lien for work which was performed prior to the posting of the Notice of Commencement to the MNLR. *See* Iowa Code § 572.13A(1).

Sections 572.13A and 572.13B must be read together in order to determine the prerequisites to a subcontractor perfecting a mechanic's lien.[2] The sum of these statutes is that a subcontractor's lien only attaches to work performed after the Notice of Commencement is posted. Nowhere is this made clearer than the "Explanation" for House File 675, which ultimately became the new Chapter 572 (the "Explanation"). The Explanation provides: "A preliminary notice posted before the

[2] The fact that sections 572.13A and 572.13B need to be read in conjunction (and therefore require both the Notice of Commencement and the Preliminary Notice be posted) is consistent with the maxims of statutory construction employed in Iowa. *In re Estate of Sampson*, 838 N.W.2d 663, 671 (Iowa 2013); *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017).

balance due is paid to the general contractor or owner-builder is effective as to all labor, service, equipment, or material furnished to the property *subsequent to the posting of the notice of commencement of work.*" Page 21/li 31-35 and page 22/li 1 (emphasis added) (Amended and Substituted Memorandum of Authorities, pp pp. 6-7; App. 286-287). Thus, work performed by the subcontractor prior to the posting of the Notice of Commencement is not subject to any subsequent mechanic's lien even if the subcontractor later posts a Preliminary Notice.

The 10-day requirement in section 572.13A(2) makes perfect sense in light of the Explanation. Had the Legislature intended to allow a subcontractor to recover under a mechanic's lien regardless of whether a Notice of Commencement was timely posted, section 572.13A(2) would not include the 10-day time limit for a subcontractor to post a Notice of Commencement. The Legislature could have given subcontractors unlimited time to post the Notice of Commencement had it not intended to ensure that the Notice of Commencement give meaningful notice to third parties. Indeed, if a subcontractor could stand on its Preliminary Notice alone, without regard to the timely filing of a Notice of Commencement, there would be no need to for section 572.13A(2) to allow a subcontractor to post a Notice of Commencement at all. Yet it is a maxim of statutory interpretation that statutory language shall not be interpreted to include superfluous language. *Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017).

The 10-day requirement is not superfluous, and no doubt exemplifies the legislature's intent to ensure that neither homeowners nor third parties will be surprised by mechanics' liens arising months or years after a subcontractor commences work. Thus, in order for a subcontractor to perfect a lien on residential construction property, it must (1) post a Notice of Commencement within 10 days of commencing work (unless the general contractor has already done so), (2) post that Notice of Commencement prior to posting a Preliminary Notice, and then (3) post a Preliminary Notice.

2. No Lien Claimant Timely Posted a Notice of Commencement or Preliminary Notice.

In light of sections 572.13A and 572.13B, Kelly and Borst were required to post Notices of Commencement within 10 days of commencing work. The record reflects that no lien claimant posted a Notice of Commencement to the MNLR within 10 days of work commencing on the properties. Likewise, no lien claimant posted a Notice of Commencement or Preliminary Notice to the MNLR within 10 days of commencing *its own work.* For instance, all of Kelly's Notices of Commencement were posted on February 1, 2018 (except MNLR No. 014670-2); Preliminary Notice posted February 1, 2018 (F.11.1, Kelly 1, 3, 5, 7, and 9; App. 409-417, 418, 424, 429, 434, 439). *See* also Tr. Exhs. F.11.2 (App. 446-454). But the record reflects Kelly's work had started in September and October, 2017, well in excess of 10 days prior to the posting. Tr. Exhs. F.11.1, Kelly 2 (work commenced October 25, 2017;

App. 409-417, 419-423), Kelly 4 (work commenced September 14, 2017; App. 425-428), Kelly 6 (work commenced September 11, 2017; App. 430-433), and Kelly 8 (work commenced September 11, 2017; App. 435-438).

Borst's work commenced on July 3, 2017, but its Notice of Commencement was not posted until February 2, 2018. (Tr. Exhs. F.7.1, Borst Bros. 1 and 2, and F.7.2. (App. 354-358, 359, 360-372, 405-408). Borst did not post its Preliminary Notice until November 8, *2018*. (Tr. Ruling, p. 11; App. 814) (emphasis added).

Previously, the FACo mortgages were recorded with the Linn County Recorder between November, 2017 and December, 2017. (Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17, and F.29.22; App. 507-523, 542-558, 577-593, 612-628, 647-663); (Tr. Trans. pp. 18-20, 185).

Borst and Kelly's failures to file Notices of Commencement after Dostal Developers failed to do so makes recovery under their purported mechanics' liens impossible. Again, the 10-day requirement has a specific purpose of providing prior notice of the subcontractors' work. By filing their Notices of Commencement long after the 10-day period, Borst and Kelly failed to comply with section 572.13A, and prohibited any opportunity to perfect mechanics' liens.

3. The Court of Appeal's Ruling Ignored the Importance of Notices of Commencement and the Policy Determination Made by the Legislature Expressed in the Amendments to Chapter 572.

Borst and Kelly argued, and the Court of Appeals held, that Borst and Kelly could enforce their purported mechanics' liens even though neither Borst nor Kelly filed their Notices of Commencement within 10 days of commencing work. (Tr. Ruling, p. 19 [Borst] and p. 21 [Kelly]) (Tr. Trans. p. 185; App. 822, 824). The Court of Appeals' ruling completely ignores the purpose of the statute to give third parties notice of potential liens, and establishes that there is no way to require a subcontractor to timely inform property owners and/or third parties that the subcontractor may eventually have a mechanic's lien. In reaching that conclusion, the Court of Appeals and district court relied upon distinguishable case law to reach their conclusions regarding lien validity. The district court relied upon the distinguishable *Standard Water Control Systems, Inc. v. Jones*¸ 888 N.W.2d 673, 677 (Iowa Ct. App. 2016) for the proposition subcontractors do not need to identify themselves. (Tr. Ruling, p. 19; App. 822); (FACo Rule 1.904 motion, pp. 7-8; App. 834-835). The district court's reliance on *Standard Water* is curious because *Standard Water* did not concern subcontractors. Moreover, the district court's holding actually contradicts the *Standard Water* court's statements about the purposes of section 572.13A. The Court of Appeals did not disturb those findings. *Standard Water* will be discussed further below.

The district court held that a subcontractor may, but is not required to, post a Notice of Commencement within 10 days of commencing work, thus allowing subcontractors to lay in the weeds until they later post a Preliminary Notice – after all of their (and the general contractor's) work is completed. (Tr. Ruling, p. 19 [Borst] and pp. 20-21 [Kelly]) (Tr. Trans. p. 185; App. 822-824). Under the Court of Appeals' holding, if the general contractor and the subcontractor both fail to file a Notice of Commencement, an unknown subcontractor could wrack up thousands of dollars in costs performing work about which homeowners and third parties are oblivious. Indeed, the subcontractor could be the party that provides most of the work, and the homeowner would never know it. Only once the general contractor is due to be paid (months or years later)—and the subcontractor files its Preliminary Notice—would anyone know that the subcontractor even existed. That result undermines the purpose of both sections 572.13A and 572.13B, which, as the *Standard Water* court noted, are to ensure that subcontractors do not show up with surprise mechanic's liens long after the work is done.

The case at bar highlights the problems that arise when both an owner-builder and subcontractors fail to meet their obligations to post a Notice of Commencement, and highlights the importance of the online registry. Although the *Standard Water* court focused on notice to homeowners, the Iowa Legislature clearly had concerns beyond that narrow focus. Had the Legislature been concerned only with notice to

homeowners, it easily could have adopted a process requiring written notice of subcontractors to be provided to homeowners (with protections in place, such as personal delivery or delivery by certified mail, to ensure that the notice is given). The Legislature went further, though, and created a *public* registry so that the public—including other possible lienholders—would know about subcontractors. Indeed, the commentary to Chapter 572 states:

> The bill provides for the creation of a state construction registry for residential construction property….The state construction registry, once created, shall be a *publicly accessible* centralized electronic database created and maintained by the administrator….The registry provides a *centralized resource of all persons or companies furnishing labor or materials* who may file a lien upon the improved property.

(H.F. 675 Explanation, Page 22/ li 18-29; App. 279) (emphasis added).

Here, the public aspects of the notice requirements and the MNLR are on full display, as the interests of lienholders affected by the subcontractors' liens have been affected.

The Court of Appeals' ruling instead eviscerates the purpose of the MNLR and disregards the Legislature's intent to create a *public* database that provides certainty in the residential construction market by requiring affirmative notice of potential subcontractor liens and the priority of those liens *vis a vis* any associated mortgage liens. (FACo Post-Trial Brief, p. 12; App. 774); (FACo Rule 1.904 motion, pp. 7-8; App. 834-835). The lien claimants would take us back to the confusion and uncertainty that reigned prior to the adoption of the new statute, which created the

publicly available MNLR and the requirement of public notice. (FACo Post-Trial Brief, p. 12; App. 774); (FACo Rule 1.904 motion, pp. 7-8; App. 834-835). The Court of Appeals did not address this important argument.[3]

4. Even if Valid Lien Claims Exist, Which FACo Denies, FACo is Still Entitled to Priority.

Furthermore, the Court of Appeals erred when it did not independently conclude that the intervening recording of the FACo mortgages made the mechanics' liens junior and inferior to the FACo mortgage liens (assuming for the sake of argument the mechanics' liens were valid in the first instance). In addition to the plain language of section 572.13A(1), it is undisputed that FACo recorded mortgages on the subject real estate between November 10, 2017, and December 20, 2017 (App. 507-523, 542-558, 577-593, 612-628, 647-663). Yet each and every Notice of Commencement was posted to the MNLR after December 20, 2017. As a result, even if valid mechanics' lien claims exist (which FACo denies), the resultant liens would be junior and inferior to the mortgage liens of FACo.

[3] The Court of Appeals' ruling could even create an opportunity for nefarious actions by builders and subcontractors. Owner/builders and subcontractors could now conspire to create liens on property, then hide those liens from lenders for months or years, only to prime lenders' liens later if doing so will protect the property from the lender's liens. Holding that subcontractors must make the public aware of their liens quickly after work commences upholds the purpose of Chapter 572 and avoids such undesirable results.

This position is supported by section 572.18(1):

> Mechanics' liens posted by a general contractor or subcontractor within ninety days after the date on which the last of the material was furnished or the last of the claimant's labor was performed *and for which notices were properly posted* to the mechanics' notice and lien registry internet site pursuant to sections 572.13A and 572.13B shall be superior to all other liens which may attach to or upon a building or improvement and to the land upon which it is situated, except liens of record prior to the time of the original commencement of the claimant's work or the claimant's improvements, except as provided in subsection 2.

(emphasis added).

Note that the statute re-incorporates the requirement of posting of the Notice of Commencement and Preliminary Notice. *See* Iowa Code §572.18(1) ("for which notices were properly posted to the mechanics' notice and lien registry internet site pursuant to sections 572.13A and 572.13B"). *See also* Iowa Code § 572.18(2) (construction mortgage lien preferred over parties who performed work subsequent to recording). Recall further that the Notice of Commencement is to be placed of record within 10 days of the provision of labor or materials on the work. *See* Iowa Code § 572.13A(2).

Using the dates found by the district court, no party posted a Notice of Commencement or Preliminary Notice prior to the recording of FACo's mortgage liens. (Tr. Ruling, p. 11 [Borst] and 12 [Kelly]; App. 814 and 815). Under Chapter 572, a mechanic's lien is now perfected by posting a verified statement of account on the MNLR. *See* Iowa Code § 572.8(1). Only once a lien is perfected is it entitled

to enforcement. *Id.* at Iowa Code § 572.13B(3)(a) ("once perfected under this chapter is enforceable only to the extent of the balance due"). Under this calculus, the mechanic's liens were not perfected prior to FACo's liens attaching, and therefore are junior to FACo's mortgage liens. Again, no language in the Code provides for the relation back of the subcontractor's claim prior to the filing of the Notice of Commencement or Preliminary Notice. *See* Iowa Code § 572.13A.1; § 572.13A.2.

Further, the Court of Appeals erred when it found that the liens of Kelly and Borst relate back. (Tr. Ruling, p. 21; App. 824). As argued below, there was nothing for the liens to "relate back to" because all of the work was performed prior to the notices posted to the MNLR. (FACo Rule 1.904 motion, p. 7; App. 834). The Court of Appeals relied upon case law which was clearly superseded by the legislative changes to Chapter 572 in 2012. (FACo Rule 1.904 motion, p. 6; App. 833); (FACo's Omnibus Reply in Support of its Rule 1.904 motion, p. 7; App. 834). Thus, it was error for the Court of Appeals to give retroactive enforcement to the mechanics liens.

Finally, the Court of Appeals' decision conflicts with an earlier Court of Appeals case which was the first case to discuss the "new" amendments to Iowa Code Chapter 572. *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d at 676. In *Standard Water*, the Court of Appeals held the purpose of the statute is to

provide the owner with the identity of subcontractors unknown to the owner who might have potential claims against the property and provide a mechanism to force the subcontractor to file notice of any potential claims." *Id.* at 676. This prior holding should have compelled the instant panel to conclude that the same analysis applied here and required diligence is due from a subcontractor when it comes to third party rights like those of FACo. A plain reading of the *Standard Water* case will identify that the rights of third parties were not at issue in the case. The case dealt only with bilateral issue of an owner and a general contractor who did not hire subcontractors. *Id.*

II. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT BORST AND KELLY WERE PREVAILING PARTIES AND ENTITLED TO RECOVER ATTORNEY FEES.

This issue is raised simply to preserve appellate jurisdiction over the attorney fee claims. FACo consistently argued below that it was the only party entitled to attorney fees. (Motion for Summary Judgment, pp. 11-14, Trial Brief, pp. 7-9, and Rule 1.904 Motion [claimants entitled to no relief]; App. 253-255, 828-836).

Should this Court vacate the lien positions of Borst and Kelly (or find their liens are inferior to the mortgage liens of FACo) the underlying award of attorney fees to Borst and Kelly should be vacated as well. At that point, neither Borst nor Kelly would be prevailing lien claimants. *See* Iowa Code § 572.32(1). Consequently, once Borst and Kelly's lien positions are reversed by the appellate

court, the attorney fee awards should be vacated as well. *First Midwest Corp. v. Corporate Finance Services*, 663 N.W.2d 888 (Iowa 2003) (attorney fee award vacated when underlying summary judgment grant reversed); *In re Marriage of Nelson*, 666 N.W.2d 620 (table), 2003 WL 1970399, *3 (Iowa Ct. App. 2003) (in reversing decision of district court, appellate court vacates attorney fee award as party in whose favor fees were awarded below is no longer prevailing party); *In re Marriage of Bechert*, 662 N.W.2d 371 (table); 2003 WL 118480, *3 (Iowa Ct. App. 2003) (same).

CONCLUSION

Finance of America Commercial LLC prays that the Court reverse the decision of the district court in Case No. LACV091167 and the Court of Appeals in this matter. The Iowa Supreme Court should hold the instant mechanic's liens are unenforceable, or to the extent enforceable, junior and inferior to liens of Finance of America Commercial LLC, and remand the case for an award attorney fees to Finance of America Commercial LLC pursuant to section 572.32(2).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Application for Further Review was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on September 7, 2021, pursuant to Iowa R. App. P. 6.1103(1) (2017).

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Application for Further Review is $0.00.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

1. This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt., and contains 5,246 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a).

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