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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

KELLY CONCRETE COMPANY, INC.'S RESISTANCE TO FACo's APPLICATION FOR FURTHER REVIEW
(DATE OF FILING OF COURT OF APPEALS DECISION AUGUST 18, 2021)

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RESPONSE TO "STATEMENT SUPPORTING FURTHER REVIEW"

The "Statement Supporting Further Review" filed by Finance Company of America ("FACo") begins by assuming away FACo's problem. It states that 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…*" (Emphasis supplied). FACo's problem is that Chapter 572 does not contain the requirement urged by FACo.

FACo urged the District Court, and then the Court of Appeals and now this Court to ignore the plain language of the statute in favor of a "legislative purpose" envisioned only by FACo.

FACo urges this Court to ignore the language of Chapter 572 because (according to FACo) innocent mortgage lenders may be surprised when mechanic's liens appear. Stated differently, FACo asks this Court to weigh the equities existing between mechanic's lien holders and mortgage lenders and then to come down on the side of mortgage lenders. FACo's problem (among other things) is that the legislature has already weighed the equities as between mortgage lien holders and mechanic's lien holders. Iowa Code §572.18(1) provides, "mechanic's liens posted by a… subcontractor within 90

days after the date on which the last material was furnished or the last of the claimant's labor was performed and for which notices were properly posted [on the MNLR] shall be superior to all other liens… except liens of record prior to the time of the original commencement of the claimant's work [subject only to an exception not relevant here]. Subsection 3 states "the rights of… encumbrancers who acquire interests in good faith, for valuable consideration, and without notice of a lien perfected pursuant to this chapter, are superior to the claims of all… subcontractors *who have not perfected their liens more than 90 days after the date on which the last of the claimant's material was furnished or the last of the claimant's labor was performed.*" (Emphasis supplied).

Thus, the legislature has expressly dictated that if the mechanic's lien is posted within 90 days of the end of the subcontractor's work, it is superior to the liens of a mortgage lender filed after the work commenced – even if the mortgage lender had no knowledge of the lien.

Because the legislature has explicitly rejected the policy argument urged by FACo, all that remains is to determine whether Kelly and Borst did file their liens pursuant to the provisions of Iowa Code Chapter 572.

FACo's interpretation of the code sections relating to posting has been rejected by the District Court and by the Court of Appeals. As will be seen below, the plain words of the statute support the rulings of the courts below.

BRIEF IN RESISTANCE TO FACo's APPLICATION FOR FURTHER REVIEW

I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE MECHANIC'S LIENS OF BORST AND KELLY ARE VALID AND ENTITLED TO PRIORITY OVER FACO'S MORTGAGE LIENS

A. The Parties

Kelly Concrete Company, Inc. ("Kelly") agrees that the identification of the parties contained in FACo's application is correct.

B. Procedural History

Kelly agrees that the procedural history set forth in FACo's application is correct.

C. Pertinent Dates

Kelly agrees that the dates recited by FACo in division I(C) of the application are accurate. Those dates may be stated more succinctly, to wit: Kelly commenced all of its relevant work prior to the recording of FACo's mortgages. Borst commenced all of its relevant work prior to the recording of FACo's mortgages. After FACo recorded its mortgages Kelly and Borst each filed their "notice of commencement" documents and their "preliminary

notice" documents to the MNLR. Those notices were all filed less than 90 days after Kelly and Borst completed their work.

D. Discussion of the Merits

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)).

FACo's entire argument is grounded upon the erroneous notion that a subcontractor is required by Iowa Code §572.13A(2) to file a notice of commencement within 10 days of the subcontractor commencing work. Section §572.13A(2) says nothing of the kind. While urging this court to construe Chapter 572 as a whole and to give meaning to the words of the statute, FACo fails to set out the statute and never makes any attempt to tie its arguments to the actual words and context used by the legislature. Instead of any quotation of, or citation to, the statutory text, FACo merely asserts, without authority, that under §572.13A(2) "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." The District Court and the Court of Appeals read no such 10 day requirement

applicable to subcontractors in §572.13A(2) and correctly rejected FACo's counter-textual assertion.

Regarding the obligation of an owner-builder or general contractor (not a subcontractor) to post a notice of commencement, Iowa Code §572.13A(1) 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. …

Subsection 2 deals with the rights of a subcontractor in the event that an owner-builder or general contractor fails in its subsection 1 duty. Subsection 2 provides, in relevant part:

> 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)

The District Court and then the Court of Appeals was required to apply the canons of statutory construction to these code sections. They did so correctly.

The word "must" used in subsection 1 states a requirement. The word "may" used in subsection 2 merely confers a power. Iowa Code § 4.1(30). Thus, by using the word "shall" in §572.13A(1) the legislature imposed a duty on general contractors and 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.

Subsection 2's reference to "10 days" clearly marks the beginning of the time when the subcontractor first acquires its discretionary power. That power is acquired when the general or owner-builder fails to post its notice of commencement within the first 10 days. The subcontractor's discretionary power to post a notice of commencement, according to the statutory text, "must" be exercised by a subcontractor "in conjunction with" the posting of any preliminary notice filed by the subcontractor pursuant to §572.13B. The word "must" states a requirement. Iowa Code § 4.1(30). "In conjunction with" is not a defined term in the statute. 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). Standard English dictionaries hold that the idiom "in conjunction" means: "with", "in

combination with" or "together". *See e.g.*, Merriam-Webster Unabridged Dictionary.[1]

Applying these black-letter-law canons of construction, subsection 1 imposes a duty on owner builders and general contractors to post a notice of commencement within 10 days of the start of the project. Subsection 2 addresses what is to be done in the event the owner builder or general fails in its subsection 1 duty. Subsection 2 plainly provides that if the owner-builder or general contractor fails in its duty to post the notice of commencement within 10 days, then the subcontractors "may" (acquire the power to) post a notice of commencement but they are only to file the notice of commencement "in conjunction with" (together with) a preliminary lien notice filed pursuant to §572.13B and that notice of commencement "must" be posted before the preliminary lien notice can be filed.

Once the subcontractors have acquired the power to file a notice of commencement (10 days after the start of the project if the general/owner-builder fails to file) Subsection 2 places no time constraints on the subcontractors.[2]

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

[2] Other sections of Chapter 572 place practical time constraints on the subcontractors. Specifically, subcontractors risk losing a portion of their lien

In its application FACo faults the District Court and the Court of Appeals for failing to follow FACo's interpretation of an "explanation" appended to the statute by the Legislative Service Bureau when the proposed amendment was filed. However, nowhere in its briefing and nowhere in its application for further review does FACo claim that §572.13A is ambiguous. A finding of ambiguity is a judicial prerequisite to the consideration of legislative history. See Iowa Code §4.6(3); Iowa Ins. Inst. v. Core Grp. of the Iowa Ass'n for Justice, 867 N.W.2d 58, 83 (Iowa 2015).

FACo's interpretation of the statute leads to an absurd result. Specifically, FACo states, that "work performed by the subcontractor prior to the posting of the notice of commencement is not subject to any subsequent mechanic's lien…" (Application for Further Review at P. 18.) At the same time, the statute clearly provides that a subcontractor's notice of commencement can only be filed "in conjunction with" its preliminary notice of lien. Iowa Code §572.13A(2). Section 572.22 requires that the preliminary notice state the amount of the lien. Therefore, because a subcontractors notice

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and/or priority if they fail to file within 90 days of completing their work. *See* Iowa Code §§572.11 and 572.18(1). Also, the lien filings must be complete within two years and 90 days after completion of the work. Iowa Code §572.9. Likewise, suits to enforce a mechanics lien must be commenced within two years and 90 days after completion of the work. Iowa Code §572.27.

of commencement and preliminary notice must be filed together and because (according to FACo's theory) a preliminary notice filed with the notice of commencement must ignore all work performed prior to the filing, the subcontractor's claim must necessarily always be zero on the day of filing. A lien securing zero dollars is not a lien. This Court should not adopt a construction of the statute that leads to this absurd result.

FACo attempts to justify its counter-textual reading of the statute by asserting that the sole purpose of the statute is to "give third parties notice of potential liens". This is clearly not the sole purpose of the statute, or even the primary purpose. Rather, the legislature was attempting to balance the equities between trades people who deserve to get paid and property owners who may be victimized by financially irresponsible general contractors. Prior to the amendment of Chapter 572 there were well-publicized instances of general contractors or owner-builders failing to pay subcontractors, after the general/owner-builder had been paid all sums due to them from the property owner. Homeowners were justifiably upset that they paid the contractor/owner-builder only to find that their home was subject to mechanic's liens placed by unpaid subcontractors. Part of the resolution of the perceived problem was the invention of the notice of commencement. Somewhat simplified, the statute now provides that if a notice of

commencement is filed, then the liens of subcontractors are only enforceable to the extent that the general/owner-builder has not been paid. Thus, the purchaser of a new home (or his/her lender) needs only to check to see if a notice of commencement has been filed. If one has been filed, then the purchaser (or the purchaser's lender) is protected so long as the contract price for the purchase of the home is paid.

The perceived issue that drove the legislative changes, as just described, has nothing to do with this case. The homes in question were not sold and the owner builder was never paid. Here, the task of the Court of Appeals was to interpret the words of the statute. It did so correctly.

At page 20 of its application, FACo argues that Kelly's notice of commencement was not timely because it was filed more than 10 days after Kelly commenced work. However, as shown above, Kelly had no obligation under the statute to file its notice of commencement within 10 days. In fact, it never had to file a notice of commencement until it filed its preliminary lien notice. There was no need – in fact no ability – to file a preliminary lien notice until Kelly had an unpaid balance.

FACo next takes the District Court to task claiming that, "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." (App. 822.) This is a misinterpretation of the District Court's order, as the District Court itself said. After the District Court entered its ruling, FACo filed a Rule 1.904(2) motion to reconsider. That motion claimed, among other things, that the District Court misapplied Standard Water. In response to that claim, the District Court noted (correctly) that its original ruling referenced Standard Water only to the extent that Kelly and Borst did not need to mail lien notices to the owner-builder. (App. 911.) The District Court was noting that, pursuant to §572.13B(2), a subcontractor's preliminary lien notice must be mailed to the property owner, except that such notice need not be mailed to an owner-builder. The District Court speculated that the legislature mandated the different treatment of owner-builders because the owner builder was presumed to already know the identity of its subcontractors. The court merely cited Standard Water in support of this presumption. (App. 822.) The citation to Standard Water was unnecessary to the court's reasoning or conclusion. It would have been sufficient if the District Court had merely noted that, pursuant to §572.13B(2), a subcontractor need not mail notice of its lien to an owner-builder.

Finally, beginning at page 24 of its application, FACo argues that even if Kelly and Borst have valid lien claims, FACo is still entitled to priority.

This is plainly wrong. As noted above Iowa Code §572.18(1) provides, "Mechanics' liens posted by a … 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 572.13A and 572.13B shall be superior to all other liens… except liens of record prior to the time of the original commencement of the claimant's work or the claimant's improvements.

Once it was established that the liens were properly filed – as shown by the Secretary of State's acceptance of the lien notices, by the District Court's ruling and by the Court of Appeals ruling – then the priority established by the District Court was correct.

FACo goes on to assert that it should have priority over every lien perfected after the date the FACo mortgage was recorded. This is directly contrary to the provisions of Iowa Code §572.18(3). That subsection explicitly provides that mortgage lien holders have priority over liens filed after the mortgage is recorded <u>except for those liens perfected less than 90 days after the last work was done</u>. As to those liens that were perfected less than 90 days after the work was completed subsection 1 applies and priority

is established by the date work or materials were first provided. Once again FACo simply complains that it does not like the statute the legislature wrote.

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

FACo admits that the issue raised in this section of its application is raised "simply to preserve appellate jurisdiction over the attorney fee claims." This division of the Application argues that if Kelly and Borst ultimately lose this appeal they will not have "prevailed" for purposes of collecting attorney fees. Conversely, FACo tacitly admits that if the Kelly and Borst liens are valid and entitled to priority, as found by the ruling of the Court of Appeals, Kelly and Borst are "prevailing parties".

The attorney fee argument need not be briefed in detail in this resistance. Kelly agrees that FACo has done what is required to preserve its argument for appeal. In the unlikely event that the Supreme Court accepts this matter for further review, Kelly agrees that the District Court's entire ruling (including the attorney fee ruling) will be subject to review. The merits of FACo's attorney fee argument can be briefed in connection with that further review.

CONCLUSION

Kelly concrete Company prays that the Supreme Court deny the application for further review.

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This resistance complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because it contains 2,907 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This resistance 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	2021-09-15
Signature	Date

Certificate of Filing and Service

I certify the preceding Appellee's Resistance to Applications was filed with the Supreme Court of Iowa by electronically filing the same with the Iowa Supreme Court Clerk on September 15, 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 September 15, 2021.

By: ________________________________

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