IN THE IOWA SUPREME COURT

SUPREME COURT NO. 22-2098

CHARLES L. SMITH, TRUSTEE IN THE BANKRUPTCY OF METRO CONCRETE, INC.,
Plaintiff,

v.

DES MOINES AREA COMMUNITY COLLEGE,
Appellee/Defendant,

ROCHON CORPORATION OF IOWA, INC., and GRAPHITE CONSTRUCTION GROUP, INC.,
Appellants/Defendants.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE ROBERT B. HANSON

APPELLEE DES MOINES AREA COMMUNITY COLLEGE'S APPLICATION FOR FURTHER REVIEW FROM THE DECISION OF THE COURT OF APPEALS DATED FEBRUARY 7, 2024

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QUESTIONS PRESENTED FOR FURTHER REVIEW

1. May a co-defendant seek relief against another co-defendant in an Iowa Code Chapter 573 action without filing a claim against it?

2. Does a general contractor's request for full release of retainage before completion of a public construction project constitute a request for early release of retainage under section 573.28? If so, does a general contractor's subsequent request for retainage after bonding off a claim under 573.16(2) require a public owner to release funds in the amount of the bond even if doing so would reduce retainage to less than 200% of the value of unfinished work contrary to its rights under section 573.28(2)(c)?

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STATEMENT SUPPORTING FURTHER REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.1103, Defendant-Appellee Des Moines Area Community College ("DMACC") requests the Iowa Supreme Court grant its application for further review of the Iowa Court of Appeals' Decision filed on February 7, 2024.

The Court of Appeals erred in concluding that DMACC failed to preserve error on its argument that the district court lacked authority to enter an order on Rochon Corporation of Iowa, Inc. n/k/a Graphite Construction Group, Inc.'s ("Graphite") "motion to compel [DMACC] release of retainage." Indisputably, DMACC raised this issue to the district court, and it was ignored in the court's order. Having prevailed on the motion, however, existing Iowa case law provides that DMACC's argument was preserved even though the district court ignored it. *See EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002) ("Ordinarily, 'a successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected' by the trial court." (quoting *Johnston Equip. Corp. v. Indus. Indem.*, 489 N.W.2d 13, 16 (Iowa 1992)). As such, the Court of Appeals should have considered DMACC's argument that the district court lacked authority to enter its order in the first place.

The Court of Appeals also erred in determining that Graphite did not invoke section 573.28 and/or DMACC could not invoke the protections of 573.28(2)(c), when, on January 4, 2022, Graphite submitted a payment application requesting the

full amount of the retainage fund despite knowing the Project was incomplete at that time. Given the timing of Graphite's request, this payment application can *only* be construed as a request for early release of retainage, as it was construed by the architect for the Project. Also, Graphite's request for payment predated Metro's section 573.7 claim by more than three weeks. As such, the Court of Appeals erred in determining that DMACC was not entitled to retain 200% of the value of remaining labor and materials needed to finish the Project, as was its right under section 573.28(2)(c).

This Court should grant this application for further review because the interplay of sections 573.16 and 573.28 is an issue of first impression and therefore is a question of law that should be settled by this Court under Rule 6.1103(2). Furthermore, this Court should grant this application under Rule 6.1103(4) because appropriate handling of retainage funds in public construction projects is an issue of broad public importance as it impacts hundreds of public improvement projects engaged in by cities, counties, school districts, colleges, the State of Iowa, and other public entities across the state on an annual basis.

STATEMENT OF THE CASE AND FACTS

This case arises out of a lawsuit initiated by Charles L. Smith, Trustee in the Bankruptcy of Metro Concrete Inc. ("Metro") against Defendants, Graphite, the Appellant, and DMACC, the Appellee. This lawsuit involves the public construction project identified as the "Building 13 Automotive Addition & Renovation" (the

"Project") owned by DMACC. Graphite was the principal contractor awarded the contract for the Project. Graphite hired Metro as a subcontractor to provide certain labor and materials for the Project. The Project architect was DLR Group ("DLR").

Graphite's Payment Application No. 29 – Request for Release of Retainage

On January 4, 2022, Graphite submitted Payment Application No. 29 to DMACC, seeking full release of retainage funds. *See* App. 248–61. Graphite does not dispute that the Project was incomplete at that time. In fact, as of January 4, 2022, the Project was far from complete. *See* Baxter Affidavit, ¶ 5, App. 267. Significant work remained for Graphite to complete the Project. *See* Baxter Affidavit, ¶ 6, App. 267. The typical punch list of remaining work that is created at, or around, substantial completion had not even been created, let alone completed by Graphite. *See* January 5 Email from DLR, App. 233; Baxter Affidavit, ¶ 6, App. 267.

To reiterate, Payment Application No. 29 was sent via email by Graphite to the Project architect, DLR, on January 4, 2022.[1] *See* App. 248 – 261 (payment application); App. 231 (January 4, 2022 email). Per this Payment Application, Graphite requested all retainage then held by DMACC, which totaled $510,004.86, be released at this point in time that was undisputedly prior to final completion of the Project. *See* App. 248 ("8. CURRENT PAYMENT DUE $510,004.86. 9. BALANCE TO FINISH, INCLUDING RETAINAGE $0.00").

[1] This version of Payment Application No. 29 in the Appendix contains the redlines made by the Project architect, DLR, as part of DLR's partial certification of the Payment Application in the amount of $351,814.86.

On January 5, 2022, Project architect DLR, responded that, "[a]t this time your final retainage pay application cannot be certified. – We need to get a list of items not completed yet. . . ." *See* App. 231. In addition, as of that date, Graphite had yet to fulfill other contractual requirements necessary to receive the final retainage payment, including submission of the required operations and maintenance manuals and warranties or required consent of surety forms. *See* January 5 Email from DLR, App. 233; Baxter Affidavit, ¶ 6, App. 267.

On June 8, 2022, DLR sent an email to Graphite, again reiterating the outstanding items that needed to be satisfied per the Contract and Iowa Code Chapter 573, prior to any final payment and requested release of the retainage. *See* June 8 Email from DLR to Graphite, App. 232; Baxter Affidavit, ¶ 10; App. 268. Thereafter, and per its most recent site observations on June 13, 2022, DLR created a punch list, monetizing the value of the unfinished work at $79,095. *See* July 21 Letter from DLR to Graphite with enclosed punch list, App. 243-244 and 247; (referencing "Date(s) of Observation: updated June 13, 2022"); Baxter Affidavit, ¶ 11, App. 268.

On August 4, 2022, Graphite finally provided the Consent of Surety to Partial Release of Retainage to DLR. *See* Baxter Affidavit, ¶ 13, App. 268. Consequently, on August 5, 2022, DLR sent a letter to DMACC partially certifying Graphite's Payment Application No. 29, to allow for a partial release and payment of the retainage in the amount of $351,814.86, which was the amount of all retainage

($510,004.86) minus double ($158,190) the amount of the value of the work left to be completed ($79,095). *See* August 5 Letter from DLR to DMACC with partial certification of PA 29, App. 247; *see also* Baxter Affidavit, ¶ 14, App. 268.

On August 5, 2022, DMACC sent out notice of a special meeting for August 12 for formal approval of payment to Graphite in the amount of $351,814.86, and on August 12, DMACC issued payment in the amount of $351,814. *See* Proof of Payment, App. 269; *see also* Baxter Affidavit, ¶ 15, App. 268.

Metro's Chapter 573 Claim & Lawsuit

After Graphite's January 4, 2022 request for full release of retainage prior to final completion of the Project, on January 26, 2022, Graphite's subcontractor, Metro, filed a Claim for Payment of Labor and Materials under Iowa Code section 573.7 ("Claim") in the amount of $217,221.32. Then, after receiving a 30-day demand to initiate suit from Graphite, on April 22, 2022, Metro filed an action under Chapter 573 to enforce its Claim. *See* App. 9–18. Again, at this point, completion of the Project had not yet occurred. Baxter Affidavit, ¶ 11, App. 268. On May 8, 2022, Graphite obtained a surety bond in double the amount of Metro's claim, thus "bonding off" the Claim under section 573.16(2).

Because Graphite's January 4, 2022 Payment Application sought full release of the retainage funds prior to final completion, such request for release of retainage could *only* be construed by DMACC as a request for early release of retainage under 573.28, or at least Graphite's *attempted* request for early release of retainage under

573.28. In this appeal, however, Graphite somehow claims that it never invoked 573.28. And remarkably, the Court of Appeals somehow agreed, concluding that Graphite was able to circumvent the protections for all public entity-owners and subcontractors under Iowa Code section 573.28(2)(c) (allowing withholding of retainage in the amount of 200% of the incomplete work) merely by not expressly invoking that section.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING DMACC HAD NOT PRESERVED ERROR ON THE DISTRICT COURT'S LACK OF AUTHORITY TO RULE ON GRAPHITE'S MOTION TO COMPEL.

The Court of Appeals erred in concluding DMACC failed to preserve error on its argument that the district court lacked authority to enter an order on Graphite's "motion to compel [DMACC] release of retainage." Indisputably, DMACC raised this issue to the district and but it chose to ignore it in its order. *See* App. 273–74 (noting review all of briefs and mentioning DMACC's Sur Reply). Having prevailed on the motion, existing Iowa case law provides that DMACC's argument was preserved even though the district court ignored it. *See Wassom v. Sac Cnty. Fair Ass'n*, 313 N.W.2d 548, 550 (Iowa 1981) ("A party may appeal only from an adverse judgment. A familiar and long-established rule prohibits any appeal from a finding or conclusion of law not prejudicial, no matter how erroneous, unless the judgment itself is adverse."); *see also EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002) ("Ordinarily, 'a successful party need

not cross-appeal to preserve error on a ground urged but ignored or rejected' by the trial court." (quoting *Johnston Equip. Corp. v. Indus. Indem.*, 489 N.W.2d 13, 16 (Iowa 1992)).

A. DMACC's argument for vacating the district court's judgment was preserved and should have been considered by the Court of Appeals.

The Court of Appeals erred in determining it could only consider DMACC's arguments that were raised to, but ignored by, the district court that offered alternate grounds for *affirming* the district court's order on appeal. *See* COA Decision, Footnote 5. Because DMACC's argument that the district court lacked authority to consider Graphite's motion would have resulted in *vacation* of district court's order, rather than an *affirmance*, the Court of Appeals reasoned DMACC failed to preserve error on this argument. *Id.* This conclusion was plainly legal error.

Iowa case law clearly permits appellate courts to consider arguments raised to, but ignored by, the district court to affirm, reverse, or provide other relief on appeal. *See e.g.*, *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811–12, 818–19 (Iowa 2000) (reversing district court ruling quieting title in city and remanding for judgment quieting title in plaintiff based upon equitable estoppel, an argument raised by plaintiff with the district court but was not considered by it). For example, in *Kern v. Palmer College of Chiropractic*, a discharged professor sued his former employer for breach of contract and several agents of the college for tortious interference with a contract. 757 N.W.2d 651, 654 (Iowa 2008). The district court

granted summary judgment in favor of the defendant college, finding as a matter of law that the professor was terminated for cause. *Id.* at 654. The district court further granted summary judgment in favor of all three defendant agents, reasoning no tortious interference could be present when no underlying breach of contract was present. *Id.* at 661. However, the Iowa Supreme Court reversed the grant of summary judgment in favor of the defendant college and then proceeded on to assess summary judgment on the tortious interference claims on the merits, ultimately reversing the grant of summary judgement as to one of the three defendant agents. *Id.* at 661–66. In doing so, it relied on arguments presented to, but not ruled on, by the district court, as is the case here.

In light of the foregoing, DMACC's argument that the district court's order should be vacated should have been considered by the Court of Appeals. Undoubtedly inherent to the rule that an appellate court may consider arguments raised to, but ignored by, the district court is that of efficiency. It makes little sense to require a party to move the district court to reconsider or enlarge an order upon which it prevailed in order to obtain a decision on an issue that was raised in the briefing but not relied upon by the court in ruling in its favor *just in case* the losing party should appeal the order. But that is the Court of Appeals' decision here. There is no principled reason why this rule should apply only in circumstances to affirm or reverse the district court but not to the vacate the district court's judgment. To the extent this issue presents an issue of first impression and not merely an application

of an existing rule, this Court should rule that an appellate court may consider any argument by a prevailing party that was raised to, but ignored by, the district court, regardless of whatever form the appellate court's relief may take.

B. Graphite was required to bring an action against DMACC to seek the relief it seeks.

Furthermore, the Court of Appeals' reliance on section 573.16(1)'s authorization to "[t]he public corporation, the principal contractor, any claimant for labor of material who has filed a claim, or the surety on any bond given for the performance of the contract," to "bring an action in equity . . . to adjudicate all rights to said fund," does not excuse Graphite from procedural requirements to bring an action against DMACC. Indeed, the text of section 573.16 merely authorizes the enumerated parties to "bring an action" to adjudicate all rights. This section should not be read to throw out all other procedural requirements under the Iowa Rules of Civil Procedure.

Instead, this section merely allows a general contractor to file claims against the public entity under Chapter 573 if it chooses to do so, which Graphite did not do. For example, in *Saydel Community School Dist. V. Denis Della Vedova*, 735 N.W. 202 (Iowa App. 2007), the Court had authority to hear the general contractor's claim against the public entity because the general contractor filed a counterclaim against the District, arguing the District had improperly retained funds. *Id.* at *1. ("DDVI [the general contractor] filed an answer and a counterclaim alleging the District

could only retain $7186.28 and its refusal to turn over the rest of the retained funds was a breach of contract and a violation of chapter 573. . . . Later DDVI filed a motion for summary judgment."); *see also Midland Restoration Co. v. Sioux City Community School District,* No. 02-0625 (Iowa Ct. App. May 29, 2003) ("When the District [who was the public entity-owner] refused payment, Midland sued [for breach of contract] under Iowa Code section 573.16 (1997) . . . , which allows a contractor who provided material and labor on a public improvement to seek adjudication of rights to funds the public corporation retained from the contract price.").

Importantly, Graphite did not file a cross claim, or any other type of action, against DMACC. Graphite and DMACC were merely co-Defendants in the litigation brought by Metro, which was then stayed pending arbitration between Metro and Graphite, at which point Graphite filed its "Motion to Compel" under which it sought, and the Court of Appeals has now granted to Graphite, injunctive and monetary relief in the form of "an order granting payment from the retention fund in the amount of $82,627.78, plus interest." *See* COA Decision, p. 28.

Graphite's failure to bring an action against DMACC deprived the district court of authority to hear the motion in the first place. When a litigant fails to satisfy statutory requirements in a case where the district court has subject matter jurisdiction, the district court lacks authority to hear the case. For example, in *City of Des Moines v. Des Moines Police Bargaining Unit Association*, the City of Des

Moines brought a declaratory judgment action contending its collective bargaining agreement with the Des Moines Police Bargaining Unit Association was illegal. *See* 360 N.W.2d 729, 729 (Iowa 1985). On appeal from the district court's ruling in favor of the City, the Iowa Supreme Court determined, *sua sponte*, that the City's failure to exhaust administrative remedies resulted in a failure to invoke the district court's authority to hear the case. *Id.* at 733.

This was also the result in *Christie v. Rolscreen Co.*, 448 N.W.2d 447 (Iowa 1989). There, the Court affirmed the district court's directed verdict in favor of the defendant, holding that the plaintiffs' failure to bring their suit in the judicial district where their employer's allegedly discriminatory acts occurred—a requirement of Iowa's employment discrimination statue—failed to invoke the court's authority to hear the case. *See* 448 N.W.2d at 451.

Similarly here, Graphite's failure to bring an *any claim* against DMACC precluded the District Court from exercising its authority to hear Graphite's motion as both Chapter 573 and Iowa's Rules of Civil Procedure generally require an action be filed against an opposing party in order for relief to be granted. *See* Iowa Code § 537.7 (allowing persons who provided labor and materials on a public improvement project to submit a "written statement of the claim" for such labor and materials); Iowa Code § 537.15 (similarly allowing a person to submit "a claim against the retainage or bond"); Iowa R. Civ. P. 1.401 ("There shall be a petition and an answer, a reply to a counterclaim denominated as such; an answer to a cross-claim, if the

answer contains a cross-claim; a cross-petition, if a person who was not an original party is summoned . . .; and an answer to a cross-petition, if a cross-petition is served."); Iowa R. Civ. P. 1.403(1) ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or cross-petition, shall contain a short and plain statement of the claim showing the pleader is entitled to relief and a demand for judgment for the type of relief sought."); Iowa R. Civ. P. 1.405(1) ("[An answer] may contain a counterclaim which must be in a separate division."); Iowa R. Civ. P. 1.901.

C. Graphite's motion sought injunctive relief or summary judgment but did not satisfy the evidentiary requirements for such motions.

While the Court of Appeals refused to consider DMACC's argument that the district court lacked authority to rule on Graphite's motion, it also did not address DMACC's argument that, even assuming the motion was proper, Graphite's lack of evidentiary support violated due process requirements for dispositive relief, as set forth in Iowa Rules Civil Procedure 1.1502(2) (injunctive relief) and 1.981(1)–(8) (summary judgment).

Although captioned as a "Motion to Compel [DMACC] to Release Retainage," Graphite's motion was not filed as a discovery motion under Iowa R. Civ. P. 1.517, and it did not seek an order compelling DMACC to produce documents, testimony, or other information. Instead, Graphite's motion sought an order forcing DMACC to pay disputed money to Graphite. This is not a motion to

compel; it is a motion for affirmative injunctive relief or for partial summary judgment finding the disputed money was owed to Graphite and must be paid to Graphite. But motions for injunctive relief or summary judgment must be supported by admissible evidence. *See, e.g.*, *PIC USA v. N.C. Farm P'ship*, 672 N.W.2d 718 (Iowa 2003) (requiring applicant to show likelihood of success on the merits for the court to grant an injunction); Iowa R. Civ. P. 1.981(1)–(8) (requiring a statement of undisputed material facts; appendix with specific reference to pleadings, depositions, interrogatories and affidavits; and memorandum of authorities).

DMACC had no notice of Graphite's claim until its motion was filed. DMACC did not have an opportunity to serve or obtain discovery from Graphite. Or take depositions to substantiate any of the allegations the motion contained. It's entirely possible, if not probable, that fact issues would have precluded summary judgment had Graphite followed the applicable rules followed. In considering Graphite's motion, the district court deprived DMACC of these procedural protections.

For these reasons, this Court should dismiss this appeal, vacate the District Court's ruling, and remand for further proceedings.

II. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S ORDER DENYING GRAPHITE'S MOTION TO RELEASE RETAINAGE

Next, the Court of Appeals erred in prioritizing Graphite's demand for release of retainage under section 573.16(2) over DMACC's right to retain 200% of the

value of unfinished work under section 573.28(2)(c). By ordering reduction of the retainage fund to go under 200% of the value of unfinished work in response to Graphite's tactic of bonding off one claim by a subcontractor who alleges it has not been paid, the Court of Appeals' decision sets a precedent that jeopardizes payment to subcontractors on public construction projects with unfinished work. As such, the Court of Appeals decisions fails to support the legislature's intent to "protect subcontractors and materialmen against nonpayment." *Star Equip., Ltd. v. State, Iowa Dep't of Transp.*, 843 N.W.2d 446, 455 (Iowa 2014).

In addition, the Court of Appeals decision entirely defeats the legislature's purpose in providing owners with the protection under section 573.28(2)(c) to continue to retain 200% of the value of unfinished work whenever a public entity is confronted with a request for release of retainage prior to final completion.

Indeed, under the Court of Appeals' rationale, a general contractor can simply ask for early release of retainage at any time prior to final completion without "invoking" section 573.28 and the protections under such section for subcontractors—to a ten-day prior notice of such request for early release of retainage—and owners—to retain 200% for unfinished work—go out the window. The Court of Appeals' precedent would forever obliterate the rights and protections of subcontractors and owners to the benefit of general contractors who can simply get around those protections by not requesting early release of retainage in accordance with Iowa Code section 573.28.

A. Graphite invoked section 573.28 when it requested payment of the full retainage prior to completion of the Project.

The Court of Appeals erred in relying on Graphite's assertion it did not invoke section 573.28. As discussed above, on January 4, 2022, Graphite submitted Payment Application No. 29 requesting release of all retainage then held by DMACC, which totaled $510,004.86, which was undisputedly prior to final completion of the Project. *See* App. 248. In response, Project architect DLR, responded that the early request for retainage could not be certified because it needed a punch list of unfinished work. *See* App. 231. This request for release of retainage was not accompanied by the required prior 10-day notice to subcontractors, and in any event, this request predated Metro's 573.7 claim by three weeks and was made at a time that Graphite knew the Project was incomplete. To reiterate, Graphite's failure to satisfy the notice requirements of, and/or failure to expressly "invoke" section 573.28 does not preclude DMACC from recognizing this request for what it is: a request for early release of retainage under section 573.28. Indeed, under the Contract and Chapter 573, it could not be anything else.

B. Legislative intent favors prioritizing retainage for unfinished work on public construction projects to protect subcontractors from nonpayment and owners from the potential consequences of unfinished work.

There is no appellate case law that applies or interprets section 573.28, let alone any case that addresses the interplay between section 573.28 and section 573.16. *See* COA Decision, p. 18. Accordingly, determining which provision should

take priority over the other when both are invoked by the principal contractor is an issue of first impression for this Court.

"The goal of statutory construction is to determine legislative intent." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). Iowa courts construe chapter 573 "'liberally with a view to promoting its objects and assisting the parties in obtaining justice.'" *Lennox Indus.*, 320 N.W.2d at 578 (quoting *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692, 694 (Iowa 1980)). The court "derive[s] legislative intent not only from the language used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 49 (Iowa 2012) (internal quotation marks omitted).

It is well-established that the purpose of Iowa Code Chapter 573 is to "protect subcontractors and materialman against nonpayment." *See, e.g.*, *Star Equip*., 843 N.W.2d at 455. It is *not* for general contractors to utilize the statute to its benefit. "All provisions of the chapter should be considered as parts of a connected whole and harmonized if possible." *Sinclair Refin. Co. v. Burch*, 16 N.W.2d 359, 361 (Iowa 1944).

Chapter 573 protects subcontractors and material suppliers from nonpayment in various ways. The up to five percent retainage is expressly intended "for payment of claims for materials furnished and labor performed." Iowa Code § 573.13; *see*

also Star Equip., 843 N.W.2d at 452 (noting that subcontractors unpaid by the principal contractor can obtain funds through retainage funds or claims against a surety bond).

Notably, the general rule regarding retainage, found in Section 573.14(1), *requires* that the public entity retain the retainage fund (when the public entity has chosen to withhold retainage) for a period of thirty days after the final completion and acceptance of the improvement. *See* Iowa Code § 573.14. Then, if, at the end of the thirty-day period, claims are on file, the public entity shall continue to retain from the unpaid funds a sum equal to double the total amount of all claims on file. The remaining balance of the unpaid fund—or if no claims are on file, the entire unpaid fund—shall be released and paid to the contractor. *Id.*

However, the general contractor does not necessarily have to wait for the payment of retainage until expiration of 30 days after final completion and acceptance. Instead, section 572.28(2) governs that situation, first, prescribing the proper method by which the general contractor has to request early release of retainage prior to final completion, which Graphite failed to do, and, second, by providing protections when a public entity is met with a request for early release of retainage, by allowing the public entity to continue to withhold 200% of the value of unfinished work, which the Court of Appeals failed to recognize.

In fact, section 573.28 expressly notes that the 200% holdback protection in subpart 28(2)(c) is an exception to, and thus takes precedence over, all other sections

of Chapter 573, with the opening language of: "2. Payments made by a governmental entity or the department for the construction of public improvements and highway, bridge, or culvert projects shall be made in accordance with the provisions of this chapter***, except as provided in this section***. . . . " Iowa Code § 573.28(2) (emphasis added).

Moreover, the last sentence of subsection 573.16(2) should be interpreted through the lens of the entire subsection. The first sentence references the 30-day demand and the situation in which the subcontractor fails to file its action within that 30-day period, stating: "2. Upon written demand of the contractor served. . . , an action shall be commenced within thirty days, otherwise **the retained and unpaid funds *due the contractor* shall be released**." Iowa Code § 573.16(2). The last sentence then references the reverse situation in which the action is filed and the general contractor bonds off the claim, in which case the public entity shall pay to the contractor "the amount of funds withheld." *Id*. The aforementioned two sentences should be read together for context. *See Sinclair Refin. Co.,* 16 N.W.2d at 361. Here, Graphite served Metro with a 30-day demand, and Metro filed its action within 30 days, on April 22, 2022. *See* App. 9–18. However, if Metro had not filed its action, then, as of the 31st day, Metro's Claim would have been extinguished per operation of the aforementioned statute, at which point DMACC would have been required to pay any retained and unpaid "due the contractor." At that point, based upon the various provisions of Chapter 573, the retainage (including the retainage

representing Metro's Claim) would not have been "due" Graphite, including because Graphite had not properly requested early release of retainage in accordance with section 573.28 and because DMACC otherwise had the right under section 573.28 to withhold 200% the value of unfinished work when confronted with Graphite's request for release of retainage prior to the completion of the Project. Likewise, DMACC was not obligated to set aside all other reasons for withholding under Chapter 573 merely because Graphite bonded off one chapter 573 claim from one subcontractor. Instead, in this situation, the public entity is only required to pay the amount *due the contractor* after the bonded off claim is removed as one of the bases for the public entity's withholding of retainage, which is what DMACC did. Other bases remained; here, the other basis was DMACC's right to withhold for unfinished work, but in other projects, those bases may include a public entity's right to continue to withhold double the amount of any other subcontractor's chapter 573 claims. This Court cannot look at the last sentence of section 573.16(2) in isolation, but must instead look at it in context of the other rights and protections under Chapter 573.

The Court of Appeals erred in ruling that Graphite's section 573.16(2) claim for bonding off one claim, Metro's Claim, should supersede DMACC's right to retain 200% of the value of unfinished work under section 573.28(2)(c). Depletion of the retainage fund in favor of the principal contractor while the Project requires

additional work activity undermines the fundamental purpose of Chapter 573: to protect subcontractors. *See, e.g.*, *Star Equip*., 843 N.W.2d at 455.

Indeed, section 573.28(2)(c)'s requirement that the funds be retained at 200% of the value of labor and materials yet to be provided is a key protection for subcontractors continuing to work on the project. That retainage fund is specifically meant to compensate these subcontractors in the event that additional claims arise before completion. Moreover, it gives the owner assurance that it can address any remaining issues on the project and compensate subcontractors in a timely manner. In other words, the 200% retainage requirement gives both subcontractors and owners the assurance and protection necessary to carry the project to final completion.

Graphite's interpretation allows this fund to be drained, placing the principal contractor's interests over all other parties to the project. This result disrupts the delicate financial stability of public construction projects and untimely jeopardizes an owner's ability to pay and a subcontractor's right to receive compensation for their work. The unworkable interpretation proposed by Graphite does not foster the financial protection envisioned by the Iowa Legislature in crafting Chapter 573 and runs afoul of its most fundamental principles.

CONCLUSION

This Court should grant DMACC's Application for Further Review and reverse the decision of the Court of Appeals, vacate the district court's order, and

remand for further proceedings because the district court lacked authority to enter the order in the first place. Alternatively, this Court should vacate the Court of Appeals decision and affirm the district court's order for the reasons described herein.

REQUEST FOR ORAL ARGUMENT

Des Moines Area Community College respectfully requests oral argument in this case.

ATTORNEY'S COST CERTIFICATE

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

By /s/ Jodie McDougal

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Appellee's Application for Further Review was served by electronic filing and electronic delivery via EDMS system on February 27, 2024, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

By /s/ Jodie McDougal

CERTIFICATE OF FILING

The undersigned certifies that the foregoing Appellee's Application for Further Review was filed with the Iowa Supreme Court by electronically filing the same on February 27, 2024, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.302(1).

By /s/ Jodie McDougal

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

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By /s/ Jodie McDougal
Signature

February 27, 2024
Date