

IN THE SUPREME COURT OF IOWA  
No. 20-0972

BORST BROTHERS CONSTRUCTION, INC.  
Plaintiff-Appellee,

vs.

FINANCE OF AMERICA COMMERCIAL, INC.  
Defendant-Appellant.

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FINANCE OF AMERICA COMMERCIAL, INC.,  
Plaintiff-Appellant/Cross-Appellee,

vs.

THOMAS DOSTAL DEVELOPERS, INC., and RANDY T. DOSTAL,  
Appellees/Cross-Appellants,

and

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

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BORST BROTHERS CONSTRUCTION, INC.  
Plaintiff-Appellee,

vs.

FINANCE OF AMERICA COMMERCIAL, LLC,  
Defendant-Appellant.

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FINANCE OF AMERICA COMMERCIAL, LLC,  
Plaintiff-Appellee,

vs.

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

and

KELLY CONCRETE COMPANY, INC., DARNELL HOLDINGS, LLC  
d/b/a DARNELL CONSTRUCTION, AFFORDABLE HEATING AND  
COOLING, INC., 5 STAR PLUMBING, INC., BORST BROTHERS  
CONSTRUCTION, INC. and KEN-WAY EXCAVATING SERVICE,  
INC.,  
Defendants-Appellees.

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

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**BORST BROS. CONST., INC.'S FINAL BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	5
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	8
ROUTING STATEMENT.....	11
STATEMENT OF THE CASE .....	11
A. Nature of the Case.....	11
B. Course of Proceedings .....	12
STATEMENT OF FACTS .....	13
ARGUMENT.....	15
I. THE DISTRICT COURT CORRECTLY DETERMINED THAT BORST’S MECHANIC’S LIEN WAS VALID AND ENTITLED TO PRIORITY OVER FACO’S MORTGAGE .....	15
A. Error Preservation.....	15
B. Standard of Review .....	16
C. Discussion.....	16
1. The District Court Correctly Interpreted Section 572.13A.	17
2. The District Court Correctly Determined that Borst Complied with the Timing Requirements Found in Sections 572.13A and 572.13B.....	29
3. The District Court Correctly Determined that Borst’s Mechanic’s Lien has Priority Over FACO’s Mortgages ....	38
II. THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT BORST WAS A PREVAILING PARTY AT TRIAL AND ENTITLED TO RECOVERY OF ATTORNEY FEES .....	43

A. Error Preservation ..... 43

B. Standard of Review ..... 43

C. Discussion ..... 44

CONCLUSION..... 44

REQUEST FOR ORAL ARGUMENT ..... 45

CERTIFICATE OF COST..... 46

CERTIFICATE OF SERVICE ..... 46

CERTIFICATE OF FILING..... 48

CERTIFICATE OF COMPLIANCE..... 48

## TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>A &amp; W Elec. Contractors, Inc. v. Petry</i> , 576 N.W.2d 112 (Iowa 1998) .....	16, 43
<i>Bank of Am., N.A. v. Schulte</i> , 843 N.W.2d 876 (Iowa 2014) .....	16, 44
<i>Carson v. Roediger</i> , 513 N.W.2d 713 (Iowa 1994) .....	39
<i>Krull v. Thermogas Co.</i> , 522 N.W.2d 607 (Iowa 1994) .....	27
<i>Meier v. Sac &amp; Fox Indian Tribe</i> , 476 N.W.2d 61 (Iowa 1991) .....	28
<i>Northwestern Nat. Bank of Sioux City v. Metro Center, Inc.</i> , 303 N.W.2d 395 (Iowa 1981) .....	40, 41
<i>Society Linnea v. Wilbois</i> , 113 N.W.2d 603 (Iowa 1962) .....	40, 41
<i>Standard Water Control Systems, Inc. v. Jones</i> , 888 N.W.2d 673 (Iowa Ct. App. 2016) .....	16, 33, 34, 35, 43
<i>State v. McIver</i> , 858 N.W.2d 699 (Iowa 2015) .....	19
<i>State v. Miller</i> , 590 N.W.2d 45 (Iowa 1999) .....	27
<i>State v. Nall</i> , 894 N.W.2d 514 (Iowa 2017) .....	19
 <u>Rules &amp; Statutes</u>	
House File 675 .....	26

IAB Vol. XXXV, No, 11 (11/28/2012) p. 935, ARC 0464C .....	34
Iowa Code Chapter 572 .....	18, 19, 25, 26, 32, 33, 35, 38
Iowa Code Section 572.1(6) .....	14, 15
Iowa Code Section 572.1(9) .....	19
Iowa Code Section 572.1(11) .....	19
Iowa Code Section 572.13 .....	25, 34
Iowa Code Section 572.13A .....	12, 14, 16, 17, 18, 19, 20, 22, 23, 25, ..... 26, 27, 28, 29, 30, 32, 34, 35, 38, 39, 40
Iowa Code Section 572.13A(1) .....	20, 21, 24, 27, 28, 30, 31
Iowa Code Section 572.13A(1)(a) .....	21
Iowa Code Section 572.13A(1)(b) .....	21
Iowa Code Section 572.13A(1)(c) .....	21
Iowa Code Section 572.13A(1)(d) .....	21
Iowa Code Section 572.13A(1)(e) .....	21
Iowa Code Section 572.13A(1)(f) .....	21
Iowa Code Section 572.13A(1)(g) .....	21
Iowa Code Section 572.13A(2) .....	17, 18, 21, 22, 23, 24, 28, 30, 31
Iowa Code Section 572.13A(3)(d) .....	41
Iowa Code Section 572.13B .....	12, 16, 17, 18, 19, 21, 22, 23, 24, 25, ..... 26, 28, 29, 30, 31, 32, 34, 36, 38, 39, 40
Iowa Code Section 572.13B(1) .....	30

Iowa Code Section 572.13B(3)(a) .....	36, 37, 38, 41
Iowa Code Section 572.13B(4).....	36
Iowa Code Section 572.18 .....	16, 17, 40, 42
Iowa Code Section 572.18(1) .....	39, 40, 42
Iowa Code Section 572.18(2) .....	42
Iowa Code Section 572.2(1) .....	18
Iowa Code Section 572.26(1) .....	16, 43
Iowa Rule of Appellate Procedure 6.1101(2) .....	11
Iowa Rule of Appellate Procedure .....	11

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

### I. WHETHER THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT BORST'S MECHANIC'S LIEN WAS VALID AND PRIOR TO FACO'S MORTGAGE LIEN.

#### Authority

##### Cases

- A & W Elec. Contractors, Inc. v. Petry*,  
576 N.W.2d 112 (Iowa 1998)
- Bank of Am., N.A. v. Schulte*,  
843 N.W.2d 876 (Iowa 2014)
- Carson v. Roediger*,  
513 N.W.2d 713 (Iowa 1994)
- Krull v. Thermogas Co.*,  
522 N.W.2d 607 (Iowa 1994)
- Meier v. Sac & Fox Indian Tribe*,  
476 N.W.2d 61 (Iowa 1991)
- Northwestern Nat. Bank of Sioux City v. Metro Center, Inc.*,  
303 N.W.2d 395 (Iowa 1981)
- Society Linnea v. Wilbois*,  
113 N.W.2d 603 (Iowa 1962)
- Standard Water Control Systems, Inc. v. Jones*,  
888 N.W.2d 673 (Iowa Ct. App. 2016)
- State v. McIver*,  
858 N.W.2d 699 (Iowa 2015)
- State v. Miller*,  
590 N.W.2d 45 (Iowa 1999)
- State v. Nall*,  
894 N.W.2d 514 (Iowa 2017)

##### Rules & Statutes

- House File 675  
IAB Vol. XXXV, No, 11 (11/28/2012) p. 935, ARC 0464C  
Iowa Code Chapter 572  
Iowa Code Section 572.1(6)  
Iowa Code Section 572.1(9)



Iowa Code Section 572.1(11)  
Iowa Code Section 572.13  
Iowa Code Section 572.13A  
Iowa Code Section 572.13A(1)  
Iowa Code Section 572.13A(1)(a)  
Iowa Code Section 572.13A(1)(b)  
Iowa Code Section 572.13A(1)(c)  
Iowa Code Section 572.13A(1)(d)  
Iowa Code Section 572.13A(1)(e)  
Iowa Code Section 572.13A(1)(f)  
Iowa Code Section 572.13A(1)(g)  
Iowa Code Section 572.13A(2)  
Iowa Code Section 572.13B  
Iowa Code Section 572.13B(1)  
Iowa Code Section 572.13B(3)(a)  
Iowa Code Section 572.13B(4)  
Iowa Code Section 572.18  
Iowa Code Section 572.18(1)  
Iowa Code Section 572.18(2)  
Iowa Code Section 572.2(1)  
Iowa Code Section 572.26(1)  
Iowa Rule of Appellate Procedure 6.1101(2)  
Iowa Rule of Appellate Procedure 6.1101(3)

**II. WHETHER THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT BORST WAS A PREVAILING PARTY AT TRIAL AND ENTITLED TO RECOVERY OF ATTORNEY FEES.**

**Authority**

**Cases**

*A & W Elec. Contractors, Inc. v. Petry*  
576 N.W.2d 112 (Iowa 1998)

*Bank of Am., N.A. v. Schulte*  
843 N.W.2d 876 (Iowa 2014)

*Standard Water Control Systems, Inc. v. Jones*  
888 N.W.2d 673 (Iowa Ct. App. 2016)

Rules & Statutes

Iowa Code Section 572.13A

Iowa Code Section 572.13B

Iowa Code Section 572.26(1)

Iowa Rule of Appellate Procedure 6.1101(2)

Iowa Rule of Appellate Procedure 6.1101(3)a

## ROUTING STATEMENT

This case should be transferred to the Court of Appeals pursuant to Iowa R. App. P. 6.1101(2) and 3(a) as it involves the application of existing legal principles.

## STATEMENT OF THE CASE

### A. Nature of the Case.

As it pertains to this Appellee, Borst Bros. Construction, Inc. (“Borst”), Appellant, Finance of America Commercial, LLC (“FACo”) appeals the Ruling of the Linn County District Court that the mechanic’s lien of Borst, timely filed and posted to the Iowa Secretary of State’s Mechanic’s Notice and Lien Registry (“MNLR”) within 90 days of completion of Borst’s work, was valid and entitled to priority over FACo’s mortgages. In addition, FACo appeals the Ruling of the Linn County District Court that the mechanic’s lien of Borst, timely filed and posted to the Iowa Secretary of State’s Mechanic’s Notice and Lien Registry (“MNLR”) within 90 days of completion of Borst’s work, was valid and entitled to priority over FACo’s mortgages. As a result of the District Court’s Ruling, the District Court entered an attorney fee award in favor of Borst, which FACo is also appealing.

**B. Course of Proceedings.**

Borst filed its Petition to Foreclose Mechanic's Lien in Linn County on September 12, 2018. (App. 12-44). FACo filed its Motion to Dismiss based on the assertion that Borst did not comply with the filing requirements identified in Section 572.13A. (App. 75-111). After both parties filed responses, the Court denied FACo's Motion. (App. 185-190). On October 30, 2018, FACo filed its own Petition to Foreclose on its mortgages in Linn County in Case No. EQCV 091488 and amended its Petition on November 16, 2018. (App. 153-184). On February 4, 2019, the Court consolidated the two cases. (App. 234-237). On November 22, 2019, FACo filed a Motion for Summary Judgment arguing that Borst's mechanic's lien was not valid because it did not comply with the filing requirements listed in Sections 572.13A and 572.13B, and if Borst did have a valid mechanic's lien its priority was junior to FACo's mortgages. (App. 238-280). After both parties filed their appropriate responses, on January 22, 2020, the District Court denied FACo's Motion for Summary Judgment. (App. 715-734). On February 3, 2020, the parties had a one-day bench trial. (App. 805). At the conclusion of the trial, the District Court indicated, and substantiated by an Order, that it would accept post-trial briefs. On February 14, 2020, Borst submitted its Post-Trial Brief outlining its position as to why it is entitled to foreclose on its

mechanic's lien. (App. 777-792). On March 18, 2020, the District Court ruled that Borst timely posted the required notices to the MNLN and that it was entitled to foreclose its mechanic's lien on Lot Nos. 5, 6, 7, 8 and 10 of Hawks Point Seventh Addition in the amount of \$53,064.59. (App. 823). FACo filed a 1.904 Motion. (App. 828-836). After the parties filed their respective responses, on June 24, 2020, the District Court denied FACo's 1.904 Motion and affirmed its March 18, 2020, Ruling. (App. 907-912).

As a result of the District Court's March 18, 2020 Ruling, it allowed Borst to submit an Application for Attorney Fees because it was a prevailing party in an action to enforce its Mechanic's Lien. On August 24, 2020, the District Court granted Borst an attorney fee award. (App. 974-980).

### **STATEMENT OF FACTS**

Appellee Borst commenced this Mechanic's Lien foreclosure action as the result of the failure of Thomas Dostal Developers, Inc. ("Dostal") to compensate Borst for labor and materials furnished on Hawks Point Seventh Addition, a residential development in the City of Cedar Rapids, Linn County, Iowa ("Hawks Point Seventh Addition"). (Tr. Trans., p. 120). Dostal was the owner-developer of Hawks Point Seventh Addition. (Tr. Trans., p. 197).

On June 15, 2017, Dostal entered an oral contract with Borst to install water main and sanitary and storm sewer piping for the project. (App. 739,

¶2). From July 3, 2017, through December 19, 2017, Borst provided labor and materials to complete its work on the project. (App. 739, ¶¶3 and 4). Throughout the project, Borst incurred labor and material costs of \$198,316.59. (App. 740, ¶12).

On November 17, 2017, while construction on the project still was ongoing, FACo filed mortgages for Lot Nos. 5, 6, 7, and 8 with the Linn County Recorder for loans it provided to Dostal. FACo also filed its mortgage for Lot 10 with the Linn County Recorder on December 20, 2017. (App. 737-739, ¶¶6, 9, 12, 15, and 18). On December 3, 2019, Borst filed an Amended Petition to reduce its Mechanic's lien amount to \$143,316.59. (App. 740, ¶13).

Borst was never compensated for the labor and materials it furnished on Hawks Point Seventh Addition. (Tr. Trans., p. 120). On February 2, 2018, and within 90 days of the last date it provided labor and materials on the project, and before Dostal had sold any of the lots involved in this appeal, Borst first filed a Notice of Commencement of Work on the MNLR pursuant to Iowa Code Section 572.13A<sup>1</sup> and then filed its Mechanic's Lien on the MNLR, identified as MNLR No. 014681-1, pursuant to Iowa Code Section

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<sup>1</sup>The law firm that originally filed Borst's mechanic's lien erroneously identified Borst as a general contractor rather than a subcontractor. It is undisputed that Borst was a subcontractor and the mistaken identification in the Notice of Commencement is not an issue in this appeal.

572.1(6). (App. 739-740, ¶¶1, 7, and 10). Borst's Mechanic's Lien covered Lots 4 through 35 of Hawks Point Seventh Addition in the amount of \$198,316.59. (App. 323-353).

On September 12, 2018, Borst filed its original Petition to Foreclose its Mechanic's Lien. (App. 12-44). On December 3, 2019, Borst amended its Petition to reduce the amount of its Mechanic's Lien to \$143,316.59 for the total amount of unpaid labor and materials furnished on Hawks Point Seventh Addition, after receiving a partial payment from a nonparty for lots not at issue in the above-captioned matter. (App. 740, ¶13).

At trial, the District Court ruled that Borst is entitled to foreclose its Mechanic's Lien on Lots 5, 6, 7, 8 and 10 of Hawks Point Seventh Addition in the amount of \$53,064.59. (App. 822-823). The District Court also ruled that Borst's Mechanic's Lien had priority over FACo's mortgages. (App. 825).

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT BORST'S MECHANIC'S LIEN WAS VALID AND ENTITLED TO PRIORITY OVER FACO'S MORTGAGES.

#### A. Error Preservation.

Borst agrees that issues related to whether Borst has a valid Mechanic's Lien and its priority over FACo's mortgage liens has been preserved for

appeal. These issues have been the focus at each stage of litigation - the Motion to Dismiss stage, the Summary Judgment stage, at Trial, and even through a 1.904 Motion. (App. 75-111; App. 238-280; App. 309 and 312; and App. 828-836).

**B. Standard of Review.**

An action to enforce a Mechanic's Lien is an action in equity. Iowa Code Section 572.26(1). Normally, an appellate court's review of a mechanic's lien action is de novo. *A & W Elec. Contractors, Inc. v. Petry*, 576 N.W.2d 112, 113 (Iowa 1998) (internal citations omitted). FACo is claiming that Borst does not have a valid Mechanic's Lien because, it claims, Borst failed to comply with the statutory filing and notice requirements. The core dispute centers around statutory interpretation. As a result, statutory interpretation and construction is reviewed for the correction of legal error. *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d 673, 675 (Iowa Ct. App. 2016) (citing *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014)).

**C. Discussion.**

The issues in this case concerning the validity of Borst's lien and its priority over FACo's mortgage are straightforward and are resolved by the plain language of Iowa Code Sections 572.13A, 572.13B and 572.18. The



District Court correctly focused on the plain language of each of those Sections, and correctly applied the facts in determining that Borst complied with Sections 572.13A, 572.13B and 572.18, and in ruling that Borst has a valid Mechanic's Lien that has priority over FACo's mortgages. (App. 822, 823, and 825).

### **1. The District Court Correctly Interpreted Section 572.13A.**

The primary issue in this appeal relates to the timing of when, under Iowa Code Section 572.13A, a subcontractor must post a Notice of Commencement of Work, when the general contractor or owner-builder has failed to timely do so. FACo's argument misapplies the ten-day period, set out in Iowa Code Section 572.13A(2), as setting the time for a subcontractor to file a Notice. It clearly does not.

The structure of Section 572.13A provides that during the ten-day period following commencement of work, it is the sole obligation of the general contractor or owner-builder who has contracted or will contract with a subcontractor to provide labor or materials, to post a Notice. If, *after* that ten-day period, those parties have failed to post the Notice, then the subcontractor may post the Notice. (Section 572.13A(2)). Section 572.13A(2) makes clear that the subcontractor is not bound by the ten-day period from commencement of work, but instead establishes a different timeframe in that

the subcontractor “may post the notice in conjunction with the posting of the required preliminary notice pursuant to section 572.13B.”

FACo asks this Court to find the language “within ten days of commencement of the work,” found in Section 572.13A(2), to modify the language that comes after those words. Instead, that quoted language clearly only relates to the words that come before it. FACo’s reading would violate the plain language of Sections 572.13A and 572.13B, violate the intent of Chapter 572, and be nonsensical. Those issues are discussed in greater detail below.

To determine whether Borst has a valid mechanic’s lien and timely posted the correct documents to the MNL, this Court only needs to focus on the plain language of Chapter 572 and determine the consequences if FACo’s interpretation of Chapter 572 was correct.

Iowa Code Section 572.2(1) identifies who is entitled to a Mechanic’s Lien, stating “(e)very person who furnishes any material or labor, or performs any labor upon, any building or land for improvement ... by virtue of any contract with the owner, owner-builder general contractor, or subcontractor shall have a lien upon such building or improvement... to secure payment for the material or labor furnished or labor performed.” Iowa Code Section 572.2(1). As Borst furnished labor and/or materials to Hawks Point Seventh

Addition, under contract with Dostal<sup>2</sup>, it is entitled to a mechanic's lien. Borst was required to follow the procedures identified in Chapter 572 to perfect its mechanic's lien. To determine what documents Borst was required to post to the MNLR and when those documents needed to be posted, the District Court reviewed Section 572.13A. (App. 821 and 822).

The District Court correctly focused on the plain language of Section 572.13A in determining that the only timing requirement applicable to the Notice of Commencement of Work posted by a subcontractor is that it must be posted before the subcontractor's Preliminary Notice of its Mechanics Lien under Section 572.13B. (App. 821). This Court should interpret Section 572.13A in the same manner. When interpreting a statute, a court primarily focuses on the plain language of the statute and applies the statute as written if it is unambiguous. *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017). "A statute is ambiguous 'if reasonable minds can disagree on the meaning of particular words or the statute as a whole.'" *Id.* (citing *State v. McIver*, 858 N.W. 2d 699, 703 (Iowa 2015)).

FACo's argument is grounded in the false assertion that Section 572.13A is ambiguous. FACo claims that a subcontractor is required to post

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<sup>2</sup>At trial, it was confirmed that Dostal was an owner-builder within the meaning of Section 572.1(9), which makes Borst a subcontractor within the meaning of Section 572.1(11). (App. 812).

a Notice of Commencement of Work within ten days of the subcontractor commencing work on the project. This interpretation runs afoul of the plain language of Section 572.13A(1). The plain language of Section 572.13A(1) clearly identifies the different timing requirements for posting a Notice of Commencement of Work by different parties.

Section 572.13A is entitled “Notice of commencement of work--general contractor--owner-builder.” Subsection 1 of this Section states in relevant part:

Either a general contractor, or an owner-builder who has contracted or will contract with a subcontractor to provide labor or furnish material for the property, shall post a notice of commencement of work to the mechanics’ notice and lien registry internet site no later than ten days after the commencement of work on the property. A notice of commencement of work is effective only as to any labor, service, equipment, or material furnished to the property subsequent to the posting of the notice of commencement of work.

By its terms, the requirement of posting a Notice of Commencement within ten days of commencement of work under Section 572.13A(1) only applies to a general contractor or an owner-builder. As the title of Section 572.13A, which provides Notice of Commencement of Work – general contractor – owner-builder, makes clear, this Section creates an obligation expressly limited to a general contractor or an owner-builder. Borst was neither of those and, therefore, not subject to the above quoted language. This

is confirmed by the information required to be included in the Notice of Commencement of Work, which is set out in subsections (a) through (g) of Section 572.13A(1). Specifically, Section 572.13A(1)(e) requires that the Notice of Commencement of Work state the date any work commenced on the project. The start date identified in that subsection relates to the start date for the general contractor or owner-builder. In this matter, it was Dostal's sole obligation to file a Notice of Commencement of Work within ten days of commencing work on Hawks Point Seventh Addition.

If a general contractor or an owner-builder fails to post the Notice of Commencement of Work within ten days of commencing work, Section 572.13A(2) applies. The plain language of Section 572.13A(2) clearly identifies the timing requirements for filing a Notice of Commencement of Work by a subcontractor, such as Borst was here.

Section 572.13A(2) provides:

If a general contractor or owner-builder fails to post the required notice of commencement of work to the mechanic's lien registry and internet site pursuant to subsection 1, within ten days of commencement of work on the property, a subcontractor may post the notice in conjunction with the posting of the required preliminary notice pursuant to Section 572.13B. A notice of commencement of work must be posted to the mechanic's notice and lien registry site before preliminary notices pursuant to section 572.13B may be posted.

The intention of subsections (1) and (2) is clear. A general contractor or owner-builder must file a Notice of Commencement of Work during the first ten days after commencement of any work on a project. Only if they fail to do so may a subcontractor then file a Notice of Commencement. The only timing requirement for a subcontractor is expressly set out in the last sentence of subsection (2) – it must be posted “before preliminary notices pursuant to section 572.13B may be posted.” As further discussed below, a subcontractor, unlike a general contractor or owner-builder, is under no obligation to post a Notice of Commencement of Work at all, and only must do so if it determines that it should post a Preliminary Notice of its Mechanics Lien.

Additional language in Section 572.13A(2) confirms that the ten-day period for filing the Notice of Commencement of Work does not apply to subcontractors like Borst. That Section confirms that “If a general contractor or owner-builder fails to post the required notice ... pursuant to subsection 1... a subcontractor may post the notice, and then may do so in conjunction with filing a preliminary notice.” This language makes it clear that there is only one notice – applicable to the date of commencement of any work on the project – and not two different notices, subject to two different ten-day deadlines. Again, the only timing requirement identified in Section

572.13A(2) that is applicable to a subcontractor is that the Notice of Commencement of Work must be posted before the Preliminary Notice.

A comparison of the relevant provisions of Sections 572.13A and 572.13B confirms this conclusion. Section 572.13A, which applies only to general contractors and owner-builders, states “(a) notice of commencement of work is effective only as to any labor, service, equipment, or material furnished to the property subsequent to the posting of the notice of commencement of work.” By contrast, Section 572.13B, which is applicable only to subcontractors, expressly states that “a preliminary notice posted before the balance due is paid to the general contractor or the owner-builder is effective as to all labor, service, equipment, and material furnished to the property by the subcontractor.” FCo’s interpretation of Section 572.13A to require that subcontractors file a Notice of Commencement of Work within ten days of commencement of their work would render this sentence meaningless, since every preliminary notice filed by a subcontractor more than ten days after it commenced work would be “ineffective,” whether or not the general contractor or owner-builder has sold or been paid in full for the property.

The Iowa Legislature clearly has identified when a subcontractor can post a Notice of Commencement of Work. By focusing on the plain language

of Sections 572.13A(1) and 572.13A(2), the earliest a subcontractor can post a Notice of Commencement of Work is eleven (11) days after the general contractor or owner-builder commenced work on a property. Section 572.13A(2) clearly states that “If a general contractor or owner-builder fails to post the required Notice of Commencement of Work to the mechanics’ notice and lien registry internet site pursuant to subsection 1, within ten days of commencement of the work on the property, a subcontractor may post the notice ....” The only logical reading of this Section is that a subcontractor must wait for this ten-day period to lapse before it can post its own Notice of Commencement of Work. The plain language of the statute does not allow a subcontractor to post a Notice of Commencement of Work within the ten-day period afforded to a general contractor or an owner-builder.

Section 572.13A(1) uses clear prescriptive language in establishing the ten-day period for posting a Notice, applicable to the general contractor or owner-builder. It uses language of “shall post a notice”... “no later than ten days after commencement.” If the Legislature had intended to impose the same time limit on subcontractors, it would have used the same language. The Legislature did not repeat that same language in Section 572.13A(2) because it was not imposing that ten-day period on the subcontractor, but simply referencing the ten-day period found in Section 572.13A(1) as having passed



without Notice of Commencement of Work being posted, and, therefore, providing that the subcontractor may then be the party to post the Notice of Commencement of Work. The subcontractor need only post a Notice of Commencement of Work before or in conjunction with the posting of the Preliminary Notice pursuant to Section 572.13B.

FACo's argument completely ignores the purpose and overall statutory scheme for mechanics liens on residential property set out in Sections 572.13, 572.13A and 572.13B. *See* Iowa Code Sections 572.13, 572.13A and 572.13B. The clear, overarching purpose of these Sections is to provide residential purchasers and owners with notice of potential liens before they pay a general contractor or owner-builder, and not, as FACo argues, to sort out priority disputes between a mortgage lender and mechanics lien claimants.

First, Section 572.13 requires a general contractor to provide homeowners with a general notice concerning possible liens and information concerning the lien registry, in order to protect homeowners from exposure to liens of which they are unaware at the time of purchase or contracting with the general contractor. Next, Section 572.13A requires that a general contractor or residential "owner-builder" – a newly defined party, added to Chapter 572 in legislation effective in 2013 – give notice to a homeowner of the date of commencement of work if they intend to use subcontractors.

Section 572.13B requires that a subcontractor post a preliminary notice of its lien, and expressly provides in subsection 1 that “(a) preliminary notice posted before the balance due is paid to the general contractor or the owner-builder is effective as to all labor, service, equipment, and material furnished to the property by the subcontractor.” Again, this Section assures that the homeowner will be protected from unknown liens if it pays the general contractor or owner-builder before the homeowner has notice of the subcontractor’s lien.

That is precisely what occurred here. Since Borst timely posted its Preliminary Notice and Notice of Commencement of Work before Dostal, the builder-owner, sold any of the residential units at issue here, Borst’s posting assured that no eventual buyer would be unprotected from undisclosed liens. FACo’s interpretation that Borst post its Notice of Commencement of Work within ten days after Borst commenced its work adds a pointless requirement that would provide no further protection to eventual home buyers.

To support its argument that Section 572.13A is ambiguous and that a subcontractor must post a Notice of Commencement of Work within ten days of commencing its own work, FACo relies upon a single sentence in the “Explanation” for House File 675 concerning Chapter 572, which added Sections 572.13A and 572.13B. That sentence provides that “(a) preliminary

notice posted before the balance due is paid to the general contractor or owner-builder by the owner is effective to all labor, service, equipment or material furnished to the property subsequent to the posting of the notice of commencement of work.” This cherry-picked sentence sheds no new light on the interpretation of Section 572.13A, because it is included in the text of Section 572.13A(1) – which, as noted above, expressly applies only to general contractors and owner-builders, and not to subcontractors like Borst.

FACo incorrectly relies upon the Explanation in arguing about what it claims the Legislature meant to say in determining when a subcontractor’s mechanic’s lien is valid. The Court is bound by what the legislature said and not what it might have said. *Krull v. Thermogas Co.*, 522 N.W.2d 607, 612 (Iowa 1994) (“We are bound by what the legislature said, not by what it should or might have said.”). The Court cannot change the words in the statute or read something into the statute that does not exist. *State v. Miller*, 590 N.W.2d 45, 47 (Iowa 1999) (“We may not – under the guise of statutory construction – enlarge or otherwise change the terms of the statute as the legislature adopted it.”). The “Explanation” and, more importantly, Section 572.13A(1) itself, make it clear that any labor and/or material furnished by a general contractor or an owner-builder on a property before it posted the Notice of Commencement of Work is not included in its mechanic’s lien. The language

in Section 572.13A is straightforward, and its plain meaning provides all the support needed to interpret the statute as Borst suggests. *Meier v. Sac & Fox Indian Tribe*, 476 N.W.2d 61, 63-64 (Iowa 1991). This Court should interpret Section 572.13A in the same manner as the District Court and affirm the District Court's ruling.

FACo's interpretation would lead to inconsistent and absurd results. For example, a subcontractor who started work on the first date that all work on the project commenced would need to wait ten days before it could post a Notice of Commencement of Work under Section 572.13A(2) because it can only do so if the general contractor or owner-builder has failed to post the notice within ten days under Section 572.13A(1). However, under FACo's analysis, it then would be too late for the subcontractor to do so, because more than ten days would have expired after the commencement of the subcontractor's work. In addition, under FACo's interpretation, an owner-builder could fail to file its own Notice of Commencement of Work, retain all sale proceeds and refuse to pay any subcontractors with posted liens and who failed to post a Notice of Commencement within ten days of the start of their work. Such is not only absurd but would create an unfair windfall for unscrupulous owner-builders, who could fail to post a Notice of Commencement of Work themselves and then retain the entire purchase price

from the sale of the residence even though it has notice of and knows of posted subcontractors' liens.

The Court also should *consider the ramifications* if FACo is correct that a subcontractor must post a Notice of Commencement of Work within ten days of commencing work on a property. The most critical result from FACo's interpretation is the number of postings on the MNLR would dramatically increase, which would result in confusion for a property owner or prospective property owner. In order to avoid losing their lien rights, virtually every subcontractor working on a property would post a Notice of Commencement of Work almost immediately to protect its rights, even if the general contractor or owner-builder intended to file a Notice of Commencement of Work within the ten-day period work commenced on the project, resulting in multiple, unnecessary Notices of Commencement of Work posted on the MNLR. This would only promote confusion for a homeowner or prospective homeowner – the exact opposite of what the MNLR seeks to accomplish.

**2. The District Court Correctly Determined that Borst Complied with the Timing Requirements Found in Sections 572.13A and 572.13B.**

At trial, it was determined that Dostal did not post a Notice of Commencement of Work within ten days of commencing work on Hawks

Point Seventh Addition. Since Dostal failed to comply with Section 572.13A(1), Borst had the option to post the Notice of Commencement of Work under Section 572.13A(2), which provides:

If a general contractor or owner-builder fails to post the required notice of commencement of work to the mechanic's lien registry and internet site pursuant to subsection 1, within ten days of commencement of work on the property, a subcontractor may post the notice in conjunction with the posting of the required preliminary notice pursuant to Section 572.13B. A notice of commencement of work must be posted to the mechanic's notice and lien registry site before preliminary notices pursuant to section 572.13B may be posted. (Emphasis added.)

As noted above, the only timing requirement applicable to Borst in Section 572.13A(2) is that a Notice of Commencement of Work must be posted before a Preliminary Notice can be posted. Borst posted its Notice of Commencement of Work on February 2, 2018 and its Preliminary Notice on November 8, 2018. (App. 740, ¶¶7 and 8). The Notice of Commencement of Work was posted before the Preliminary Notice as required by Section 572.13A(2). (App. 740, ¶9). Therefore, Borst complied with the posting requirements identified in Section 572.13A for timely posting a Notice of Commencement.

Borst also complied with the timing requirements of Section 572.13B. Section 572.13B(1) provides, in relevant part:

A subcontractor shall post a preliminary notice to the mechanic's notice and lien registry internet site. A preliminary notice posted before the balance due is paid to the general contractor or the owner-builder is effective as to all labor, service, equipment, and material furnished to the property by the subcontractor. (Emphasis added.)

At trial, it was confirmed that a balance was never due or paid to Dostal because Dostal never completed or sold the lots. (App. 822). At trial, it was confirmed that Borst posted its Preliminary Notice on November 8, 2018, which was before any sums were due or paid to Dostal. (App. 822). Therefore, Borst complied with the timing requirements under Section 572.13B.

Reading Sections 572.13A(1) and 572.13A(2) together, it is clear that the Legislature intended that during the first ten days after commencement of a project, a general contractor or owner-builder has the exclusive responsibility to file a Notice of Commencement of Work, and that a subcontractor may post a Notice of Commencement of Work only after the ten-day period has elapsed. A subcontractor is not required to post a Notice of Commencement of Work unless it intends to file a Preliminary Notice, and the only time deadline for doing so is expressly provided in Section 572.13A(2): "A notice of commencement of work must be posted to the

mechanics' notice and lien registry internet site before preliminary notices pursuant to section 572.13B may be posted.”

In interpreting the plain language of Sections 572.13A and 572.13B and applying the facts of this case to the statute, the District Court held:

In construing Iowa Code Chapter 572 liberally, a subcontractor is not required to post a notice of commencement within ten days of the start date of labor or materials performed. Iowa Code 572.13A states a subcontractor “may” post a notice of commencement when the general contractor fails to do so but does not provide a limitation of ten days to post such a notice. It is required for a notice of commencement to be filed before the preliminary notice is posted in order for a subcontractor to have an enforceable mechanic’s lien. *Iowa Code 572.13B*. The Court concludes Borst started to perform labor and/or materials on July 3, 2017 and the last day Borst furnished labor and/or materials was on December 19, 2017. Based on Borst Exhibit 2, the Court concludes that Borst filed its Notice of Commencement on February 2, 2018 when it filed its Mechanic’s Lien and filed its Preliminary Notice on November 8, 2018. Due to Dostal never selling the lots at issue, the Court concludes that Borst posted its Preliminary Notice before the balance was due to Dostal Developers. The Court finds that Borst complied with the filing and timing requirements of a subcontractor pursuant to Iowa Code §§ 572.13A and 572.13B.

(App. 822). Therefore, as the District Court correctly concluded, Borst complied with the posting requirements found in Sections 572.13A and 572.13B.



FACo criticizes the District Court’s reliance on *Standard Water Control Sys., Inc. v. Jones*, 888 N.W.2d 673, 677 (Iowa Ct. App. 2016), even though The District Court’s Ruling only briefly discusses that decision:

The Preliminary Notice must be posted on the mechanics’ notice and lien registry internet site and while notice is mailed to the owner, the notice is not mailed to the owner-builder of the property. *Id.* It is presumed that “owner-builders have the same relationship with subcontractors as do general contractors with subcontractors, that is, they are directly contracting with one another and do not need to identify themselves. *Standard Water Control Sys., Inc. v. Jones*, 888 N.W.2d 673, 677 (Iowa Ct. App. 2016).

(App. 821 and 822).

Citing *Standard Water*, the District Court correctly noted that a Preliminary Notice does not need to be mailed to the owner-builder because the owner-builder is in a direct contractual relationship with the subcontractor and is aware of the subcontractor.

*Standard Water* provides key insights concerning the interplay of the three Sections of Chapter 572 that are involved in this case and confirms why this Court should affirm the District Court Ruling. As the Court of Appeals clearly recognized in describing the purpose of the 2013 amendments to the statute, providing for notice of commencement and the posting of preliminary notices, “The statute is intended to provide a mechanism by which *owners of*

*residential real estate receive notice* of who was working on the property and claims by the same party.... in short, the statute is intended to provide the owner with the identity of subcontractors unknown to the owner who might have potential claims against the property and provide a mechanism to force the subcontractors to file notice of any potential claims.” *Standard Water Control Sys*, 888 N.W.2d at 676 (Iowa Ct. App. 2016) (citing IAB Vol. XXXV, No. 11 (11/28/2012) p. 935, ARC 0464C. (emphasis supplied). The Court of Appeals further elaborated on how each of these Sections accomplishes this statutory intent:

Three sections of the chapter thus effectuate the twofold purpose of the statute: a general contractor who hires subcontractors unknown to the *owner* provides the owner with notice of said subcontractors (section 572.13), a general contractor or owner-builder who has contracted or will contract with a subcontractor posts a notice when work commences (section 572.13A), and a subcontractor posts a notice identifying themselves in situations where they might otherwise be unknown to owners (section 572.13B). These three sections work in concert to identify persons working on the property and to provide adequate notice of any claims by those persons.

*Id.* at 677. The District Court’s interpretation of these Sections fully accomplishes these two-fold purposes of identification of persons working on the property and timely notice to the owners of claims. Again, the obvious purpose of these three Sections is to assure that owners can “identify subcontractors unknown to the owner who might have potential claims against

the property and provide a mechanism to force the subcontractor to file notice of any potential claims.” *Id.* at 676. (Emphasis supplied).

Nothing in *Standard Water* suggests that the amendments to the residential property provisions of Chapter 572 were intended to protect the rights of, and provide notice to, third parties, such as FACo. Further, *Standard Water* clearly states that Section 572.13A only applies to a general contractor or owner-builder. *Id.* at 677. (“Three sections of the chapter thus effectuate the twofold purpose of the statute: ... a general contractor or owner-builder who has contracted or will contract with subcontractors, posts a notice when work commences, (section 572.13A) ....”).

Chapter 572 is intended to protect homeowners. *Id.* at 676. (“The statute is intended to provide a mechanism by which owners of residential real estate receive notice of who was working on the property and claims by the same party.”) The provisions of Chapter 572 governing notice of commencement of work and preliminary notices of liens for residential construction were intended to protect homeowners, not third parties such as FACo. Under the interpretation of those provisions urged by Borst and adopted by the District Court, focusing on the plain language and meaning of the relevant provisions, as well as the overall structure and purpose of Chapter 572, the homeowner is protected. A Preliminary Notice is posted to the

MNLR to assist with identifying the subcontractor in situations where it might otherwise be unknown to the owners. *Id.* at 677. A subcontractor who fails to post a Preliminary Notice does not have a valid lien. Iowa Code Section 572.13B(4). It is impossible for a subcontractor to “wrack up thousands of dollars in costs” and remain hidden as FACo suggests. Section 572.13B does not allow for a subcontractor to remain hidden.

Pursuant to Section 572.13B(3)(a), “(a) mechanic’s lien perfected under this chapter is enforceable only to the extent of the balance due the general contractor or owner-builder at the time of the posting of the preliminary notice....” If the prospective owner has not paid the owner-builder for the property, the prospective owner is not harmed by paying the subcontractor for the improvements it provided to the property. In this specific case, the District Court found that Dostal has not sold the properties. (App. 822). The District Court noted that the entire balance from the eventual sale of the property remained “due” at the time Borst posted its Preliminary Notice on November 8, 2018. (App. 822). Borst has a properly perfected Mechanic’s Lien and is entitled to recover the value of its improvements to the property through the eventual sale proceeds. In short, because Borst’s Preliminary Notice was filed before Dostal was paid for the properties, Borst may receive payment for the labor and/or materials it furnished to Hawks

Point Seventh Addition. Under these circumstances, the owner is protected, and a subcontractor can and should be compensated for the improvements it provided to the property.

FACo's argument that homeowners will be harmed by "hidden" subcontractors, ignores that a subcontractor must post its Preliminary Notice before the general contractor or owner-developer has been paid in full by the homeowner, and that the subcontractor can only recover to the extent of the unpaid balance owed by the homeowner. *See* Iowa Code Section 572.13B(3)(a). The subcontractor cannot remain "hidden" and recover anything. In fact, it is the subcontractor who would be needlessly harmed by FACo's interpretation, since a homeowner could receive the benefit of the subcontractor's work without paying for it, and/or the general contractor or owner-builder could be paid for the work that the subcontractor performed without paying the subcontractor for that work. This Court should reject this unfair and absurd result of FACo's interpretation and affirm the District Court's Ruling.

Borst is in the exact scenario that the Iowa Legislature intended to protect. Borst has timely filed its Preliminary Notice and posted its mechanic's lien within ninety days of the last day it furnished labor and/or materials on Hawks Point Seventh Addition. (App. 740, ¶¶9 and 10). The

properties have not been sold, so the balance of sale proceeds remains due and owing to Dostal, the owner-builder. (App. 822). A prospective homeowner is on notice that Borst has a mechanic's lien and of the amount owed to Borst. The Iowa Legislature protected Borst's ability to receive payment for the improvements it made to the residential property through Section 572.13B(3)(a). FACo's argument would make this Section completely meaningless and allow Dostal to sell the properties free and clear of Borst's mechanic's lien even though the homeowner would be on notice of Borst's mechanic's lien. This result runs counter to fairness, common sense and the purpose of Chapter 572, and is not what the Iowa Legislature intended.

The case does not highlight the problems suggested by FACo. Instead, this case highlights the problems for a third-party lender who fails to perform its due diligence prior to lending money in the middle of a construction project. In accordance with the purpose of Chapter 572 and the plain language of Sections 572.13A and 572.13B, the District Court correctly determined that Borst posted the proper notices to the MNL and this Court should affirm the District Court's ruling.

### **3. The District Court Correctly Determined that Borst's Mechanic's Lien has Priority over FACo's Mortgages.**

As a mechanic's lien is purely statutory in nature, the determination of priority between a mechanic's lien and other liens, such as FACo's lien, is

found in the statute. *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994); Iowa Code Section 572.18(1). Section 572.18(1) provides the rule a court must follow to determine the priority between a mechanic's lien and a non-mechanic's lien.

Section 572.18(1) provides, in relevant part:

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

In order to have a valid mechanic's lien a subcontractor party must:

(1) post a Notice of Commencement of Work pursuant to Section 572.13A; (2) post a Preliminary Notice pursuant to Section 572.13B; and (3) post a mechanic's lien within ninety (90) days of the last day it furnished labor and/or materials. As noted above, Borst complied with each of these requirements. It complied with requirements for posting a Notice of Commencement of Work in Sections 572.13A and 572.13B by filing it before it filed its Preliminary Notice before the residential units had been sold, and, therefore, before the owner-builder had been paid in full. (App.

740, ¶9; App. 822). It complied with posting its mechanic's lien within ninety days of the last day it furnished labor and/or materials to Hawks Point Seventh Addition. (App. 740, ¶10). The last day Borst furnished labor and/or materials to Hawks Point Seventh Addition was on December 19, 2017 and it filed its mechanic's lien on February 2, 2018. (App. 739-740, ¶¶4 and 5). Borst filed its mechanic's lien within the ninety-day timeframe identified in Section 572.18(1). (App. 740, ¶10). Because Borst commenced work on July 3, 2017, long before FACo recorded its mortgages in November and December 2017, its mechanic's lien has priority over FACo's mortgages. (App. 739, ¶13; App. 737-739, ¶¶6, 9, 12, 15, and 18).

For purposes of determining priority under Section 572.18, Borst's lien relates back to the date of commencement of its work. A mechanic's lien is valid upon the furnishing of labor or material, not upon the filing date of the mechanic's lien. *Society Linnea v. Wilbois*, 113 N.W.2d 603, 606-07 (Iowa 1962). The lien itself predates the filing of the mechanic's lien, which then relates back to the date of commencement. *Northwestern Nat. Bank of Sioux City v. Metro Center, Inc.* 303 N.W.2d 395, 398 (Iowa 1981).

FACo states that no notices under Sections 572.13A and 572.13B were served prior to the recording of its liens. The plain language of Sections 572.13A and 572.13B confirm that no such notices were required here.



Pursuant to Sections 572.13A(3)(d) and 572.13B(3)(a), notice is not required to be served on an owner-builder, and there were no other owners of the residential units on whom notice could be served. Borst was not required to serve the notices on Dostal as Dostal was aware of Borst's presence at Hawks Point Seventh Addition. FACo also argues that when it filed its mortgages, no filings related to Borst's mechanic's lien were posted at the time FACo recorded its mortgages so Borst does not have a properly perfect mechanic's lien. The Iowa Supreme Court has resolved this issue. In *Northwestern Nat. Bank of Sioux City v. Metro Center, Inc.*, the Iowa Supreme Court was confronted with determining when a mechanic's lien is effective. 303N.W.2d 395 (Iowa 1981). In *Northwestern Nat. Bank*, the bank advanced the argument, like FACo, that since no mechanic's lien filings were posted at the time the bank's mortgage was recorded, no valid mechanic's lien existed. *Id.* at 398. However, the Court quickly dismissed this argument, stating, "(t)he mechanic's lien arises upon furnished labor or material; not upon its filing." *Id.*; see also *Society Linnea v. Wilbois*, 113 N.W.2d 603, 606-07 (Iowa 1962) (stating a mechanic's lien is effective "from the day [a party] commences work or furnishes material ...."). The Iowa Supreme Court also explained that "the lien in such case actually predates the filing, which relates back to the date of commencement. *Northwestern Nat. Bank*, 303 N.W.2d at 398.

Following the rationale outlined by the Iowa Supreme Court, the District Court correctly determined that Borst's mechanic's lien has priority over FACo's mortgages. The District Court stated:

As determined above by the Court, the liens that are enforceable are Kelly's Lots 5, 6, 7, and 8; Borst's mechanic's liens for Lots 5, 6, 7, 8, and 10; and FAC's mortgages for Lots 5, 6, 7, 8, and 10. The issue in priority is whether the mechanic's liens are superior over the non-mechanic's liens. The Court concludes that both Borst and Kelly filed its mechanic's liens for the above named Lots within ninety (90) days of the last date of furnished materials or labor. Pursuant to Iowa Code § 572.18 the date of commencement of furnished materials or labor performed for Kelly and Borst relates back to when the mechanic's lien would be enforceable. For both Kelly and Borst, the date of commencement of furnished materials or labor was before FAC recorded its mortgages. Therefore, the Court finds that Borst's and Kelly's liens are established as superior to FAC's mortgages.

(App. 824).

Another provision of Section 572.18 reinforces that Borst has priority over FACo's mortgage lien. Section 572.18(2) provides that “(c)onstruction mortgage liens shall be preferred to all mechanics’ liens of claimants who commenced their particular work or improvement subsequent to the date of the recording of the construction mortgage lien.” The clear inference of this Section, as well as Section 572.18(1), is that in cases like this case, where Borst commenced its work long before FACo recorded its mortgage, Borst's lien has priority over FACo's mortgage lien.

Borst's mechanic's lien has priority over FACo's mortgages. The District Court's Ruling should be affirmed and Borst is entitled to foreclose its mechanic's lien in the amount of \$53,064.59.

**II. THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT BORST WAS A PREVAILING PARTY AT TRIAL AND ENTITLED TO RECOVERY OF ATTORNEY FEES.**

**A. Error Preservation.**

Borst agrees that issues related to whether Borst has a valid mechanic's lien and its priority over FACo's mortgage lien has been preserved for appeal. Borst agrees that FACo filed this appeal to preserve appellate jurisdiction over Borst's attorney fee claim. (App. 981-984).

**B. Standard of Review.**

An action to enforce a mechanic's lien is an action in equity. Iowa Code Section 572.26(1). Normally, an appellate court's review of a mechanic's lien action is de novo. *A & W Elec. Contractors, Inc. v. Petry*, 576 N.W.2d 112, 113 (Iowa 1998) (internal citations omitted). FACo is claiming that Borst does not have a valid mechanic's lien because the parties failed to comply with the statutory filing and notice requirements. The core dispute centers around statutory interpretation. As a result, statutory interpretation and construction is reviewed for the correction of legal error. *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d 673, 675 (Iowa

Ct. App. 2016) (citing *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014)).

**C. Discussion.**

In FACo's Brief, it states that if the Appellate Court reverses the District Court's Ruling that Borst has a valid mechanic's lien or determines that Borst's mechanic's lien is inferior to FACo's mortgage liens, Borst is not entitled to an award of reasonable attorney fees. This is the sole issue raised by FACo in its Brief. This position is rebutted by Borst in Section I above. For the reasons stated in Section I, Borst has a valid mechanic's lien and its mechanic's lien has priority over FACo's mortgage liens. As such, provided the Appellate Court affirms the District Court's Ruling that Borst has a valid mechanic's lien and priority over FACo's mortgages, the Appellate Court should affirm the Borst reasonable attorney fees awarded by the District Court.

**CONCLUSION**

For the above stated reasons, this Court should affirm the District Court's Ruling that Borst had a valid mechanics lien in the amount of \$53,064.59 and that Borst has priority over FACo's mortgages. This Court should also affirm the District Court's award of attorney fees to Borst and

permit Borst to submit an application for an award of appellate attorney fees to the District Court.

### **REQUEST FOR ORAL ARGUMENT**

Borst respectfully requests to be heard at oral argument concerning the issues raised above.

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## CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Appellee's Final Brief is \$0.00.

By: /s/ David T. Meyers  
David T. Meyers

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellee's Final Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on February 17, 2021, pursuant to Iowa R. App. P. 6.901(1), (8) (2017) and Iowa Ct. R. 16.1221(2) (2017).

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## CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Appellee's Final Brief was filed with the Iowa Supreme Court by electronically filing the same on February 17, 2021, pursuant to Iowa R. App. P. 6.901(1), (8) (2017) and Iowa Ct. R. 16.1221(1).

By: /s/ David T. Meyers  
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This foregoing Final Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 7,812 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By: /s/ David T. Meyers  
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