THE IOWA SUPREME COURT

No. 17-1169
MONROE COUNTY

WINGER CONTRACTING COMPANY
Plaintiff – Appellant,

-vs-

CARGILL, INC.
Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR MONROE COUNTY
IOWA SPECIALTY BUSINESS COURT

THE HONORABLE JOHN D. TELLEEN, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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ARGUMENT IN REPLY

INTRODUCTION

This case reduces to a single legal issue which forms the core of the appeal and about which the parties and the district court have gone round and round: *When a lessor and lessee participate in a major construction project, is the lessor's land subject to a mechanic's lien for the lessee's failure to pay third party laborer and material suppliers when the lessor knowingly receives the service.* The district court said "no". With all due respect that was the wrong answer.

The district court got it wrong because it accepted Cargill's version of the facts, which were wrong. Except for an unnecessary diversion regarding legislative intent, which will be dealt with later in this brief, all errors in this case flow from the district court's wrong answer. By applying well-established law to uncontested facts, this Court can correct all errors and reverse the district court's judgment denying summary judgment to the lienholders.

I. THE DISTRICT COURT ERRED WHEN IT HELD "IT IS NO LONGER SUFFICIENT [UNDER IOWA CODE § 572.2] TO SHOW A CONTRACT WITH THE OWNER'S AGENT; THERE MUST BE A CONTRACT WITH THE OWNER BEFORE THE LIENHOLDER'S LIEN ATTACHES TO THE LAND BELONGING TO THE OWNER UPON WHICH THE BUILDING SITS."

ARGUMENT

Cargill convinced the district court that the 2007 Amendment, (HF 774) to the Iowa Mechanics Lien Statute, Iowa Code Chapter 572 abrogated the law of agency. Cargill went too far and is now faced with the insurmountable problem of statutory construction.

Winger submits this is a threshold issue for the case. Resolution does not involve the facts but is strictly a legal issue regarding the interpretation and effect of the 2007 Amendment (HF 774) to Iowa Code Chapter 572. Winger urged, that using the traditional rules of statutory construction, it is obvious the district court came to the wrong conclusion. Iowa Code §4.4 is the starting point for statutory construction, and, if an ambiguity exist, one proceeds to an analysis under Iowa Code §4.6. Strangely, Cargill ignored the argument. It chose not to reference either Iowa Code §§ 4.4 or 4.6. Instead, it argued facts relating to the relationship between Cargill and HFCA, and the *Denniston & Partridge Co. v. Romp*, 244 Iowa 204, 56 N.W.2d 601 (1953) and *Stroh Corp. v. K & S Dev. Corp.*, 247 N.W.2d 750

(Iowa 1976), hereinafter the *Romp* and *Stroh* rules, regarding the lessor-lessee relationship *vis a vis* mechanics liens, both of which are irrelevant to the legal issue of the correctness of the district court's interpretation of Amendment (HF774) requiring a direct contract with the landowner.

The lessor-lessee-mechanic's lien situation has been a thorny issue for the court for nearly a century, but a well-developed body of caselaw has evolved which brings clarity to the situation. The jurisprudence is founded upon the theory that the lessor, either explicitly by terms in the lease which require the lessee to build or improve the property or implicitly because of the duties or obligations imposed on the lessee, or by conduct such as directly or indirectly financing the improvement, has consented to or otherwise authorized the lessee to become the lessor's contracting agent to secure labor and materials attendant to the construction required by the lease. Those issues, and that caselaw, are before the court in Division II. The district court, by simply saying that a labor or material supplier must have a direct contract with the landowner, has disregarded those considerations and ignored that body of caselaw.

Statutory Construction

Both parties, in addressing the construction of Amendment HF 774 to Iowa Code Chapter 572, have expended significant briefing resources, i.e.

17 pages or approximately 22% of Winger's brief, and twenty-six pages or 34% of Cargill's brief. Clearly, there is a dispute regarding interpretation which could only result from ambiguity. Two weeks ago, the Court addressed statutory construction in the context of the Iowa Uniform Pre-Marital Agreement Act, Iowa Code Chapter 596. Justice Hecht, speaking for the Court in *In re Erpelding*, No. 16-1419, 2018 Iowa Sup. LEXIS 19, at *7-8 (Mar. 2, 2018) addressed ambiguity as the threshold issue for applying the traditional and statutory rules of construction, "Because we find both interpretations of section 596.5(2) are reasonable, we conclude the statute is ambiguous. Therefore, we resort to our tools of statutory construction."

As summed up by Erpelding, "If the statute is unambiguous, we do not search for meaning beyond the statute's express terms. Id. However, if the statute is ambiguous, we consider such concepts as the "object sought to be attained"; "circumstances under which the statute was enacted"; "legislative history"; "common law or former statutory provisions, including laws upon the same or similar subjects"; and "consequences of a particular construction." Iowa Code § 4.6; accord State v. McCullah, 787 N.W.2d 90, 95 (Iowa 2010). Additionally, we consider the overall structure and context of the statute, Rolfe State Bank, 794 N.W.2d at 564, "not just isolated words

or phrases," Kline v. Southgate Prop. Mgmt., LLC, 895 N.W.2d 429, 438 (Iowa 2017).” *Id.*

As it did in *Erpelding*, the Court should use the tools of statutory construction such as Iowa Code § 4.6, and consider:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble or statement of policy.

Iowa Code § 4.6

Winger discussed statutory construction and the application of Iowa Code § 4.6, and legislative history, etc. *ad nauseum* in its opening brief and will not burden the Court with a tit-for-tat rehash of the issue. But one cannot read the district court’s ruling in relation to Iowa Code § 4.6 without recognizing that the construction industry in Iowa will suffer significant damage and thinking that, if the legislature intended such a drastic change in the law and culture of Iowa, it would have been a little more specific in

doing so. Cargill's interpretation results in absurd results. *Janson v. Fulton*, 162 N.W.2d 438, 442 (Iowa 1968) "It is a familiar, fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences will be avoided."

Cargill's Challenge to Winger

Cargill did, however, challenge Winger to explain the effect of certain changes in the mechanic's lien structure because of the Amendment. It stated, "But Appellants offer no explanation of what the legislature could have been clarifying when it removed the term 'owner's agent' from six places it was used in Chapter 572." Cargill identifies the sections at footnote 2 at page 27 of its brief but identifies only five sections of the law. (Cargill Br. Pg 27). So Winger will address those sections specifically identified by Cargill.

In its opening brief, Winger Br. Pg 20-21, Winger argued when HF 774 is read in its entirety, it is obvious that the legislature intended to improve the process of filing mechanic's liens by requiring that it contain specific content and that notice be given to the actual owner of the property. Prior to 2007 Iowa Code §572.8 did not require the lienholder to identify date services were performed, nor did it require the official legal description of the property to be charged, only a statement that adequately

described the property. Further, the property owner's name was merely an option, one could comply with the statute by merely giving the name and address of the owner's agent or trustee. The 2007 Amendment (HF774) changed all that.

The district court recognized that "Mechanic's liens are charged against property, not against persons or entities." (APP. pg. 1618 @ 1637) But it failed to recognize that, prior to the amendment, neither the property nor the owner need be identified in the lien. In reality, the identity of the owner's-agent or trustee is not important or even relevant information by which to charge or bind the property, but a proper legal description and identity of the actual owner is.

Responding to Cargill's challenge the following legislative changes were concerned with process and not substantive mechanic's lien law:

(1) Iowa Code §572.1(11) defines "subcontractor" and eliminating "owner's agent, or trustee" becomes irrelevant to the definition. Notice that the legislature left the term "directly with the owner" in the statute. Cargill would read the term "directly" to exclude agent, especially because the amendment eliminated "owner-agent, trustee" from the statute. If this is true it shows the legislature certainly knew how to eliminate agency by simply using the term "directly with the owner." Nowhere in the 2007

HF774 or 2012 HF 675 amendments did it do so, because eliminating agency was not its intent.

(2) Iowa Code §§ 572.2 (1) and (2) is the lien entitlement statute. At issue is the term, "by virtue of any contract with the owner, the owner's agent, trustee, owner-builder, general contractor." To adopt Cargill's view the Court must read in the term "directly" before "with the owner" in the statute. There is nothing in the statute that indicates that agency is eliminated. One must read meaning into words which were not used. Such a concept is dangerous and it begs the question as to how anyone could determine the meaning of a statute.

(3) Iowa Code § 572.8 is the lien perfection statute and dictates the content of the lien and the process used to perfect it. It best illustrates the legislature's intent. The date of the service must be provided and the identity of the owner, not the owner's agent or trustee, must be stated along with the legal description of the land to be charged.

(4) Iowa Code § 572.10 concerns perfecting the lien after a lapse of 90 days. The statute concerns the process used to perfect the lien after the expiration of 90 days from the last date labor or materials were finished. It requires that it is the owner, not the owner's agent or trustee, who is to receive notice: "…and giving written notice thereof to the owner." Again,

this follows Winger's interpretation of the legislature's intent in HF 774. It confirms that the lien perfecting process is now property and owner focused.

(5) The last section in Cargill's challenge to Winger is Iowa Code §572.28, a section that concerns an owner's demand for bringing suit to foreclose the lien. As before, the statute as amended follows Winger's process position. Because the lien is on the owner's property, the owner is authorized to give demand to bring suit. "Upon the written demand of the owner, served on the claimant…" Under Cargill's theory, if a lawyer issued a demand for suit on behalf of the lawyer's client, the demand would be ineffective because lawyers are agents for their clients and, according to Cargill and the district court, owner's agent was eliminated by HF 774.

Cargill takes a myopic view of HF 774 and HF 675 focusing only on certain words, i.e. "owner-agent, trustee" and concludes that the legislature intended to eliminate the law of agency from the building contracting process. Myopia, in statutory construction, is contrary to the law. Iowa Code § 4.4 "… it is presumed that: … 2. The entire statute is intended to be effective. 3. A just and reasonable result is intended. 4. A result feasible of execution is intended. 5. Public interest is favored over any private interest."

Conclusion

Cargill took the district court down the agency-elimination road because it was the only way to rid itself of the mechanic liens. What Cargill must avoid is the lessor-lessee-lienholder caselaw that applies to the Cargill-HFCA relationship. It must do so because the facts do not favor Cargill because it neglected to file with the Monroe County Recorder's Office the Cargill-HFCA lease which included the disavowal language in Section 22.14, and it failed to include Section 22.14 in its Memorandum of Lease which was filed. Further, as shown by the most recent case dealing with the issue, which Cargill fails to address or even cite, the law does not favor Cargill, *A & W Elect. Contrs. v. Petry*, 567 N.E.2d 112 (Iowa 1998).

II. THE DISTRICT COURT ERRED IN FINDING THE CARGILL-HFCA RELATIONSHIP DID NOT SATISFY THE LESSOR-LESSEE RULE IN ROMP AND STROH AND GRANTED SUMMARY JUDGMENT TO CARGILL.

ARGUMENT

Introduction

The fighting issue is the lessor-lessee-mechanic's lien question. Cargill pushed two concepts to the district court and is doing so again in this Court: Constructive notice regarding Section 22.14 of the Cargill-HFCA lease which attempts to disavow partnership, joint-venture or association, and the so-called sophisticated parties contract theory.

Cargill divided its argument into two sections. First it argued that because of the Lease, the *Romp* Rule did not apply. Cargill Br. Pg 45. It then argued that Cargill and HFCA were not joint-venture partners. Cargill Br. Pg 52. Winger will respond to each, in kind.

A. Winger's reply to Cargill's argument regarding the Lease Agreement and the *Romp* Rule.

The district court erroneously denied summary judgment to the lienholders because they had constructive notice of Section 22.14 of the lease. But as Winger argued at Winger brief pgs 42-43, the lease was not filed. What was filed was the Memorandum of the Lease and it did not

contain Section 22.14. Cargill devoted ten pages of its brief, pages 42-52 trying to build a constructive notice argument regarding Section 22.14 of the lease. Cargill did not in the district court, and cannot in this Court, produce a filed lease. Instead, it skirts the issue by claiming that the Memorandum of Lease somehow put the lienholders on notice of Section 22.14. At page 50 of its brief Cargill argues "Thus Appellants were on constructive notice that HFCA owned only a leasehold interest in the land and was not an agent or joint-venture partner with Cargill." The issue is easily resolved by simply reading the Memorandum of Lease, (APP pg. 1319). Nowhere in the Memorandum of Lease can one find the words "agent," or "joint-venture" or even "partner." While Cargill can argue that "Appellants were on constructive notice that HFCA owned only a leasehold interest in the land," it cannot legitimately go the next step and state that the Memorandum of Lease stated that HFCA "was not an agent or joint-venture partner with Cargill." (Cargill Br. Pg 50).

This was not the only instance where Cargill overstated the facts related to the Memorandum of Lease. At page 17 of its brief, Cargill stated: "The Memorandum of Lease identified the Lease Agreement as relating to the Cargill property by legal description, identified HFCA as the Lessee and Cargill as the Lessor, memorialized the existence of the Lease Agreement,

identified the term as a 50 year lease and incorporated all the terms and conditions of the Lease Agreement." Cargill's statement is incorrect. Nowhere in the Memorandum of Lease is there any term which can be read as an omnibus incorporation of the terms and conditions of the unfiled lease.

Cargill was on Constructive Notice

In its opening brief Winger at pg. 44, Winger argued that, if the lienholders are to be charged with constructive notice of what was filed of record, then Cargill too must be charged. In that regard, Winger and Cargill are both charged with constructive notice of the HFCA-US Bank Leasehold Mortgage which was filed of record in Monroe County and specifically references HFCA's partners, joint venturers or members of Mortgagor [HFCA]" (App pg. 932 @ 955) Thus, the state of the "constructive notice" record does not bode well for Cargill, because one could reasonably conclude from the filed Memorandum of Lease that Cargill and HFCA are in a lessor-lessee relationship, and, from the filed US Bank Mortgage, that HFCA is in a partner and joint-venture relationship. Cargill did not try to correct the constructive notice record which it easily could have done by simply filing the lease or referencing Section 22.14 in the filed Memorandum of Lease.

Sophisticated Parties

Cargill argued in the district court that "The parties had every right to provide by contract whether HFCA would act as Cargill's agent, and they contracted against such a relationship. The Court should honor their right to contract." (APP pg. 1266 @ 1283) The district court was persuaded by Cargill's right to contract argument and found "This case involves sophisticated parties and the construction of an industrial plant. The Court will not infringe upon these sophisticated parties' right of private contract." (APP pg 1618 @ 1650).[1] Cargill's right to contract is not in issue, what is at issue is their failure to give notice to third parties who they intend to bind by their contract.

No doubt Cargill and HFCA are sophisticated parties. Unlike the amateurs in *Romp* who grew mushrooms, or *Stroh* who built a car wash, or *A & W Elect. Contrs* who built a bar, Cargill and HFCA entered into a relationship to build a $120,000,000 chemical plant to furnish hydrochloric acid to Cargill's adjoining existing corn milling plant. All parties are presumed to know the law, including Cargill who undoubtedly

[1] It appears Cargill confused the Lease with the Memorandum of Lease and argued in the district court that "The Lease Agreement was recorded on July 23, 2013 (SOAF ¶ 4), giving notice to potential lienholders of HFCA's interest in the Facility, its lack of interest in the land and its status as independent of -and not an agent for- Cargill. Cargill's statement was wrong. It was the Memorandum of Lease that was recorded as shown by Cargill's Statement of Additional Fact No. 4 SOAF ¶ 4 which states: "4. On July 23, 2013, a Memorandum of Lease was duly recorded with the Monroe County, Iowa Recorder in Book 2013, Page 21084. The Memorandum of Lease is attached hereto as Exhibit A. (Ap. 1-8)." (APP pg. 1319).

knew that even though they were in a lessor-lessee relationship, given the interlocking agreements between the lease, the six Ancillary Agreements and its financing of the project, its land could be at risk for mechanic's liens under the holdings in *Romp, Stroh* and *A & W Elect Contrs*. Winger suggests that is why Cargill attempted to build the disavowal in Section 22.14 into the lease. But an unfiled lease gives notice of its terms to no one. Cargill simply dropped the ball by not filing the lease, and it hid the ball by not including the disavowal in Section 22.14 in the filed Memorandum of Lease.

Implied Authorization

The lessor-lessee-mechanics lien issue is well known as is a risk to a lessor who participates with a lessee in any way beyond a strict rental agreement. Cargill tries to avoid the effect of *Romp, Stroh* and *A &W Elect. Contrs* by superimposing its HF774 argument regarding agency elimination by claiming "Thus, to be entitled to a lien on Cargill's land, Appellants must establish they had a contract with Cargill, Cargill's general contractor, or Cargill's subcontractor. While general agency principles would allow them to have negotiated a contract with Cargill through its agent, the contract would still need to be with Cargill for the lien to attach to Cargill's land." Cargill Br. 31-32. What Cargill fails to recognize is that under Romp*, Stroh*

and *A & W Elect. Contrs* a lessee may become the contracting agent for the owner-lessor in certain situations as it did in this case. Instead, it criticizes the extensive body of supportive caselaw by calling it "judge made circumstances." Cargill Br.pg 46. Pejoratively characterizing caselaw is one thing, but failing to address it is an entirely different matter.

The most recent Iowa Supreme Court case dealing with the lessor-lessee-mechanic's lien issue is *A & W Elect. Contrs. v Petry* 576 N.W.2d. 112, 114 (Iowa 1998), which Winger discussed at pages 60-64 of its opening brief. There, Justice Harris speaking for a unanimous court, upheld the mechanics' liens for services rendered at the request of the lessee because it found the lease was conditioned upon the tenant obtaining all licenses and permits to operate the bar, and electrical permits were necessary; the lessee was impliedly authorized by the lessor to contract with the electricians for their service. Here the directive in the Cargill-HFCA lease was even more specific: "…on which Lessee will build and operate a chloralkali manufacturing facility for the principal purpose of supplying sodium hydroxide, hydrochloric acid and sodium hydrochloride to Cargill…" (APP pg 696) If the lessee in *A & W Elect. Contrs* was impliedly authorized to contract with the electricians to bring light to a bar, certainly HFCA was impliedly authorized by Cargill to contract with the lienholders

to furnish and install the piping for manufacturing chloralkali, the building foundations for the plant and all other labor and material which constitute a functioning hydrochloric acid plant. But Cargill chose to ignore the case.

B. Winger's Reply to Cargill's argument regarding Joint-Venture or Enterprise.

Cargill claims that a joint-venture cannot exist between it and HFCA because sharing profits and losses is the *sine qua non* of a joint-venture. While Winger addressed this issue in its opening brief, Winger Br. 46, Cargill's response merits further reply. Winger argued that how one profits or suffers loss from an endeavor or adventure with another is always unique and often personal to the parties. The district court, adopting Cargill's argument, implied that an economic calculus was required. (APP pg. 1618 @ 1652) Joint-venture analysis between the parties themselves differs from the analysis that occurs regarding third parties. "As to third persons the rule is that the legal and not the actual intent of the parties controls and the parties may be estopped in favor of third person from denying that they are joint venturers even though they never intended to become such. Indeed, with regard to third persons, a joint-venture status will be imposed upon individual entities conducting their affairs as if they were joint venturers, notwithstanding their actual intent. As in the case of any other claim of estoppel, there must be proof of action in reliance upon the acts

constituting the alleged estoppel, resulting in injury or damage, to establish a joint-venture by estoppel." 46 *Am. Jur.2d. Joint Venturers* §13. SEE also *Martin v. Chapel*, 1981 OK 134, ¶ 12, 637 P.2d 81, 86 "As to third parties, it is the legal and not the actual intent which controls. The parties may be estopped in favor of third persons from denying that they are joint venturers, even though they never intended to become such. As to third parties, it is the intent to do those things which constitutes a joint-venture that usually determines whether the relation exists."

This is consistent as to third parties with Iowa's ostensible partnership law: *Crist v. Tallman*, 190 Iowa 1248, 1252, 179 N.W. 522, 524 (1921), "If a person voluntarily and knowingly holds himself out, by his acts or language, to the public or to third persons, as the partner of another, and a third person deals with that other on the faith of an existing partnership, then the person so holding himself out will be liable as a partner to the person so dealing, notwithstanding there was, in fact, no such partnership." SEE also *Hanley v. Elm Grove Mut. Tel. Co.*, 150 Iowa 198, 201, 129 N.W. 807, 808 (1911) "That such an association will sometimes be treated as a partnership as between its members and third parties who have dealt with it as an apparent partnership is undoubtedly true."

Regardless of whether the issue is approached from the standpoint of the implicit authority of a lessee to contract with third parties to comply with the terms of the lease as in *Romp, Stroh*, and *A & W Elect. Contrs.*, or joint-venture by estoppel or ostensible or implied partner principles, in mechanic's lien cases the goal of avoiding unjust enrichment is the same. *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 19 (Iowa 2001) "We have recognized that "mechanic's liens stem from principles of equity which require paying for work done or materials delivered" and that "the doctrines of restitution and prevention of unjust enrichment drive the mechanic's lien entitlement." *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994). Additionally, we have recognized that we are to "liberally construe the mechanic's lien statute to promote these objectives and assist parties in obtaining justice." *Id.*"

This is not a case by Cargill or HFCA attempting to establish a joint-venture. Instead it is a claim by the third-party lienholders who have relied upon Cargill and HFCA's actions which caused their detriment and unjustly enriched Cargill.

Conclusion

Facts and caselaw cannot be ignored. One cannot ignore the most recent case on point, especially when the holding is against one's interest.

Further, one cannot ignore that the document by which it seeks immunity was never filed and gave notice to no one. By doing so one is left with the conclusion that HFCA was Cargill's lessee who, because of Cargill's financing and Cargill's Ancillary Agreements, had explicit authority to substantially improve its vacant land by building a $120,000,000 plant, which was connected with Cargill's adjacent plant, to supply it with hydrochloric acid, and, that under the holdings in *Romp, Stroh* and *A&W Elect. Contrs,* the lease impliedly authorized HFCA to contract with Winger and the lienholders and accordingly subject Cargill's land to the mechanic's liens of the unpaid labor and material suppliers.

III. THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE EQUITABLE DOCTRINE OF MERGER TO EXTINQUISH CARGILL'S AFTER-ACQUIRED MORTGAGE IN RELATION TO THE LIENS.

ARGUMENT

Winger claims that the district court erred by refusing to apply the equitable doctrine of merger and by holding that Cargill's after-acquired interest was superior to the mechanic's liens. The doctrine would prevent Cargill as mortgagee of its own leasehold from holding a mortgage on its own fee simple estate. In *Re Estate of Herring*, 265 N.W.2d. 740, 741-42

(Iowa 1978) " It is also a well-recognized rule that a leasehold merges and is extinguished in a freehold when the tenancy and fee vest in the same person at the same time."

Cargill claims the doctrine does not apply because under *Kelmer v Hannifan*, 85 N.W. 16 (Iowa 1901) "It is a well-settled rule of equity jurisprudence that a purchase by a mortgagee of the mortgaged premises does not merge the mortgage in the legal title, when it is the interest of the mortgagee that it should be kept alive, if the rights of third persons are not thereby prejudiced." It then concludes that Winger, standing in the shoes of a third person, was not prejudiced because, "Prior to the assignment of U.S. Bank's mortgage interest to Cargill, the Appellants had no lien on Cargill's fee interest." Cargill Br. 57. Cargill is wrong.

Cargill acquired its rights over a year after Winger filed its mechanic's lien and ten months after it brought this foreclosure action. Winger's lien was filed on June 11, 2015 (APP pg. 215 @ 222; 413). It filed this foreclosure action on September 8, 2015. (APP pg. 12) Cargill acquired U.S. Bank's mortgage interest on July 21, 2016 (APP pg. 749 @ 755-756; 1227) Cargill actually knew of the lien and the lawsuit when it bought U.S. Bank's mortgage interest.

Conclusion

Cargill got the facts wrong. Winger is a third party whose rights were prejudiced by Cargill's acquisition of U.S. Bank's mortgage interest. The district court erred in not applying the equitable doctrine of merger making Cargill's newly-acquired mortgage interest inferior to Winger's pre-existing mechanic's lien.

IV. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE DOCTRINE THAT EQUITY WILL NOT FACILITATE AN ARTIFICE FOR FRAUD AND BY GIVING CARAGILL'S AFTER-ACQUIRED MORTGAGE PRIORITY OVER WINGER'S MECHANIC'S LIEN.

ARGUMENT

In the district court Winger sought the protection of the equitable maxim that Equity will not facilitate an artifice for fraud. It argued that, to avoid paying for labor and materials, lessors and lessees can easily construct their relationship to avoid mechanic's liens. Winger alerted the district court to the lien avoidance schemes referenced in *Romp* at 56 N.W.2d at 606 and *Veale Lumber Co. v Brown* 195 N.W. 248, 250 (Iowa 1924). Cargill responded by claiming that the parties had a right to contract and convinced the district court to adopt the sophisticated parties concept

referenced in Division II. Winger suggests that it is because the parties are sophisticated and that gives rise to the use of exotic relationships which can "permit something like a fraud upon the suppliers of materials or labor." *Romp*, 56 N.W.2d. at 606.

Cargill attempts to extricate itself from the scheme by claiming: "Winger argues it is fraudulent for Cargill to take the place of U.S. Bank and take priority over Appellant's mechanic's liens. But the mechanic's liens were already subordinate to U.S. Bank's construction lien. It makes no difference to applicants who hold the construction mortgage lien, they are still subordinate to that lien." Cargill Br. Pg 59. The argument acknowledges the artifice for fraud. As clarified in Division III, Cargill's interests were acquired over a year after Winger filed its mechanic's lien and some ten months after this foreclosure action was initiated. The artifice is evident because Cargill received the benefits of the lienholders' labor and materials and knew they had filed mechanic's liens and instituted foreclosure proceedings when it purchased the U.S. Bank's mortgage interest. Cargill now claims it should stand in U.S. Bank's shoes and have priority over the lienholders – while keeping the benefits of the lienholders' labor and material. In doing so Cargill runs afoul of the equitable principle that Equity will not be used to facilitate an artifice for fraud. *Veale* and

Romp warned about this scheme and the equitable principles announced in *Bruner v Myers*, 212 Iowa 308, 311, 233 N.W. 505, 506 (1931) and *La Fontaine v. Developer & Builders, Inc.* 261 Iowa 1177, 1185, 156 N.W.2d. 651,657 (1968) prevent it from happening. Noticeably, Cargill chose not to address either case or the maxim of equity upon which they are based.

Conclusion

The district court erred in unjustly enriching Cargill's by allowing it to use its after-acquired rights to oust the mechanic's liens.

V. THE DISTRICT COURT ERRED IN FINDING THAT WINGER WAS NOT ENTITLED TO AN IOWA CODE § 572.2 MECHANIC'S LIEN FOR IMPROVING CARGILL'S LAND.

A. Appellants preserved error.

Cargill claims the lienholders cannot have appellate review of the district court's error in refusing to grant them a mechanic's lien under Iowa Code §572.2(1) because they failed to raise the issue of betterment at the district court. Cargill's argument fails because the argument was raised two or more times before the district court and the district court ruled on the merits of the issue.

The issue arises out of the summary judgment proceedings before the district court. Under Iowa R. Civ. P. 1.981 "the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." *Kellogg v. City of Albia*, No. 15-2143, 2018 Iowa Sup. LEXIS 20, at *6 (Mar. 9, 2018) "Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As discussed in its opening brief (Winger's Br. 73-74), Winger raised the betterment issue at paragraph 15, 16 and 18 of its foreclosure Petition. (APP pg. 215 @ 222) It raised it again in its Motion for Partial Summary Judgment by alleging that Cargill received substantial benefit from the labor furnished and materials provided by the lienholders. (APP pg 684 @ 687), and again in Division II of its opening brief on the Motion for Partial Summary Judgment (APP pg. 959). The whole of Winger's motion is that it was entitled to a mechanic's lien under Iowa Code §572.2(1) on Cargill's property because it bettered or otherwise improved Cargill's land, and to

not allow the lien would constitute unjust enrichment. Finally, when the district court agreed with Cargill's argument that the 2007 Amendment (HF 774) eliminated the law of agency, Winger restated the issue in its Iowa. R. Civ. P. 1.904(2) Motion to Reconsider (App pg. 1660) which the district court considered by holding "Finally, Winger's interpretation of Iowa Code §572.2(1) runs afoul of the "fundamental rule of statutory construction [that]a statute will not be construed to make any part of it superfluous unless no other construction is reasonably possible." In the next sentence the district court refused to grant the Motion to Reconsider because "Winger did not even address this rule of statutory construction in its Reply Brief. (App pg. 1781 @ 1791) It is obvious from the ruling that in the first sentence the district court did address Winger's betterment or otherwise improved claim under Iowa Code §572.2(1) and did not agree with Winger's interpretation of the statute. The second sentence merely denied Winger's motion to reconsider the issue.

The preservation of error doctrine exists to allow the district court to address an issue before it is appealed. It is a doctrine of fairness. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005) "This rule of error preservation is "'based upon considerations of fairness.'" Id. at 197 (quoting *Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 489 (Iowa 2003)). That

is, "it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." Id. (internal quotations omitted)." The district court addressed the argument and specifically found "Winger's interpretation of Iowa Code §572.2(1) runs afoul of the "fundamental rule of statutory construction [that]a statute will not be construed to make any part of it superfluous unless no other construction is reasonably possible." Winger submits it has given the district court an opportunity to rule on the issue; it did, and so error has been preserved for appeal. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) "However, it should be emphasized that the foregoing rule is not concerned with the substance, logic, or detail in the district court's decision. If the court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved."

B. Appellants Correctly Construe the Statute.

The district court ruled, and Cargill argues, that Winger's construction of Iowa Code §572.2(1) regarding "or otherwise improved" violates the statutory canon of *ejusdem generis* that specific terms control over general terms. Cargill Br. Pg 65. As discussed in its opening brief,

Winger, Br.75-76 the oxford comma is used to avoid ambiguity which necessitates the use of *ejusdem generis*. See, for example *Teamsters Local Union No. 421 v. City of Dubuque,* 706 N.W.2d 709, 715 (Iowa 2005) where the legislature did not use the oxford comma in a statute that read "Cities may set reasonable maximum distances outside of the corporate limits of the city that police officers, fire fighters and other critical municipal employees may live." Failing to use the oxford comma after "fire fighters" resulted in ambiguity on whether "other critical municipal employees" needed to be related to the class of emergency responders. To resolve the dispute the Court relied on rule of last resort, *ejusdem generis*. The Court in *Teamsters Local Union* cautioned "In using the doctrine as an interpretative aid, it is important to keep in mind that it is not applied in a vacuum, and disputes cannot be resolved by merely tying the issue 'to the procrustean bed of *ejusdem generis*.'".

In this case the statute reads:

> "1. Every person who furnishes any material or labor for, or performs any labor upon, any building or land for improvement, alteration, or repair thereof, including those engaged in the construction or repair of any work of internal or external improvement, and those engaged in grading, sodding, installing nursery stock, landscaping, sidewalk building, fencing on any land or lot, by virtue of any contract with the owner, owner-builder, general

contractor, or subcontractor shall have a lien upon such building or improvement, and land belonging to the owner on which the same is situated or upon the land or lot so graded, landscaped, fenced, or otherwise improved, altered, or repaired, to secure payment for the material or labor furnished or labor performed."
Iowa Code §572.2

Parsing the statute reveals:

1. Every person [Winger and the lienholders] who furnishes any material or labor *** by virtue of any contract with the *** subcontractor [Conve] shall have a lien upon such building or improvement [the HFCA Facility] and land belonging to the owner [Cargill] on which the same is situated or upon the land or lot so *** otherwise improved *** to secure payment for the material or labor furnished or labor performed.[2]

The district court held that Winger's argument violated the "fundamental rule of statutory construction [that] a statute will not be construed to make any part of it superfluous unless no other construction is reasonably possible." (APP pg 1781 @ 1791) It begs the question as to what is superfluous about Winger's statutory construction. On its face nothing is

[2] The Iowa Mechanic's Lien Act recognizes that a contract with an owner can be either expressed or implied. This is consistent with the implied authority theory recognized in *Romp, Stroh* and *A&W Elect. Contrs.* SEE: "Iowa Code § 572.1 (3)"General contractor" includes every person who does work or furnishes materials by contract, express or implied, with an owner. "General contractor" does not include a person who does work or furnishes materials on contract with an owner-builder."

obvious. Either the district court misread the statute or it read something into the statute which it did not identify.

The district court did not explain what the fundamental rule of statutory construction was, or how Winger's interpretation made other parts of the statute superfluous or unreasonable, and Cargill offers no explanation on appeal. Winger's statutory interpretation follows the underlying theory supporting mechanic's liens and avoiding unjust enrichment: *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994) "A mechanic's lien is purely statutory in nature. [internal citation omitted]. All persons who furnish any material or labor for improvements to building or land will generally be entitled to a lien to secure payment for the labor and materials furnished. Iowa Code §572.2. Mechanic's liens stem from principles of equity which require paying for work done or materials delivered. 53 *Am. Jur. 2d Mechanic's Liens* § 2, at 516 (1970). The doctrines of restitution and prevention of unjust enrichment drive the mechanic's lien entitlement. *Id.* The mechanic's lien statute is liberally construed to promote these objects and assist parties in obtaining justice. *Gallehon,* 286 N.W.2d at 201."

SEE also, *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 19 (Iowa 2001) "We have recognized that 'mechanic's liens stem from

principles of equity which require paying for work done or materials delivered and that the doctrines of restitution and prevention of unjust enrichment drive the mechanic's lien entitlement."

Conclusion

The district court either misread the statute or read something into the statute that was not there. As plainly read the statute gives Winger and the other mechanic lienholders a lien on Cargill's land.

CONCLUSION

For these reasons, the lienholders request this Court reverse the district court's judgment and enter judgment in their favor as set forth in their opening brief.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 12, 2018, I electronically filed the foregoing Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the parties and counsel of record. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

CERTIFICATE OF COMPLIANCE

Likewise, I certify that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6396 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 this brief has been prepared in a proportionally spaced typeface using Georgia 14 pt.

April 12, 2018

Nick Critelli