IN THE SUPREME COURT OF IOWA

NO. 17-1169

WINGER CONTRACTING COMPANY
Plaintiff-Appellant
vs.
CARGILL, INCORPORATED, ET AL.
Defendant-Appellee

TRACER CONSTRUCTION, LLC
Plaintiff-Appellant
v.
CARGILL, INCORPORATED, ET AL.
Defendant-Appellant

APPEAL FROM THE IOWA DISTRICT COURT FOR MONROE COUNTY
THE HONORABLE JOHN TELLEEN
MONROE COUNTY NOS. EQEQ 009184 & EQEQ 009228

DEFENDANT-APPELLEE CARGILL, INCORPORATED'S FINAL BRIEF

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Routing Statement

This case involves statutory amendments that have not yet been considered by an Iowa appellate court, and is properly retained by the Supreme Court. Iowa R.App.P. 1101(2)(c).

Statement of the Case

This case involves interests in land subject to a leasehold interest and the extent to which mechanic's liens attach to the lessor's interest for work performed for the lessee.

Nature of the case and course of proceedings.

Cargill generally agrees with Appellants' statements of the Nature of the Case and Course of Proceedings. (Winger Br. 12-16; Tracer Br. 9-16; PCI Br. 7-9.)

This interlocutory appeal involves a number of general contractors and subcontractors who have filed mechanic's liens related to construction of a chlor-akali facility in Eddyville, Iowa. The Facility is owned by HF Chlor-Alkali, LLC ("HFCA") and was constructed on property HFCA leased from Cargill. Only some of the subcontractors filed notices of appeal, and some of those have since dismissed, leaving the following subcontractors as appellants in this case: Winger Contracting Company ("Winger"); Tracer Construction, LLC ("Tracer"); Peterson Contractors, Inc. ("PCI"); Tri-City Electric Company; TAI Specialty Construction,

Inc.; and American Piping Group. These parties are referenced herein collectively as Appellants.

With respect to the Course of Proceedings, Winger's Motion for Partial Summary Judgment expressly asserted that the mechanic's liens attached not only to the Facility for which the subcontractors provided work, but also to Cargill's fee interest in the land. (App. 961, 980-87, Winger MPSJ Br. 3, 22-29.) Cargill responded that the mechanic's liens did not attach to its fee interest because none of the lienholders had a contract with Cargill as the owner of the land, a statutory requirement under Iowa Code section 572.2(1). (App. 1270-83, Cargill MSJ Br. 5-18.)

The District Court's disposition of the case.

In its Ruling on Summary Judgment, the District Court gave effect to recent amendments to Iowa Code Chapter 572 and held:

> [I]t is no longer sufficient 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. IOWA CODE §572.2(1)(2017). In addition, the owner is clearly limited to the titleholder of record. IOWA CODE §572.1(8)(2017). Accordingly, the subsequent revisions to Iowa Code chapter 572 supersede a mechanic's lien attaching to a lessor's fee interest under the agency principles enunciated in *Romp* and *Stroh*.

(App. 1642, 4/20/17 Ruling 25.)

The Court alternatively applied the *Romp* and *Stroh* cases and concluded that even if those cases survived the statutory amendments, HFCA was not acting as Cargill's agent, such that the mechanic's liens would not attach to Cargill's land under the prior version of Chapter 572. (App. 1643-1651, 4/20/17 Ruling 26-34 ("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.").) The Court also rejected Winger's arguments of a joint enterprise and fraud based on the terms of the agreements between Cargill and HFCA. (App 1651-54, Ruling 34-37.)

On Reconsideration, the District Court affirmed its prior ruling but clarified that the prior ruling did not address claims by PCI and Tracer that their liens extended to Cargill's property outside of the Leased Property. (App. 1806, 6/30/2017 Ruling 26.) The District Court rejected as premature Tracer's argument that Iowa Code § 572.6 allowed the lienholders to foreclose on the HFCA Facility and go forward with a sale. (App. 1796-97, *id*. 16-17.) The Court did not rule on Appellant's separate "otherwise improved" argument because it was not raised in the summary judgment proceedings. (App. 1791, *id.* 11.)

Statement of the Facts

Cargill owns real property in Eddyville, Iowa. (App. 1307, SOAF ¶1.) HF Chlor-Alkali, LLC ("HFCA") entered into a Lease Agreement dated June 24, 2013

with Cargill to allow HFCA to construct a chlor-alkali manufacturing facility (hereinafter "the Facility") on the Eddyville property. (App. 1307, SOAF ¶2.) HFCA manufactures sodium hydroxide ("Caustic") and hydrochloric acid ("HCl"), products Cargill uses in its corn wet milling facility. (App. 774, Chem. Agree.) Cargill and HFCA entered into "Ancillary Agreements", including Supply Agreements and Water Service Agreements, to govern their contractual relationship. (App. 696, 774-878, Ancillary Agreements.)

The Lease Agreement granted HFCA a leasehold interest in the land for a period of fifty years at a rent of $12,000 per year.[1] (App. 1307, SOAF ¶2,3.) It defined "Land" by the legal description of the property owned by Cargill and leased to HFCA. (App. 1307-1308, SOAF ¶1,5.) The Lease Agreement defined

Facility as "all buildings, fixtures, structures, improvements, machinery, equipment and other tangible personal property purchased or constructed by Lessee from time to time and located on the Land." (App. 1308, SOAF ¶6.) The Lease Agreement expressly defined "Cargill Property" to exclude the Facility and Improvements. (App. 1308, SOAF ¶5-6.) Under the Lease Agreement, HFCA took title and ownership of any additions, alterations, and improvements, including the Facility. (App. 1309, SOAF ¶7.)

The Lease Agreement required HFCA to surrender possession of the Land to Cargill "as soon as commercially practicable after the expiration or earlier termination of this Lease, [and] to remove any and all Improvements and Lessee's Property or other improvements of any nature and kind from the Land," restoring the Land to its original condition. (App. 1309, SOAF ¶8.) The Lease Agreement gave HFCA the right to mortgage the Leasehold and Facility and required Cargill to acknowledge the Facility as personal property that could be removed from the Premises in the event HFCA defaulted on its mortgage. (App. 1310, SOAF ¶12.) Cargill and HFCA disclaimed any partnership, joint venture or association between them in the Lease Agreement. (App. 1310, SOAF ¶11; App. 722, Lease ¶22.14.) HFCA covenanted to keep the Land, the Facility and the Easement Parcels free of mechanic's liens. (App. 1307-1309, SOAF ¶3-8.)

On July 23, 2013, a Memorandum of Lease was recorded with the Monroe County, Iowa Recorder in Book 2013, Page 1084. (App 1308, SOAF ¶4; App. 1319-26.) 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,

[1] Tracer's assertion HFCA was required to pay "all other sums of money" (Tracer Br. 18) refers only HFCA's obligation to reimburse Cargill for expenses Cargill incurred for security services, property taxes, and insurance. (App. 1307, SOAF ¶3.)

identified the term as a fifty-year lease, and incorporated all the terms and conditions of the Lease Agreement. (*Id.*)

To construct the Facility, HFCA entered into contracts with Carl A. Nelson & Company and Conve & AVS, Inc. ("Conve"), to provide general contracting services for constructing the Facility. (App. 1314, SOAF ¶27-28.) Appellants were among the subcontractors who contracted with HFCA's general contractors to provide material or labor for constructing the Facility. (App. 1314, SOAF ¶29.)

Construction of the Facility did not go as planned, and the general contractors and the subcontractors were not paid in full. While the parties to those contracts dispute who is to blame for the construction problems and the failed contracts, those issues are not relevant to the current appeal. The Appellants, and other subcontractors not party to the appeal, filed mechanic's liens based on their work on the Facility, and each seeks to foreclose their mechanic's lien against Cargill's fee interest in the real property on which the Facility sits.

Argument

I. THE DISTRICT COURT PROPERLY CONSTRUED THE LEGISLATIVE AMENDMENTS IN IOWA CODE CHAPTER 572 TO HOLD THE MECHANIC'S LIENS ATTACHED TO HFCA'S INTERESTS ONLY, I.E., THE FACILITY AND HFCA'S LEASEHOLD INTEREST IN THE REAL PROPERTY. ABSENT A CONTRACT WITH CARGILL, AS THE OWNER, THE LIENS DO NOT ATTACH TO CARGILL'S FEE INTEREST.

A. Error preservation.

Cargill agrees this issue was properly preserved.

B. Scope and standard of review.

Cargill agrees the standard of review is for errors at law.

C. Argument

Appellants urge this Court to ignore the plain language of, and intentional legislative amendments to, Iowa Code Chapter 572 and find their mechanic's liens attach to Cargill's fee interest in the land upon which HFCA's Facility was constructed. Appellants urge the Court to ignore statutory amendments based only on policy arguments and vague language contained in the "Explanation" attached to the Introduction of the Bill that made those revisions.

Chapter 572 dictates that the mechanic's liens attach only to HFCA's Facility and its leasehold interest in the land and not Cargill's fee interest.

1. As a lessee, HFCA has only a Leasehold Interest in the real property and has no authority to impair the fee interest.

It is important to understand the interests held by the parties in considering the property to which Appellants' mechanic's liens attach. Cargill owns the fee interest to the real property upon which the HFCA Facility was constructed. Cargill granted HFCA a leasehold interest in its land, which is "an estate carved out of the fee-simple title." *Queal Lumber Co. v. Lipman*, 200 Iowa 1376, 206 N.W. 627, 628 (1925). When a lessee enters into a contract for improvements, "[i]t is too elementary to need discussion that the lien claimants cannot acquire a greater interest in the real estate than that held by the lessee." *Id.*

Under the Lease Agreement, HFCA owns the Facility, including "all buildings, fixtures, structures, improvements" purchased or constructed by HFCA. The Lease Agreement expressly provided that any additions, alterations, and improvements are the property of HFCA, giving HFCA title to such additions, alterations, and improvements. Upon termination, the Lease Agreement requires HFCA to remove any and all Improvements and its Property.

No one disputes that under the plain terms of the Lease Agreement, Cargill owns the real property in fee, HFCA has a leasehold interest in the real property for a period of fifty years, and HFCA has all title and ownership of the Facility.

2. Because Appellants had no contract with Cargill, their liens attach only to the Facility and HFCA's leasehold interest.

Iowa Code Section 572.2 identifies the property to which a mechanic's lien attaches:

> 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(1)(2017) (emphasis added). The Code specifically defines "owner" as "the legal or equitable titleholder of record." Iowa Code § 572.1(8) (2017).

Thus, (1) a person who provides material or labor, (2) on a building, (3) by virtue of a contract with the owner, owner-builder, contractor, or subcontractor, (4) is entitled to a lien on the building or improvement for which the work was provided, (5) as well as a lien on the land belonging to the owner. The statute makes a distinction between a lien on the building or improvement for which the material or labor was provided, and a lien on the underlying land on which the building or improvement sits.

Appellants argue their liens should extend to Cargill's fee interest in the land because HFCA, as the lessee of Cargill's land, made improvements that benefit Cargill as the lessor. The plain language of the statute following the legislature's amendments does not support this construction.

Section 572.2(1) is set up to provide a mechanic's lien on the building or improvements for which the supplier provides labor or material pursuant to a contract with the owner, owner-builder, general contractor or subcontractor. The owner in this scenario is HFCA, which owns the Facility for which the Appellants provided material and labor pursuant to contracts with HFCA's general contractor. Section 572.2(1) then provides that the lien extends to "land belonging to the owner upon which the same is situated". §572.2(1). The owner, HFCA, has a leasehold interest in the land upon which the Facility is situated. Thus, the Appellants also have a lien on HFCA's leasehold interest in the land, as the District Court found.

But that lien does not extend to Cargill's fee interest in the land because none of the Appellants provided labor or material pursuant to a contract with Cargill, or Cargill's general contractor or subcontractor. In the context of leased land, the Supreme Court of Iowa has "repeatedly held that without a contract with the owner no lien [on the land] can be maintained." *Queal Lumber Co.*, 206 N.W. at 628-29 (citing *Redman v. Williamson*, 2 Iowa 488, 489 (1856); *Wilkins v.*

Litchfield, 69 Iowa, 465, 29 N.W. 447 (1886); *Carney v. Cook*, 80 Iowa, 747, 45 N.W. 919 (1890); *Littleton Sav. Bank v. Osceola Land Co.*, 76 Iowa, 660, 39 N.W. 201 (1888); *Templin v. Chicago*, B. & P. Ry. Co., 73 Iowa, 548, 35 N.W. 634 (1887)). Appellants admit they "did not have a direct contract with Cargill, the landowner." (Winger Br. 19.) Recognizing the need to have a contract with the owner of the land, Appellants rely solely on an alleged agency relationship between HFCA and Cargill based on their relationship as lessor/lessee to assert that Appellants had a contract with Cargill through its alleged agent, HFCA.

As discussed below in Section II, the lessor/lessee relationship between Cargill and HFCA would not meet the requirements of the *Romp* and *Stroh* cases. However, given recent changes to Iowa Code Chapter 572, a lessor/lessee relationship is no longer sufficient to allow a mechanic's lien to attach to land in favor of a subcontractor who contracts only with a lessee.

3. The legislative amendments removing "owner's agent" from § 572.2(1) and redefining "owner" in § 572.1(8) must be given effect.

"The law governing mechanic's liens is rooted in statute, for the common law provided no such protection for persons who improve real property." *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 708-12 (Iowa 1985). While "mechanic's liens stem from principles of equity which require paying for work done or materials delivered[,] … the lien itself is purely statutory in nature,

dependent solely on statutory authority for its existence." *Baumhoefener Nursery, Inc. v. A & D P'ship, II*, 618 N.W.2d 363, 366 (Iowa 2000) (internal citations and marks omitted). It is therefore important to consider closely the language used, and revisions made, by the legislature.

"[I]t is not the province of the court to speculate as to probable legislative intent without regard to the wording used in the statute, and any determination must be based upon what the legislature actually said, rather than what it might or should have said." *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). The Court "cannot, under the guise of construction, enlarge or otherwise change the terms of a statute as the legislature adopted it." *Id.* The Court is also guided by the "well-established rules of statutory construction that legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned. " *Id.*

Chapter 572 was amended in 2007 and again in 2012. Prior to 2007, Section 572.2(1) provided: "Every person who shall furnish any material or labor for … any building … by virtue of any contract with the owner, the owner's agent, trustee, contractor, or subcontractor shall have a lien upon such building or improvement, and land belonging to the owner on which the same is situated …." Iowa Code § 572.2(1) (2005) (emphasis added). The phrase "owner's agent,

trustee" was removed from § 572.2(1) in 2007. 2007 Ia. Legis. Serv. Ch. 83, H.F. 774, § 3.

Section 572.2(1) was again amended in 2012 to add "owner-builder" to the list of contracting partners giving rise to a mechanic's lien and to clarify that both a general contractor and a subcontractor could be a contracting partner. See 2012 Ia. Legis. Serv. Ch. 1105, H.F.675, §3. The statute now requires the mechanic's lienholder to have a contract with the owner, owner-builder, its general contractor, or its subcontractor and grants a lien on the building or improvement for which material or labor was provided pursuant to the identified contract. With respect to land, the lien attaches only to that "land belonging to the owner on which the [building] is situated". § 572.2(1).

The legislature also made significant changes to the definition of "owner" in Section 572.1(8). Prior to the 2007 amendment, owner "included every person for whose use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians." Iowa Code § 572.1(3)(2005). In 2007, the definition of "owner" was amended to "mean the record titleholder", retaining the phrase "and every person for whose benefit any building, erection, or other improvements is made …." 2007 Ia. Legis. Serv. Ch. 83, H.F. 774, § 2. The definition was again changed in 2012, eliminating the phrase about benefited persons and leaving owner to be defined simply as: "the legal or equitable

titleholder of record." § 572.1(8)(2017); *see* 2012 Ia. Legis. Serv. Ch. 1105, H.F. 675, § 2.

These statutory amendments must be given meaning. As the Court recently explained, it "aim[s] to give meaning to the statutory changes the general assembly enacts." *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016)(citing *Davis v. State*, 682 N.W.2d 58, 61 (Iowa 2004)). "'When an amendment to a statute adds or deletes words, a change in the law is presumed unless the remaining language amounts to the same thing.' When considering statutory amendments, [the Court] must assume that the general assembly 'sought to accomplish some purpose' and the amendment 'was not a futile exercise.'" *Id.* (quoting *Davis*, 682 N.W.2d at 61).

The statute at issue in *Homan* previously included the phrase "permanently established," but the phrase was removed in 1894. In considering whether the present version of the statute required the state to maintain state-owned mental hospitals, the Court was constrained by "the principles of statutory construction [to] conclude that the general assembly's omission of the phrase 'permanently established' in the Code after 1894 altered its meaning." *Homan*, 682 N.W.2d at 169. The Court "cannot read into the statute what [it] think[s] it ought to say," but is guided by "[w]hat the general assembly actually said". *Id.* at 169-70.

Appellants argue statutory amendments either modify or clarify prior statutory meaning. An example of a modification is found in *State v. Crone*, 545

N.W.2d 267, 273 (Iowa 1996), where the Supreme Court held an amendment in Iowa Code § 711.4 was "material because there is a distinct difference between 'monetary or pecuniary' value and 'anything' of value. The legislature must have intended to alter the scope of the statute by eliminating any limitation to monetary worth." *State ex rel. Schuder v. Schuder*, 578 N.W.2d 685, 687 (Iowa 1998) provides an example of a clarification, where adding language to a child support statute requiring an "equal and proportionate share" clarified prior law, which used the phrase "attributable to the child" without further defining how much was "attributable" to a particular child in a multi-child family.

Appellants argue the 2007 legislative changes were meant merely "to improve the process relating to filing, perfecting and foreclosing of mechanic's liens", identifying examples, including: the change from "time" to "date", requiring a lienholder to identify the "legal description" instead of the "correct description", and adding "record titleholder" to the definition of owner. (Winger Br. 21.) But Appellants offer no explanation of what the legislature could have been clarifying when it removed the term "owner's agent" from six different places it was used in Chapter 572[2].

[2] In addition to the section identified by Winger, H.F. 774 also removed the "owner's agent [or] trustee" language from other provisions of Chapter 572. *See* 2007 Ia. Legis. Serv. Ch. 83, H.F. 774, §2, amending § 572.1(5); §3, amending Iowa Code § 572.2(2); §4, amending Iowa Code § 572.8; §6, amending Iowa Code § 572.10; and §17, amending Iowa Code § 572.28.

Appellants argue the amendments to chapter 572 did not modify prior case law, under which a materialman could obtain a lien on a lessor's fee interest in its property based on the materialman's contract with the lessee if it could show the lessee improved the lessor's property under specific limited circumstances. But those cases relied on the "owner's agent" language in Section 572.2(1) that has been removed. In *Romp,* the lack of a contract between the materialman and lessor was not conclusive where the materialman had a contract with the lessee, which could satisfy the statutory language requiring a contract with the "owner's agent". *Denniston & Partridge Co. v. Romp,* 244 Iowa 204, 56 N.W.2d 601, 606 (1953) ("The terms of Code section 572.2, supra, are sufficiently met if the contract is made with an agent of the owner …."). Where the materialman can show the lessee was contractually bound to erect the improvement and further satisfy the three-factor test adopted by the *Romp* Court, "the lessee [wa]s considered to be the agent of the lessor within the meaning of § 572.2" and the claimant's lien attached to the lessor's fee interest because the claimant had furnished material or labor by virtue of a contract with the owner's agent. *Stroh Corp. v. K & S Dev. Corp*., 247 N.W.2d 750, 752 (Iowa 1976).

Removing the very term that courts had relied on to hold a lessor's land subject to a lien based on a contract entered into by its lessee clearly alters the statute's meaning. It certainly cannot logically be said to "clarify" the statute to

support the *Romp* line of cases. Rather, removing "agent" from § 572.2(1) makes clear that a materialman must have a contract with the owner, not merely the owner's agent, before it is entitled to a lien on the owner's interest in the land.

Appellants' argument also ignores the significant amendments made to the definition of "owner" in Section 572.1(8). Excluding the phrase "every person for whose benefit the building … is made" from the definition of "owner" and limiting it to the "legal or equitable titleholder of record" directly addresses the reasoning behind *Romp* and *Stroh*. *See Ringland-Johnson-Crowley Co. v. First Cent. Serv. Corp*., 255 N.W.2d 149, 1450 (Iowa 1977) (definition of "owner" in § 572.1 relevant to agent analysis); *Knudson v. Bland*, 253 Iowa 614, 617-18, 113 N.W.2d 242, 244-45 (1962) (same). Following these amendments to the definition of "owner", the fact that a lessor "benefits" from a lessee's construction of a building on the lessor's land is no longer sufficient to make the lessor an "owner" of the building for purposes of attaching a mechanic's lien to the lessor's fee interest in the land.

Appellants recognize that removing "agent" from other sections of Chapter 572 had meaning. For example, removing "agent" from Iowa Code Section 572.8(3), which requires the person filing a lien to identify the titleholder, no longer requires identification of the owner's agent. (Winger's Br. 23-24.) Yet, Appellants argue that removing "agent" from section 572.2(1) has no meaning.

(Id.) If removal of "agent" modified section 572.8(3), it should also be given meaning when removed from section 572.2(1).

4. The legislature's amendments do not create "statutory chaos" or the "parade of horribles" claimed by Winger.

Prior to 2007, § 572.2(1) allowed a materialman to enter into a contract with an "owner's agent", which then entitled the materialman to a mechanic's lien on the property for which material was provided as well as land belonging to the "owner". The materialman was entitled to a lien if he could prove he had "a contract" with someone who was the "owner's agent", even if the contract was not entered on behalf of the owner. But the lien would still extend to the owner's land. As amended, the statute now requires a materialman to contract with the owner, its general contractor, or its subcontractor before he is entitled to a mechanic's lien on land belonging to the owner. § 572.2(1).

Appellants' "statutory chaos" argument is flawed because it starts with a false premise, namely that: "To adopt Cargill's position one must also adopt the concept that unless agent or agency is specifically referenced in a statute, it is not allowed." (Winger Br. 29.) The legislature's amendment does not remove agency principles from any statutes, including Chapter 572. Rather, the amendment clarifies that a contract with the owner's agent—rather than with the owner—does not give a materialman a right to a lien on the owner's land.

Under agency principals, when a person enters into a contract in his capacity as an agent, he does so on behalf of the principal, and the principal is the party to the contract. The Restatement (Third) of Agency explains:

> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 100 (Iowa 2011) (emphasis added) (quoting Restatement (Third) of Agency § 1.01, at 17 (2006)). Further, "agency law conditions the scope of the agency relationship to transactions where the agent is acting on the principal's behalf." *Id*. The District Court's holding does not preclude application of general agency principles to any of the Code provisions identified by Winger.[3]

As previously worded, Section 572.2(1) allowed a lien to attach if a materialman had a contract with the owner's agent without having a contract with the owner. As amended, the Legislature removed "owner's agent" from the list of persons with whom a materialman may contract and receive the benefit of a lien.

[3] An acquiring agency may negotiate with the owner of property directly or through its attorney or land agent, and the owner's agent could "accept a purchase offer", Iowa Code § 6B.2B, to the extent the agent was acting on the owner's behalf. The contract would be with owner, not the agent. Likewise, a soil and water conservation district may negotiate with an owner's agent when "enter[ing] into agreements … with the owner or occupier of land," Iowa Code § 161A.7(1)(o), but the agreement is still with the owner. And a board of supervisors may negotiate

Now, the materialman must have a contract with the owner, his general contractor, or his subcontractor. A materialman could still negotiate and enter into a contract with the owner through the owner's agent, but the contract must be with the owner. If anything, the legislative change made Chapter 572 consistent with the code provisions identified by Winger. (Winger Proof Br. at 29-30.)

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. Appellants admit they did not have a contract with Cargill. (Winger Proof Br. 19.) Rather, Appellants each entered into contracts with HFCA, HFCA's general contractor, or HFCA's subcontractor to provide material and labor for HFCA's Facility. Appellants do not argue that HFCA entered into those contracts on Cargill's behalf rather than on HFCA's own behalf. None seeks to hold Cargill liable on the contracts giving rise to the mechanic's liens on the theory that HFCA acted as Cargill's agent under general agency law principles or otherwise. Under Section 572.2(1), as amended by the Iowa Legislature in 2007 and 2012, a contract with an owner's agent is not

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with a taxpayer's attorney, but the board "enter[s] into a written agreement with the owner", not with the owner's attorney. Iowa Code § 445.16.

enough to extend a lien to land belonging to the owner; the contract must be with the owner. A contract with HFCA (or HFCA's general contractor or subcontractor) does not give Appellants a lien on Cargill's land.

5. The legislative changes further the purpose of the amendments to streamline mechanic's liens and provide notice in a centralized electronic location.

The legislative amendments gave "owner" a precise meaning; that is, "owner" "means the legal or equitable titleholder of record." Iowa Code § 572.1(8). This is a significant change from the prior, imprecise definitions of "owner". Prior to July 1, 2007, "owner" was not defined, but was a concept that "shall include every person for whose benefit any building, erection, or other improvements is made …." Iowa Code § 572.1(3)(2005). HF 774 brought a level of certainty to the meaning of "owner" by deleting "shall include" and inserting "means the record titleholder". *See* Iowa Code § 572.1(4)(2007) ("owner" "means the record title holder and every person for whose benefit any building, erection, or other improvements is made …."). At the same time the legislature amended the definition of "owner" to "mean[] the record titleholder," the Iowa legislature also removed all references to "agent [or] trustee" from Chapter 572. This amendment was intentional, and the Court must give it the meaning the legislature intended. *Cf. Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) ("When a statute

includes an explicit definition, we must follow that definition ….” (internal citation and marks omitted)).

HF 675 added additional certainty to the meaning of “owner” in the 2012 amendment by removing the phrase “and every person for whose benefit any building, erection, or other improvements is made ….” Iowa Code § 572.1(8) (2017); *see* 2012 Ia. Legis. Serv. Ch. 1105, H.F. 675, § 2. The evolution of “owner” from being a concept to a defined term with a precise meaning is consistent with the legislature’s implementation of the mechanic’s lien registry and the focus on notice and certainty. Likewise, removing “owner’s agent” from the Chapter gives notice and consistency to identification of the property to which a mechanic’s lien attaches.

The District Court’s interpretation brings certainty to the statute. A materialman who provides material or labor for a building or improvement has a lien on the building or improvement. He also has a lien on the contracting party’s interest in the land on which the building sits. That interest, and the extent of the lien, is determined by the public land records, i.e., the titleholder of record. Thus, to have a lien on the fee interest in land, he must have a contract with the legal or equitable titleholder of record of the fee interest (directly or through a contract with a general contractor or subcontractor who has a contract with such person). *See* Iowa Code §572.1(3),(11).

In this case, although Appellants' liens attached to HFCA's Facility and its leasehold interest in the land, they were on notice from the recorded Memorandum of Lease that Cargill, not HFCA, owned the fee interest in the land. Because Appellants did not have contracts with Cargill, their liens do not extend to Cargill's fee interest in the land.

Appellants recognize that the 2007 amendments were a "step toward clarification" by eliminating the difficulty in "determining the quality of land titles and ownership". (Winger's Br. 24.) Appellants also assert that the 2012 amendments "streamlined the perfection of mechanic's liens by creating a central registry" online database. (*Id*.) Yet, Appellants' construction leaves uncertainty in the land of mechanic's liens, contrary to the Iowa legislature's clear attempts to create certainty through the changes made in 2007 and 2012. Under Appellants' analysis, when a materialman contracts with the owner of a building to be constructed on land not owned by the building-owner, the materialman must perform a detailed analysis of the *Romp* factors, which would involve non-public information, in an attempt to determine whether the mechanic's lien attaches to the land or just to the building. The legislature's amendments to Chapter 572 to remove reference to an "owner's agent" and prescribe a precise definition of "owner" bring that certainty. By limiting owner to the "titleholder of record" and removing "owner's agent" from the list of contracting parties, a materialman is on

clear notice of the property to which its lien will attach and can protect itself through contract.

The District Court's ruling is not a significant sea change even within the context of mechanic's liens. It applies in the limited circumstances of a lessee making improvements on a lessor's property where the materialman seeks a mechanic's lien on the lessor's fee interest. It does not alter the materialman's entitlement to a lien on the improvements for which his material or labor was supplied. But it does require a contract with the lessor before the lien can attach to the lessor's fee interest. Winger has identified only a handful of cases where the issue has come up in the hundred years since the issue was first addressed in Iowa, dating back to *Denniston & Partridge Co. v Brown*, 183 Iowa 398, 167 N.W. 90 (1918). As cited herein, a number of cases have held to the contrary, depending on the fact-specific circumstances of the case. To the extent the amendments altered prior case law, they bring clarity and consistency to the fact-specific issue.

In its separate Brief, Tracer argues that use of the word "equitable" in the new definition of "owner" means equitable principles still apply. (Tracer Br. 32.) Tracer ignores the context of how the word "equitable" is used. "Owner" is now defined as "the legal or equitable titleholder of record." § 572.1(8). An equitable titleholder includes a vendee purchasing property on contract, where the legal title remains in the vendor, but the equitable title vests in the vendee. *See, e.g.*,

Clemens, 368 N.W.2d at 708-12 (addressing property sold on contract). The requirement that the owner be the equitable titleholder "of record" focuses on certainty and notice—limiting ownership to what is contained in the record of the property. *See id.* at 712 (rejecting claim of implied contract where contractors were on constructive notice from recorded documents that the contracting party did not own the property). It does not mean equitable doctrines control over statutory language. *See, e.g., S. Sur. Co. v. York Tire Serv.*, 209 Iowa 104, 227 N.W. 606, 607 (1929) (focusing on the "statutory definition of the word 'owner'" in determining whether a mechanic's lien attached to property owned by a lessor).

6. The District Court's application of the legislative changes does not make Iowa an outlier in mechanic's lien law.

Appellants assert that "Cargill's interpretation makes Iowa … an outlier in the nation", identifying statutes from other states that expressly include "agent, or trustee" in their respective definition of mechanic's liens. (Winger Br. 31 & n.11.) As Appellants point out, however, it is the legislatures of each of those states that expressly include "agent" in the relevant statutory language.

Tennessee's statute includes the "owner's agent" language and expressly provides that a lessee is deemed the "fee owner's agent" only if the fee holder maintains control over the improvement and bears the cost of the improvements. *See* Tenn. Code § 66-11-102(c)(1),(d). Wyoming's statute is similar (but not

identical) to Iowa's. *See* Wyo. Stat. §29-1-201 (defining owner), §29-2-101 (extending lien to land on which building sits), §29-2-104 (allowing improvements on leasehold interest to be sold separately). Yet, by statute, Wyoming specifically allows a lien on a landlord's property only if the landlord has agreed to pay the costs of improvements or "specifically authorizes" them. *See* Wyo. Stat. §29-2-105. *Redco Const. v. Profile Properties, LLC*, 271 P.3d 408, 418-19 (Wyo. 2012), cited by Winger, holds that under this statutory language, a lien attaches to the lessor's interest only when the lessee "is empowered or given legal authority to act on the other's behalf," i.e., bind the lessor.

Inclusion of the term "agent" in the statutory language reveals the importance and relevance of those terms to the meaning of the statutes. Likewise, the removal of "owner's agent" from § 572.2(1) has significance and must be given meaning.

Further, the disparity between Iowa and other states is not as Winger claims. Several other jurisdictions recognize that, absent a contractual relationship between the materialman and the lessor, a mechanic's lien premised on a contract between the materialman and the lessee does not extend to the lessor's interest. *See, e.g.*, *Accurate Const. Co. v. Dobbs Houses, Inc.*, 154 Ga. App. 605, 605, 269 S.E.2d 494, 495 (Ga. Ct. App. 1980) (even though lease agreement required lessee to make improvements to real property, "[a] contract for improvements between a

lessee and a materialman does not subject the interest of the lessor to a lien unless a contractual relationship exists between the lessor and the materialman as well. No express or implied consent of Dobbs Houses to the contract for improvements appears." (internal citations omitted)); *Cupside Props. Ltd. V. Earl Mechanical Svcs*, 53 N..3d 818, 827 (Ohio Ct. App. 2015) (contract with lessee, who lacked direct authority to act on lessor's behalf, does not give rise to mechanics' lien on lessor's interest).

"The lien statutes of the different states are so varied as to make decided cases of doubtful value without a study of the statutes." *Aldridge v. Johnson*, 270 P. 322, 323-24 (Okla. 1928). Nonetheless, a review of how other states construe their mechanic's lien statutes reveals that the District Court's construction of the statutory changes to Iowa Code § 572.2 is consistent with other jurisdictions' mechanic's lien laws.

A number of states grant a mechanic's lien based on an agreement or "consent" of the owner, which is much broader than Iowa's statute, requiring a contract with the owner. Yet, even those states apply "consent" narrowly, holding that the landlord "must give either his tenant or the materialman express or implied consent acknowledging he may be held liable for the work" before a lien attaches to the fee. *F&D Elec. Contractors, Inc. v. Powder Coaters, Inc*., 567 S.E.2d 842, 846-47 (S.C. 2002) (emphasis added) (construing S.C. Stat. § 29-5-10, granting a

lien to one who furnishes labor or materials "by virtue of an agreement with, *or by consent of*, the owner of the building or structure").

The Connecticut mechanic's lien statute uses similar language: "If any person has a claim … for ... services rendered ... in the improvement of any lot …, and the claim is by virtue of an agreement with or by consent of the owner ... then the plot of land, is subject to the payment of the claims." Conn. Gen. Stat. § 49-33(a)(emphasis added). In *St. Catherine's Church Corp. of Riverside v. Tech. Planning Assocs., Inc.*, 520 A.2d 1298, 1299 (Conn. Ct. App. 1987), the Court held § 49-33 did not entitle an architect to a lien on the land for work on a housing project to be built on land owned by the Church and leased to Augustana Homes. "The consent meant by the statute must be a consent that indicates an agreement that the owner of at least the land shall be, or may be, liable for the materials or labor …, so that there is an implied contract by him to pay for them." *St. Catherine's Church*, 520 A.2d at 1299. With respect to whether the contractor "ha[d] authority from or [was] rightfully acting for the owner" under the statute, the Court required evidence "that Augustana had acted on behalf of the plaintiff in contracting for the defendant's services." *Id.* at 1300.

By contrast, the Oklahoma mechanic's lien statute does not include "owner's agent". *See* OKLA. STAT. tit. 42, §141. The Oklahoma Supreme Court precludes a lien on the fee unless the lessee is the lessor's "duly authorized agent," which

requires the landowner to be contractually bound by the tenant's contract with the materialman. *See Aldridge*, 270 P. at 325-26 (If parties "were made agents of the owner, then the landowner is liable and the whole of the land and improvements are subject to lien for unpaid labor and material bill, for a contract is, in law, made with the owner if made by his authorized agent."); *see also Bell v. Tollefsen*, 782 P.2d 934, 937-38 (Okla. 1989) (continuing to apply "duly authorized agent" requirement); *Statser v. Chickasaw Lumber Co.*, 327 P.2d 686 (Okla. 1958).

These cases support the District Court's holding in this case. By removing "owner's agent" from the list of persons with whom the materialman must have a contract in § 572.2(1), the statute recognizes that before a lessor's fee interest in its land is burdened with a mechanic's lien, the lessor must have a contractual obligation to pay for the services giving rise to the lien. In other words, the lien attaches only if the lessee can bind the lessor to the underlying contract as its authorized agent acting on behalf of the lessor.

The following language is "especially enlightening" to explain the purpose behind preventing tenants from creating mechanic's liens that attach to the landlord's interest:

> [Materialman] did the work under contract with [Lessee] with the understanding that it was to be charged to him. If they were unwilling to do the work and furnish the material upon his credit and intended to look to the security provided by statute, ordinary prudence required that they exercise that degree of diligence which would enable them to

> ascertain the status of the title to the land upon which the building was to be erected and to obtain the approval or procurement of the owners. Their loss must be attributed to their failure to do so.

F&D Elec. Contractors, 567 S.E.2d at 845 (quoting *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324, 326 (N.C.1942)).

Here, Appellants do not argue that their contracts through HFCA give rise to contractual liability for Cargill. Nonetheless, they seek to foreclose on Cargill's land to recover under the contracts based on judge-made factors that appear outside the record of title. As part of moving the mechanic's lien statute to an electronic notice platform, the Iowa Legislature intentionally removed "owner's agent" from § 572.2(1) and limited "owner" to the record titleholder to make clear that there must be a contractual basis for liability before a property owner's property is subject to a lien.

7. The "Explanation" contained in the initial version of HF774 does not limit the meaning of the Legislature's deletion of "owner's agent" from Iowa Code § 572.2(1).

Appellants urge the Court to ignore the plain language of the amended statute by considering the Explanation included with the "Introduced" version of the 2007 bill that amended Iowa Code § 572.2(1). There are several problems with relying on the Explanation. First, additional substantive changes were made to the "Introduced" version of HF774 that became the "Enrolled" version of HF774, which is the version that was enacted into law. (Compare App. 1572, Winger MSJ

Reply Br. Ex.A, "Introduced" version of HF774 to App. 1577, Winger MSJ Reply Ex.B, "Enrolled" version of HF774.) The House Study Bill and the Senate Study Bill likewise include different substantive language than the Bill as enacted. (See App. 1581, 1586 Winger MSJ Reply Att. 1 and Ex. C.) An Explanation of a preliminary version of the Bill, which was not the enacted Bill, does not provide a proper legislative history.

Since 2014, "Explanations" contained in House and Senate bills include a disclaimer: "The inclusion of this explanation does not constitute agreement with the explanation's substance by the members of the general assembly."[4] Courts should be cautious in relying on "Explanations", particularly those included in the Introduced version that did not become law.

The Explanation also makes little sense in the context of mechanic's liens, which are charged against property, not against persons. *See* § 572.2(1) (one who provides material or labor "shall have a lien upon such building or improvement, and land"); § 572.8(1) (requiring "legal description that adequately describes the property to be charged with the lien"). The list of "owner, owner-builder, contractor, or subcontractor" provides the necessary contractual relationship giving rise to the mechanic's lien, but the lien is "upon" or "charged against" the building

[4] *See, e.g.*, House File 2002, available at: https://www.legis.iowa.gov/legislation/BillBook?ba=HF2002&ga=85 and Senate File 2001, available at: https://www.legis.iowa.gov/legislation/BillBook?ba=SF2001&ga=85.

or improvement for which the material or labor was provided. Changing the list of people with whom a contractual relationship is required has no effect on "who" is charged with the mechanic's lien because the lien is charged against the property, not the person. The Explanation that "[t]he bill eliminates owner agents and trustees from the list of persons against whom a lien may be filed" is therefore not relevant to identifying the property to which a mechanic's lien attaches.

Even if the Court considers the "Explanation", it does not support Appellants' argument that deleting "agent" from § 572.2(1) had no substantive impact. The Explanation makes sense with respect to changes removing "agent" from other sections of Chapter 572, such as § 572.8(3), which previously required identification of the "owner, agent, or trustee of the property" for purposes of perfecting a mechanic's lien and identifying who was to receive a copy of the lien, or § 572.10, identifying the persons required to receive notice of the lien from a subcontractor.

But nothing in the Explanation limits the amendments to the purpose stated in the Explanation. Winger's construction of the statute gives no meaning whatsoever to the legislature's removal of "owner's agent" from § 572.2(1). The Explanation does not preclude the District Court's construction of the legislative amendments to 572.2(1).

8. Conclusion

The legislative amendments bring certainty to mechanic's lien law and must be given their clear effect. A contract with the "owner's agent" is insufficient to extend a mechanic's lien to the landowner's fee interest.

II. THE DISTRICT COURT PROPERLY CONCLUDED IN ITS ALTERNATIVE HOLDING THAT EVEN IF § 572.2 COULD BE SATISFIED BY A CONTRACT WITH THE LANDOWNER'S AGENT, THE ROMP RULE WAS NOT SATISFIED.

A. Error preservation.

Cargill agrees the issue of whether HFCA was Cargill's agent based on its lessor/lessee relationship was properly preserved.

However, neither PCI's separate argument that Cargill's "surrounding … property" will "benefit immediately" from PCI's alleged work, nor the underlying factual basis for asserting the argument—PCI's alleged erosion control, storm sewer installation, and "other things" (PCI Br. 13-14)—has ever been presented to the District Court. PCI's argument at pp. 13-15 of its Brief is therefore not properly preserved for appeal. *See State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015) (error preservation affords the district court an opportunity to avoid or correct error and provides the appellate court an adequate record to review).

B. Scope and standard of review.

Cargill agrees the standard of review is for errors at law.

C. Argument

If the Court adopts the District Court's plain language reading of § 572.2(1), it need not further consider the District Court's alternative holding that even under the *Romp* Rule, the liens in this case do not attach to Cargill's fee interest. Nonetheless, the undisputed facts of this case make clear the *Romp* Rule does not apply.

1. The terms of the Lease Agreement between Cargill and HFCA defeat application of the *Romp* Rule.

Even prior to the legislative changes to § 572.2(1), "[i]t [wa]s settled that mere knowledge of or consent to the making of improvements by a lessee or vendee does not ordinarily subject the interest of the lessor or vendor to a mechanic's lien." *Romp*, 56 N.W.2d at 603. Nonetheless, Iowa courts have allowed a materialman's lien to attach to the lessor's interest in limited circumstances where the lessor required the lessee to make the improvement and the following judge-made circumstances were also found: (1) the buildings or improvements become the property of lessor after a relatively short term, (2) the additions or improvements were permanent and beneficial to the real property and so contemplated by the parties to the lease, and (3) the lease payments reflect the additional value created by the improvements. *See Ringland-Johnson-Crowley Co. v. First Cent. Serv. Corp.*, 255 N.W.2d 149, 151 (Iowa 1977); *Romp*, 56 N.W.2d at

604. Even if this standard still applied notwithstanding the legislative changes to § 572.2(1), the undisputed facts of this case fail to meet the requirements for the *Romp* Rule.

The *Romp* Rule is based on the terms of the lease. In *Romp*, the lessee was required to construct a building for the purpose of growing mushrooms. The amount of rent contemplated a value greater than the land without the building. The lease was for only five years and made no provision for removal of the improvements at the end of the five-year lease term. *Romp*, 56 N.W.2d at 605. The *Romp* Court found under these facts, the lessor "made her lessees agents for the construction of the buildings to the extent that her interest in the realty became subject to the plaintiff's claim for mechanic's lien." *Romp*, 56 N.W.2d at 606. In *Stroh*, the lessor required the lessee to build a car wash on the vacant land, the value of the building accounted for the amount of the rent payment, and "the improvements became the property of the lessor at once." *Stroh*, 247 N.W.2d at 752-53.

By contrast, in *Queal Lumber*, an agency relationship was not found even though the lease provided that the improvements became the property of the lessor at the end of the lease term. 206 N.W. at 628. The relevant lease terms included: a lease term of 25 years, a statement that the premises should be used for a restaurant, a requirement to complete construction of the restaurant in a specified

time period, and a prohibition against allowing mechanic's liens to be filed against the premises. *Id.* at 627-28. The Supreme Court considered the lease terms and relied on the parties' right to contract to conclude that the lessee was not an implied agent for the lessor. *Id.* at 629. The Supreme Court held: "It is fundamental, under the Iowa mechanic's lien law, that, before one can successfully maintain a lien, he must have a contract with the owner, his agent, trustee, contractor or subcontractor." *Id.* at 628. Because none of the lienholders had contracts with the lessor, they had nothing to enforce against the lessor's interest in the property. The court rejected an argument that the lessee was the lessor's agent "because the lease specifically provides otherwise", and cases relied on by the lienholders involved facts from which the court could imply an agency relationship. *Id.* at 629.

The Supreme Court more recently in *Stroh* recognized *Queal's* continuing validity and distinguished *Queal* in part on the basis that the "recorded lease disavowed the lessee's agency and specifically gave notice to potential lienholders they had no right to file liens." *Stroh*, 247 N.W.2d at 752. While the lease in *Stroh* was recorded, the recording is not a prerequisite to considering the language of the lease in determining whether a lessee can act as the lessor's agent. Agency is a contractual relationship, and where a lease expressly provides that a lessee does not act as the lessor's agent, courts have abided by that language in finding a lack of

agency. *See, e.g., Perkins Supply & Fuel Serv. v. Rosenberg*, 226 Iowa 27, 282 N.W. 371, 373 (1938) ("Reading these agreements found in the lease in their entirety, we are unable to discover an appointment of the lessees as agents to bind the lessors or their real estate for improvements the lessees might see fit to make. … But a more important consideration … is the fact the lease itself provides otherwise.").

Under the Lease Agreement here, Cargill and HFCA expressly disclaimed any partnership, joint venture or association between them. HFCA covenanted to keep the Land, the Facility and the Easement Parcels free of mechanic's liens. The Memorandum of Lease was recorded on July 23, 2013, giving notice to potential lienholders of HFCA's interest as owner of the Facility, its limited leasehold interest in the land, and its status as independent of—and not an agent for—Cargill. 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. *See Stroh*, 247 N.W.2d at 752; *Perkins Supply & Fuel Serv.*, 282 N.W. at 373; *Queal*, 206 N.W. at 629.

Appellants take umbrage at the fact that Cargill recorded a Memorandum of Lease instead of the entire Lease Agreement. Winger does not dispute, however, that the Memorandum of Lease was recorded in the land records, putting Appellants on notice that HFCA owned only a leasehold interest in the land on

which Appellants were constructing the Facility. Recording a Memorandum of Lease, rather than the full Lease Agreement, satisfies recording requirements, *see, e.g.*, Iowa Code § 588.44(6), and is common practice to prevent publication of confidential terms of the Lease Agreement, such as its price.[5] The recorded Memorandum of Lease gave "notice to the world not only of the facts and claims therein expressly set forth, but also of all other material facts which an inquiry thereby reasonably suggested would have developed." *Clemens*, 368 N.W.2d at 709 (quoting *Loser v. Savings Bank*, 128 N.W. 1103 (1910)). 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. *See id.* ("Contractors have constructive notice of all information contained in recorded documents and have a duty of inquiry concerning circumstances disclosed in those records."). It was incumbent upon Appellants to protect their interests, if they thought it necessary. *See Cassaday v. De Jarnette*, 251 Iowa 391, 396, 101 N.W.2d 21, 25 (1960) (discussing *Romp* Rule and holding that "this desire to do equity should not be extended unduly, for the creditor also is required to act reasonably").

[5] *See* Recording of Leases, 3 Com. Real Estate Forms 3d § 12:7 (Nov. 2017 Update) ("Although the parties may want to put the world on notice of the existence of the lease, it is unusual for the parties to want all of their business terms made public. Therefore, the usual form of notice is through the recording of a Memorandum of Lease (§ 15:1), which limits the information given to such terms as are necessary to put an interested party on notice to seek additional information from the parties.").

Setting aside the issue of whether Appellants were given sufficient notice that HFCA was not acting as Cargill's agent, Appellants cannot meet any of the *Romp* requirements. A contract with a lessee does not give rise to a mechanic's lien on the lessor's land unless the lease requires the lessee to make the improvements and, if that prerequisite is found, the following three factors are also established: (1) the buildings or improvements become the property of lessor after a relatively short term, (2) the additions or improvements were permanent and beneficial to the real property and so contemplated by the parties to the lease, and (3) the lease payments reflect the additional value created by the improvements. *See Ringland-Johnson-Crowley*, 255 N.W.2d at 151.

None of these requirements exist here. The Lease was for fifty years; even after that lengthy period of time, the Facility and all improvements made by HFCA remained HFCA's property. (App. 555, 570-71 Lease ¶¶3.01, 19.01.) Winger's suggestion that the HFCA Facility is "one of the largest industrial plants in Iowa", making fifty years "short" (Winger Br. 64) is based on complete speculation. While it is a large industrial facility, its purpose is to manufacture sodium hydroxide ("caustic") and hydrochloric acid. (App. 549, Lease Recitals.) Winger's speculation that fifty years is "short" in the life of a large industrial plant is rebutted by the actual use of that plant to produce caustic acids.

With respect to the second requirement, the Lease Agreement contemplated that HFCA will remove the Facility and improvements from the property at the end of the fifty-year lease. (App. 570-71.) Contrary to Winger's conclusory statement that "[t]he nature and size of the construction proves [the second] point," (Winger Br. 62), the actual Lease Agreement required HFCA to remove the Facility and improvements and restore the property to its original state at the end of the lengthy fifty-year lease.

Finally, as to the last requirement, the lease payments—$12,000 per year for the entire fifty-year term—do not contemplate an increased value in Cargill's land. (App. 556.) Again, Winger brushes past this factor by claiming "there is no dispute" the last factor is met based on benefits to Cargill under the Ancillary Agreements. (Winger Br. 62-63.) As the District Court properly found, however, the Ancillary Agreements were all arms' length transactions, for which Cargill agreed to pay for the products it received from HFCA. (App. 1652-53, 4/20/17 Ruling 35-36.) Appellants do not argue the Agreements were not arms' length agreements. A constant $12,000 annual rent over a fifty-year term can hardly be said to "reflect[] the increased value of the property as a result of those improvements". *Ringland-Johnson-Crowley*, 255 N.W.2d at 151.

Even Winger concedes that not all three requirements are met, suggesting two out of three is enough. (Winger Br. 63.) Where Appellants cannot, with

evidence in the record, support any of the three requirements, the District Court properly concluded in its alternative holding that the facts of this case do not meet the *Romp* requirements.

2. Cargill and HFCA were not joint venture partners that would entitle Appellants to a mechanic's lien on Cargill's land.

Even if Appellants' argument of a joint venture had evidentiary support, Appellants are not entitled to a mechanic's lien on Cargill's land under the plain language of Chapter 572 on that basis. Whereas the definition of "owner" previously included "every person for whose use or benefit any building, erection, or other improvement is made," § 572.1(3)(2005), the definition of owner is now limited to the "legal and equitable titleholder of record." § 572.1(8). Appellants' attempt to rely on the Ancillary Agreements between HFCA and Cargill to create a contract with the Mechanic's Lienholders simply ignores this distinct change in the statute.

In any event, the Ancillary Agreements did not create a joint venture between HFCA and Cargill. A joint venture "is characterized by a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits and a duty to share the losses." *Brewer v. Cent. Const. Co*., 241 Iowa 799, 806, 43 N.W.2d 131, 136 (1950). "[A] gateway requirement of a joint venture is a showing that the participants have agreed to share in the profits and

losses." *Peoples Trust & Sav. Bank v. Security Sav. Bank*, 815 N.W.2d 744, 756 (Iowa 2012) (citing *Skemp v. Olansky*, 249 Iowa 1, 7-8, 85 N.W.2d 580, 584 (1957) (joint venture not present where no showing of sharing of profits and losses and only assistance in obtaining a loan)).

The Ancillary Agreements were arms' length contracts through which Cargill and HFCA defined their relationship as independent contracting parties using market prices. Appellants do not argue otherwise. The terms of the Ancillary Agreements make clear the parties are not in a joint venture. First, the Lease Agreement expressly provides that HFCA, not Cargill, owns the Facility. Thus, there is no "joint proprietary interest," the first prerequisite to a joint venture. Additionally, none of the Ancillary Agreements gives Cargill a right to share in HFCA's profits; nor do any of them require Cargill to share in HFCA's losses. Likewise, HFCA is not entitled to share in Cargill's profits or required to contribute towards Cargill's losses. None of the relevant agreements gives Cargill a mutual right to control HFCA's operations. Finally, the Lease Agreement expressly disclaimed any partnership, joint venture or association between Cargill and HFCA. That Cargill received a contractual benefit from the Ancillary Agreements does not make it a joint venturer with HFCA in those arms' length agreements.

Winger's argument that Cargill Financial Services International[6] was really the financier of the Facility, instead of U.S. Bank (Winger Br. 56-57) does not support Winger's joint venture argument. CFSI assisted in arranging the bond financing for HFCA through the Iowa Finance Authority bonds and U.S. Bank. (App. 1310-1313, SOAF ¶13-23.) However, assistance in obtaining lending is insufficient to create a joint venture. *See Skemp*, 85 N.W.2d at 584. Further, Cargill's obligation under the Put Agreement to reimburse U.S. Bank was triggered only if HFCA defaulted on its loan with U.S. Bank. Cargill did not "purchase" the U.S. Bank obligations; rather, it was required by the Put Agreement to reimburse U.S. Bank over $81 million for HFCA's default. (*Id.* ¶23-26.) The cases Winger relies upon—primarily *Romp* and *Stroh*—involved cases where the landlord funded construction for a building in which the landlord received the ownership under the lease agreement, such that the landlord was constructing its own building. The Lease Agreement makes clear that is not the case here. (App. 1308-1309, 1310, SOAF ¶¶5-8, 12.) Despite Cargill's reimbursement to U.S. Bank, HFCA owns the Facility, both at the time of its construction and at the end of the Lease Term.

[6] Tracer's assertion that CFSI financed a portion of the financing (Tracer Br. 25) ignores that CFSI prepaid for product Cargill was to receive under the Chemical Supply Agreement and received a security interest that was subordinated to U.S. Bank's interest in HFCA's personal property. (App. 1337, Loan Agreement ¶3.1 discussing Prepayment Agreement.)

This fact also explains why the equities do not favor Appellants. In the cases finding the lessee to be the lessor's agent, the lienholders were unable to attach their liens even to the improvements, because the improvements became the property of the landlord at the end of the lease. *See, e.g.*, *Romp*, 56 N.W.2d at 603; *Stroh*, 247 N.W.2d at 752-53. Here, Cargill is seeking to protect its fee interest in the land. Cargill does not dispute that the Mechanic's Liens attach to the Facility itself as well as to HFCA's leasehold interest. Thus, any discussion of the financing arrangements and Cargill's interest in the Facility is irrelevant to this separate issue of whether the mechanic's liens can attach to Cargill's fee interest in the land.

III. MERGER DOES NOT APPLY TO CARGILL'S MORTGAGE LIEN.

A. Error preservation.

Cargill agrees this issue was properly preserved.

B. Scope and standard of review.

The standard of review is for errors at law.

C. Appellants' liens continue in HFCA's Facility, and there is no basis to merge Cargill's separate interests.

Appellants do not challenge on appeal the District Court's ruling that Cargill received U.S. Bank's lien priority status when U.S. Bank assigned its construction mortgage lien to Cargill in exchange for Cargill's payment under the Put

Agreement. (App. 1654-1655, 4/20/17 Ruling 37-38.) Winger nonetheless argues the District Court should have applied merger principles to preclude Cargill's construction mortgage lien. (Winger Br. 65-67.)

Winger's merger argument improperly attempts to conflate two separate "merger" issues. Cargill obtained U.S. Bank's mortgage interest when Cargill reimbursed U.S. Bank under the Put Agreement and received an assignment of U.S. Bank's construction mortgage lien. But HFCA still holds title to the leasehold interest, which is the interest Winger claims should be merged with Cargill's interest as lessor. That U.S. Bank (and now Cargill standing in its shoes) has a right to foreclose on the mortgage lien, does not address the separate issue of whether the leasehold interest has merged with the dominant fee estate.

Even if merger was at issue, "[i]t 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." *Kilmer v. Hannifan*, 85 N.W. 16, 16 (Iowa 1901). Prior to the assignment of U.S. Bank's mortgage interest to Cargill, the Appellants had no lien on Cargill's fee interest. The Appellant's liens, like the construction mortgage lien, still attach to the HFCA Facility and HFCA's leasehold interest in the land, so there is no prejudice. Under Winger's theory, Cargill's alleged interest in the leasehold

interest should be merged into Cargill's fee interest, which would serve to enhance the Appellant's rights by extending their lien in the leasehold estate to Cargill's fee interest. This is precluded by *Kilmer*.

Limiting the mechanic's liens to the Facility and Improvements is consistent with Iowa Code Section 572.6. Pursuant to § 572.6, "[w]hen the interest of such person is only a leasehold, the forfeiture of the lease … shall not forfeit or impair the mechanic's lien upon such building or improvement …." (emphasis added). Such is the case with the liens created by or through contracts with HFCA, which holds only a leasehold interest. Appellants' liens continue in the Facility and HFCA's leasehold interest, but are subordinate to the construction mortgage lien now held by Cargill.

IV. THE DISTRICT COURT PROPERLY REJECTED APPELLANTS' CLAIM OF FRAUD

A. Error preservation.

Cargill agrees this issue was properly preserved.

B. Scope and standard of review.

Cargill agrees that the standard of review is for errors at law.

C. Whether the superior construction mortgage lien is held by U.S. Bank or Cargill makes no difference to Appellants' liens.

It is undisputed that U.S. Bank had a construction mortgage lien on the HFCA Facility, which was recorded on August 29, 2013. (App. 1313, SOAF ¶21-

22.) It is also undisputed that the construction mortgage lien, which was filed before any of the Appellants began work on the HFCA Facility, took priority over Appellants' mechanic's liens. *See* Iowa Code § 572.18(1), (2).

When HFCA defaulted on its payment obligations, U.S. Bank exercised its rights under the Put Agreement to require Cargill to pay U.S. Bank for the outstanding obligations. Cargill assumed the obligations of U.S. Bank pursuant to the Put Agreement and received an assignment of U.S. Bank's rights under the Leasehold Mortgage. (App. 1313, SOAF ¶23-24.) Cargill now has all of the rights U.S. Bank had under its Leasehold Mortgage, including priority dating to August 29, 2013. *See* Iowa Code § 572.18(4); *see also Diversified Mortg. Inv'rs v. Gepada, Inc*., 401 F. Supp. 682, 686-87 (S.D. Iowa 1975) (assignee of mortgage took priority over subcontractor whose work commenced after filing of original mortgage).

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. If makes no difference to Appellants who holds the construction mortgage lien; they are still subordinated to that lien.

This is a significant, and controlling, distinction between this case and the cases relied on by Winger. In *Veale Lumber*, the Supreme Court found it

noncontroversial under the "plainest principles of equity" that an oral agreement requiring the builder to construct houses on the owner's land clearly made the builder an agent for the owner when the builder contracted for the lumber supplies necessary to carry out the agreement. *Veale Lumber Co. v. Brown*, 195 N.W. 248, 249-50 (Iowa 1923). The "absurdity" noted by the Court was if the owner was treated as a mortgagor rather than an owner of the buildings, contrary to the mechanic's lien statute. *Id.*

Here, Cargill did not finance construction of its own building to be constructed on its own land. Rather, U.S. Bank financed construction of HFCA's Facility, receiving a mortgage lien in the HFCA Facility. The U.S. Bank lien took priority over Appellant's mechanic's liens regardless of whether Cargill subsequently paid U.S Bank's mortgage and took assignment of its construction mortgage lien in the Facility owned by HFCA. The Appellant's liens continue in the HFCA Facility, but they are subject to the construction mortgage lien, regardless of who owns that lien. It can hardly be inequitable for Cargill to receive assignment of the construction mortgage lien in the HFCA Facility when Cargill was required to reimburse U.S. Bank over $81 million for that lien.

Winger's argument that Cargill is attempting "to gazump its rights by using an after-acquired mortgage <u>on its own property</u>" reveals the fallacy of its argument. (Winger's Proof Br. at 72.) The "after-acquired mortgage" is not on Cargill's

"own property". The mortgage lien is limited to HFCA's Facility and HFCA's leasehold interest, not Cargill's property. (App. 1658, 4/20/17 Combined Ruling at 41 ("Cargill has a mortgage interest in the Facility as well as in HFCA's Leasehold Interest in the land.").)

The District Court properly rejected Appellants' fraud argument.

V. THE ISSUE OF WHETHER APPELLANTS "OTHERWISE IMPROVED" CARGILL'S LAND UNDER IOWA CODE § 572.2 WAS NOT PRESERVED FOR APPEAL.

A. Error preservation.

Section 572.2(1) essentially recognizes two ways a lien can attach to land. A person who provides material or labor for construction of a building or improvement is entitled to a lien on the building or improvement and any "land belonging to the owner upon which the building is situated". The statute also provides: "those engaged in grading, sodding, installing nursery stock, landscaping, sidewalk building, fencing on any land or lot" are entitled to a lien on "the land or lot so graded, landscaped, fenced, or otherwise improved, altered, or repaired". § 572.2(1) (emphasis added). It is this second "otherwise improved" language Appellants belatedly rely upon, which was not preserved for appeal.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) (quoting *Meier v.*

Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)). "Error preservation is important for two reasons: (1) affording the district court an 'opportunity to avoid or correct error'; and (2) providing the appellate court 'with an adequate record in reviewing errors purportedly committed' by the district court." *Ambrose*, 861 N.W.2d at 555 (quoting *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003)).

This "otherwise improved" argument was not raised in Appellants' Motions for Partial Summary Judgment, and the District Court properly refused to consider the new legal issue in ruling on the Rule 1.904(2) Motions for Reconsideration. (App. 1791, 6/30/17 Ruling 11 ("The Court stated Lemartec was too late in raising this legal issue in its Reply Brief to the Summary Judgment proceedings. It defies reason that the argument is now timely submitted.").) Not only was the issue not raised, it was not decided.

Where a party has alternative legal theories but fails to present them to the District Court, the legal issue not raised or decided by the District Court is not preserved for appeal. *See Lee v. State, Polk Cty. Clerk of Court*, 815 N.W.2d 731, 740 (Iowa 2012) (refusing to consider issue of express waiver of state immunity based on state statute where party raised only constructive waiver under federal statute). As this Court has noted, this applies even to constitutional challenges to a statute. *See Taft v. Iowa Dist. Court*, 828 N.W.2d 309, 322 (Iowa 2013) (refusing to consider constitutional challenge to application of statute that was not presented

to district court, noting "[e]ven issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal"); *State v. Biddle*, 652 N.W.2d 191, 202 (Iowa 2002) (refusing to consider defendant's argument that strict scrutiny applied to equal protection challenge to statute where defendant only argued rational basis analysis to district court).

Appellants recognize the preservation problem, vaguely arguing Winger raised the "betterment issue" in its Motion for Partial Summary Judgment and in its Reply Brief in support of its Motion for Reconsideration. (Winger Br. 73-74; PCI Br. 15-16.) While Winger argued in its Summary Judgment Brief that Cargill "benefited" from the work performed by HFCA, the legal argument was premised entirely on the *Romp* Rule and HFCA's actions, as Cargill's lessee, of constructing the Facility on Cargill's property. (App. 980-993, Winger MPSJ 22-35.) Not until the Motion for Reconsideration did any of Appellants raise a claim that their liens attached to Cargill's land under the "otherwise improved" portion of § 572.2(1).

An appeal from the Ruling on Reconsideration does not allow Appellants to raise on appeal legal issues raised for the first time in the Motion to Reconsider. "[A]ppeals from orders denying motions to reconsider previous rulings raise no legal question ... because an appeal ordinarily must be taken from the ruling in which the error is said to lie." *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa

1998) (internal marks omitted). Appellants[7] did not raise the "otherwise improved" legal argument in the underlying Cross Motions for Partial Summary Judgment, and the legal issue is not properly presented to this Court. *See State v. Britt*, 901 N.W.2d 838, 2017 WL 1735633, *1 (Iowa Ct. App. 2017) (claims that "do nothing more than … raise a new argument for the first time" in a Rule 1.904(2) motion are not proper); *In re Estate of Spahn*, 732 N.W.2d 887, 2007 WL 754633,*3 (Iowa Ct. App. 2007) (Rule 1.904(2) "is not a vehicle for advancing a wholly new legal theory in support of a claim").

That Winger and Peterson both assert they raised the issue generally in their pleadings, i.e., Winger's Petition (Winger's Br. 73) and Peterson's Answer (PCI Br. 15), does not preserve the specific legal issue for review on appeal from the District Court's Ruling on Summary Judgment. *See* Iowa R. App. P. 6.102(2)(a) (appeal may be taken from a "decree, judgment, [or] order" of the District Court).

[7] While Lemartec raised the issue belatedly in its Reply Brief in support of its Motion for Summary Judgment, the District Court refused to consider Lemartec's argument as raised too late. (App. 1656-1657, 4/20/17 Ruling at 39-40 (citing *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996)). Although Appellants joined others filings, none joined Lemartec's Motion for Summary Judgment. Lemartec is not a party to this appeal, and Appellants cannot rely on issues of a co-party in which they did not join.

B. Scope and standard of review.

To the extent the Court considers the issue of whether Appellants' actions of providing labor and material "otherwise improved" Cargill's land, Cargill agrees that the standard of review is for errors at law.

C. Providing labor or material for a building does not meet the "otherwise improved" basis for a lien on Cargill's land within the meaning of § 572.2(1).

The phrase "otherwise improved" is a general description at the end of a list of specific items. The first part of the sentence identifies the persons entitled to this separate lien: "those engaged in grading, sodding, installing nursery stock, landscaping, sidewalk building, [or] fencing." Other than PCI, Appellants do not even claim to have performed any of these services. Essentially, Appellants ask this Court to rule that providing material and labor for construction of a building fits within the definition of "otherwise improving" the land on which the building sits.

Appellants' construction runs afoul of several rules of statutory construction. First, it is a "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." *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 305 (Iowa 2000) (internal marks omitted). The lienholders' construction would make superfluous the whole rest of § 572.2(1), which provides a lien to those who

provide "material or labor for, or perform[] any labor upon, any building or land for improvement, alteration, or repair." If constructing a building amounted to "otherwise improving the land", there would be no need for the separate provision granting these services a lien on the building and the "land belonging to the owner on which the same is situated."

The lienholders' construction also violates the statutory canon "*ejusdem generis*, [which] counsels: Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (internal citations omitted)); *see also Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 715 (Iowa 2005) (applying canon to Iowa statute); *Messerschmidt v. City of Sioux City*, 654 N.W.2d 879, 884 (Iowa 2002) (same). The phrase "otherwise improved" follows the list "the land or lot so graded, landscaped, fenced, or otherwise improved" and should be limited to similar actions to the land. Providing material or labor to construct a building is not similar to grading, landscaping, or fencing the land.

While PCI claims to have moved dirt, provided erosion control, cleared land, and installed fencing (PCI Br.18), it failed to provide any evidence in the summary judgment or reconsideration proceedings to support those bald assertions, not even

an affidavit, as noted by the District Court. (App. 1791, 6/30/17 Ruling 11.) Even on appeal, PCI identifies only its Answer and a Statement[8] filed with the District Court to provide the evidentiary support for the work performed by PCI (*id.*), neither of which was argued to the District Court or included in the summary judgment or reconsideration record.

As a legal matter, providing material and labor to construct the HFCA Facility does not satisfy the "otherwise improved" language to afford a lien on Cargill's land. As a factual matter, Peterson failed to raise the argument or provide any evidence to support the argument it attempts to make in its Appeal Brief. The place for those arguments was in the District Court. To the extent this argument is considered, it should be denied.

VI. THE DISTRICT COURT PROPERLY ADDRESSED THE ISSUE OF ATTACHMENT TO CARGILL'S FEE INTEREST IN THE SUMMARY JUDGMENT PROCEEDINGS.

A. Error preservation.

Tracer takes a slightly different approach to the "otherwise improved" issue, arguing it was premature and beyond the scope of the Case Management Order. (Tracer Br. 39-43.) Tracer does not address the merits of the legal issue (*id.*), as the

[8] The 8/29/16 Statement to the District Court expressly stated: "These statements will not be binding … and [will] not be offered into evidence against any party later in these proceedings." (App. 674, 8/29/16 Statement.)

Court did not rule on it. The District Court addressed the scope of its Summary Judgment Ruling on Reconsideration.

B. Scope and standard of review.

The District Court's review of the scope of its decision in light of its Case Management Order should be reviewed for abuse of discretion. *Cf. Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996) (trial court has "considerable discretion" in managing litigation); *Fed. Land Bank of Omaha v. Tiffany*, 529 N.W.2d 294, 295 (Iowa 1995) (recognizing orders involving case management are "highly discretionary").

C. Winger raised the issue of attachment to Cargill's fee interest within the context of the Case Management Order.

On Reconsideration, the District Court addressed the extent of its prior Ruling at length (App. 1799-1804, 6/30/17 Ruling 19-24), concluding, based on the voluminous summary judgment filings, that its Summary Judgment Ruling "extend[ed] to HFCA's Leasehold Interest, which includes the real property on which the Facility is situated and the Easement Parcels on which additional improvements were made." (*Id.* at 24.) "To the extent Ameritrack and Peterson [PCI] [and Tracer, who joined them] assert that they have each filed mechanic's liens on Cargill property that is outside of the Leasehold Interest (defined to include the Easement Parcels), those liens were not part of the summary judgment

proceedings. However, this does not entitle Ameritrack and Peterson [PCI] to a complete overhaul of the Court's Combined Ruling on Motions for Partial Summary Judgment." (*Id.*)

As the District Court aptly explained, Winger took the lead in moving for summary judgment and specifically argued that the mechanic's liens not only took priority over Cargill's construction mortgage lien in the Facility, but that the liens attached to Cargill's fee interest. Winger relied solely on the lessor/lessee relationship between Cargill and HFCA to support its position under the *Romp* Rule. (App. 980-87, Winger MPSJ 22-29.) Appellants each joined Winger's Brief and did not raise any separate legal basis to support the claimed lien on Cargill's fee interest. Cargill resisted, cross-moving for summary judgment based on the legislative amendments to Chapter 572. Again, Winger relied on the *Romp* Rule in its Reply Brief, and none of the Appellants raised the separate legal basis for claiming a lien in Cargill's fee interest. Notably, Lemartec raised the issue in its Reply Brief, and still none of the Appellants' joined Lemartec's argument.

Winger, joined by the Appellants, first raised the issue of whether the mechanic's liens attached to Cargill's fee interest, to which Cargill replied. If the parties intended to assert other legal bases for supporting their claim that the liens attached to Cargill's fee interest, it was incumbent upon them to raise them in the proceedings directly addressing the issue.

The District Court did not abuse its discretion in concluding its Summary Judgment Ruling decided the issue of the extent to which Appellants' liens attached to Cargill's fee interest in its land. The Appellants had the opportunity to raise the issue they now seek to raise, but failed to do so.

VII. THE DISTRICT COURT HELD THE MECHANIC'S LIENS ATTACHED TO HFCA'S LEASEHOLD INTEREST AND IOWA CODE SECTIONS 572.6 AND 572.21 HAVE NO EFFECT ON PRIORITY.

A. Error preservation.

This issue was not preserved, as the District Court concluded it was premature and did not rule on it. (App. 1797, 6/30/17 Ruling 17 ("Tracer's concern with an order to sell the improvements separately under Iowa Code section 572.6 is premature."). *See Ambrose*, 861 N.W.2d at 555.

B. Scope and standard of review.

The standard of review is for errors at law.

C. Sections 572.6 and 572.21 do not address the extent or priority of liens.

Tracer argues "it was error [for the District Court] to ignore that the lien claimants' liens still attached to the leasehold." (Tracer Br. 34.) Tracer argues that under Iowa Code Sections 572.6 and 572.21, Appellants should be "permitted to maintain their foreclosure action against and on the improvements to the leasehold, to be sold at Sheriff's sale." (*Id.*) Tracer seeks remand for directions "that the lien

attaches to the leasehold pursuant to Iowa Code section 572.6" or alternatively, "that the improvements be sold separately under execution at the conclusion of the foreclosure." (*Id*. at 38-39.) Both of these sections provide a mechanism for selling improvements separate from the land. *See* § 572.6; 572.21.

As the District Court properly recognized, the mechanic's liens attached to HFCA's Facility and to HFCA's leasehold interest in the real property, and Tracer's argument under § 572.6 has no bearing on the extent of the lien or the priority of liens. (App. 1796, 6/30/17 Ruling 16.) The District Court ruled as Tracer requests. Further, Cargill, who stands in the shoes of U.S. Bank, has a construction mortgage lien on that same property—HFCA's Facility and HFCA's leasehold interest—that is superior to Appellants' liens based on the timing of the lien attachments. Other than the argument about merger, no Appellant has raised on appeal the validity or priority of Cargill's construction mortgage lien, which it received through assignment from U.S. Bank.

For the reasons stated in the District Court's Ruling, Sections 572.6 and 572.21 provide mechanisms for foreclosing on liens; neither section addresses priority of liens in HFCA's leasehold interest or creates lien rights in Cargill's fee interest. (App. 1795-1797, 6/30/17 Ruling 15-17.) If considered, the District Court's rulings on the issues under Section 572.6 and 572.21 should be affirmed.

VIII. Conclusion

Absent a contract with Cargill, Chapter 572 precludes Appellants' liens from attaching to Cargill's fee interest. The District Court's Ruling should be affirmed.

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Pursuant to Iowa Rule 16.317(1)(a)(2), this constitutes service for purposes of the Iowa Court Rules.

/s/ Dana L. Oxley
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