IN THE SUPREME COURT OF IOWA
No. 20-0972

BORST BROTHERS CONSTRUCTION, INC.
Plaintiff-Appellee,

vs.

FINANCE OF AMERICA COMMERCIAL, INC.
Defendant-Appellant.

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.

BORST BROTHERS CONSTRUCTION, INC.
Plaintiff-Appellee,

vs.

FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

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.

IOWA COURT OF APPEALS DECISION FILED AUGUST 18, 2021

BORST BROTHER'S CONSTRUCTION, INC.'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

Matthew L. Preston, PIN: AT0006314
Brad J. Brady, PIN: AT0001138
BRADY PRESTON GRONLUND PC
2735 First Avenue SE
Cedar Rapids, IA 52402
Phone: 319/866-9277
Fax: 319/866-9280
MPreston@BPGLegal.com
BBrady@BPGLegal.com

ATTORNEYS FOR PLAINTIFF-APPELLEE BORST BROTHERS CONSTRUCTION, INC.

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RESPONSE TO FAC'S STATEMENT SUPPORTING FURTHER REVIEW

The Application for Further Review ("Application") filed by Defendant-Appellant, Finance of America Commercial, LLC ("FAC")[1], should be denied without further consideration as the dispute does meet the well-established threshold for further review. *See* Iowa Rule of Appellate Procedure 6.1103(b) (providing further review is granted based on judicial discretion, not as a matter of right). The above-captioned matter is a straight-forward lien priority dispute that starts and ends with the plain language of Iowa Code Sections 572.13B and 572.18. Slip Op. at p. 8 (Iowa Ct. App. Aug. 18, 2021) (finding the District Court "read the statute as we have and then applied the statute."). There is simply no substantial question of law, important question of changing legal principles, or issue of broad public importance that lends itself to further review by the Iowa Supreme Court. *See* IOWA R. APP. P. 6.1103(1)(b)(2-4).

FAC attempts to meet the difficult further review hurdle imposed by Rule 6.1103 by urging that this case "represents an important opportunity for

[1] An Application for Further Review was also filed by Appellees/Cross-Appellants, Thomas Dostal Developers, Inc. and Randy T. Dostal. As the cross-appeal and subsequent Application for Further Review filed by Dostal does not pertain to Borst's claims or resulting judgment, Borst takes no position on the merits of Dostal's Application.

the Iowa Supreme Court to settle the issue of a subcontractor's obligations under… Iowa Code Chapter 572" and requires the Court resolve "the interplay between Iowa Code Chapter 572 (the mechanic's lien statute) and the rights of mortgagees…" (*FAC Application*, p. 7). However, Iowa's legislature has already, expressly, resolved both the issue of subcontractor obligations and the interplay between mechanic's and mortgage liens. *See* IOWA CODE §§ 572.13A(2); 572.13B and 572.18. The clear statutory language leaves nothing requiring this Court to review.

FAC also alleges as a basis for further review, that the Court of Appeal's opinion in this case is "at odds" with its holding in *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d 673, 676 (Iowa Ct. App. 2016) but fails to identify any specific conflict it relies upon in seeking further review. In addition to the lack of conflict, neither the District Court nor the Court of Appeals relied on *Standard Water* nor was reliance on *Standard Water* required to resolve the priority lien dispute between FAC as mortgagor and Borst as a subcontractor. In an effort to suggest a purported conflict, FAC baldly asserts a conflict exists without identifying it, and wrongly suggests that the Court of Appeals and District Court relied on *Standard Water* in reaching their dispositive decisions, when, in fact, they did not.

This case simply presents none of the characteristics this Court looks for when exercising its judicial discretion to consider the merits of a dispute. Such was evident to this Court in the initial briefing stage, as it denied FAC's request to retain the appeal notwithstanding FAC's assertion that "the case involves substantial issues of first impression" and "is of broad public importance...". (*Amended Proof Brief of Appellant (FAC)*, filed October 19, 2020, at p. 9; *Brief of Finance of America Commercial, LLC*, filed February 18, 2021, at p. 10.) Nothing about the Court of Appeal's decision changes this analysis and FAC's mere disappointment with the outcome does not create a sufficient basis for further review. FAC's Application should, therefore, be denied without any additional consideration by the Supreme Court.

SUBSTANTIVE RESISTANCE TO FAC'S APPLICATION FOR FURTHER REVIEW

Although consideration of the substantive arguments FAC makes is unnecessary for the reason identified in the preceding section, a brief recitation of the pertinent facts and legal proceedings is provided here in the event the Court does consider granting further review. It is undisputed the owner-builder of a residential real estate project, Thomas Dostal Developers, Inc. ("Dostal"), failed to timely post a commencement of work for the project as provided by Iowa Code Section 572.13A(1). Pursuant to agreements

directly with Dostal, subcontractors, Kelly Concrete Company, Inc. ("Kelly") and Borst Brothers Construction, Inc. ("Borst"), each furnished labor and materials in furtherance of Dostal's development. *After* Kelly and Borst began furnishing labor and materials to Dostal, FAC extended financing for the project to Dostal and secured its interest in the project with mortgages executed by Dostal. Dostal failed to honor its obligations under the terms of its agreements with FAC.

Dostal similarly failed to honor the terms of its agreements with its subcontractors. Various proceedings, including actions involving both Kelly and FAC, were consolidated into the above-captioned matter. It was evident from the outset of the litigation that the value of the secured property would be insufficient to satisfy all of the parties' respective encumbrances.

As a result, the District Court was tasked with determining the parties' respective interests in the property and priority of those parties' interests. Following a one-day non-jury trial, the District Court found Kelly's and Borst's mechanic's liens[2] were superior to, and had priority over, FAC's mortgage lien based on the plain language of Iowa Code Chapter 572. The

[2] As between Kelly and Borst, the District Court found Kelly's mechanic's liens were superior to Borst's on four out of the five secured properties. However, the Court's findings as between Kelly and Borst were not challenged on appeal.

Court of Appeals affirmed the District Court's priority findings based on *the same* "plain reading" of Iowa Code Sections 572.13A, 572.13B and 572.18.

I. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY DETERMINED BORST'S MECHANIC'S LIEN WAS VALID AND ENTITLED TO PRIORITY OVER FAC'S MORTGAGE

The primary issue in this appeal is the time in which a subcontractor may post a Notice of Commencement of Work when a general contractor or owner-builder fails to timely do so. The District Court and the Court of Appeals answered this question by applying the plain language of Iowa Code Section 572.13A which provides:

> 1. Either a general contractor, or an owner-builder who has contracted or will contract with a subcontractor to provide labor or furnish material for the property, shall post a notice of commencement of work to the mechanics' notice and lien registry internet site no later than ten days after the commencement of work on the property. 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. A notice of commencement of work shall include …
>
> 2. If a general contractor or owner-builder fails to post the required notice of commencement of work to the mechanics' notice and lien registry internet site pursuant to subsection 1, within ten days of commencement of the work on the property, a subcontractor may post the notice in conjunction with the posting of the required preliminary notice pursuant to section 572.13B. A notice of commencement of work must be posted to the mechanics' notice and lien registry internet

> site before preliminary notices pursuant to section 572.13B may be posted.

IOWA CODE § 572.13A (emphasis added). FAC has argued that general contractors, owner-builders and subcontractors must all post notice within ten days after the commencement of work under section 572.13A(1). FAC's argument misapplies the ten-day period, set out in Iowa Code Section 572.13A(1), as setting the time for a subcontractor to file a notice. It clearly does not as the express language of section 572.13A(1) provides it applies the ten-day period only to general contractors and owner-builders while a subcontractor's time for filing starts on day 11.

Section 572.13(A) provides objectively clear and simple successive time-periods. For the first ten days following commencement of work, the general contractor or owner-builder may post the notice of commencement of work. If they fail do so in that ten-day period, then from day 11 forward, the subcontractor may, per subsection (2), post that notice. The express time limit for that posting is after day ten but before posting a preliminary notice pursuant to section 572.13(B). That timeline is objectively clear, as readily observed by both the District Court and Court of Appeals. There is no ambiguity, and no basis for further review of the holding of the Court of Appeals.

FAC's argument that subcontractors are subject to the same ten-day filing period as the general contractor or owner-builder is simply illogical. The legislature separated the time-period for subcontractors to file, into its own subsection, because it is a different time. If subcontractors were subject to the same ten-day period as the general contractor or owner-builder, there would have been no need for Subsection 572.13A(2), and Subsection 572.13A(1) would have simply read "a general contractor, owner-builder, or subcontractor…". The obvious reason the legislature separated subcontractors into Subsection (2) is because subcontractors must wait until the full ten days from commencement of work has passed to determine if they need to then post the notice of commencement of work that the general contractor or owner-builder failed to post.

FAC's argument would render the timeframe laid out in Subsection (2) null and void. It would necessitate that all subcontractors file a notice of commencement of work in the same ten-day period as the general contractor or owner-builder, without even knowing if the general contractor or owner-builder had failed to post the notice, as is the requirement of Subsection 572.13A(2).

The general contractor or owner-builder, statutorily have until 11:59:59pm on the tenth day to file the notice of commencement of work. As

such, a subcontractor cannot know until day 11 if the general contractor or owner-builder has failed to file the notice. FAC asked the Court of Appeals to ignore that obvious issue and require the subcontractor to file within the ten-day period in any event. The Court of Appeals correctly refused to engage in such a non-sensical reading of Section 572.13A, and there is no need for further review of that decision.

Beyond the obviously incorrect reading of the statute, there is the practical implication if FAC's interpretation were to be adopted. Every subcontractor would simply immediately file a notice of commencement of work, without regard to whether the general contractor or owner-builder had filed. The number of postings on the lien registry would dramatically increase, resulting in confusion for a property owner or prospective property owner.

Section 572.13 avoids that duplication by allowing the subcontractor additional time, after the filing period provided for general contractors and owner builders has expired, to file their own notices. The timeframe was provided by the Iowa legislature in Section 572.13(A)(2) which provides a subcontractor the right to "post the notice in conjunction with the posting of the required preliminary notice pursuant to section 572.13B." 572.13B provides:

> A subcontractor shall post a preliminary notice to the mechanics' 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.

IOWA CODE § 572.13B(1).

Applying these provisions to the facts of this case, the District Court and the Court of Appeals rejected FAC's argued interpretation of Section 572.13(A)(1) requiring subcontractors to post notice within ten days of commencement of the work on the property. The District Court concluded "Borst posted its Preliminary Notice before the balance was due to Dostal Developers" and further found "Borst complied with the filing and timing requirements of a subcontractor pursuant to Iowa Code §§ 572.13A and 572.13B ("Ruling")." (*Ruling*, p. 19, App. 822.) Borst's posting of its preliminary notice before the balance due was paid entitled Borst to a lien "effective as to all labor, service, equipment and material furnished to the property" by Borst. *See* IOWA CODE § 572.13B(1).

The Court of Appeals affirmed the District Court's findings, noting:

> In [FAC's] view, '[b]y filing their Notices of Commencement long after the 10-day period, Borst and Kelly failed to comply with section 572.13A, and prohibited any opportunity to perfect mechanic's liens.' A plain reading of these provisions leads us to a different conclusion.

Slip Op. at p. 8 (Iowa Ct. App. Aug. 18, 2021). Citing the above quoted District Court language, the Court of Appeals found "[t]he district court read the statute as we have and then applied the statute." *Id*. at *3. The Court of Appeals agreed, based on its own reading and application of the statute, the ten-day deadline for filing a notice of commencement under Section 572.13A(1) applies only to general contractors or owner-builders, not subcontractors like Borst.

FAC's arguments concerning priority of the subcontractor's valid mechanic's liens have similarly been considered, and correctly rejected, by the District Court and the Court of Appeals, negating any need for further review. The applicable priority statute is found in Iowa Code Section 572.18. This Section provides:

> 1. Mechanics' liens posted by a general contractor or subcontractor within ninety days after the date on which the last of the material was furnished or the last of the claimant's labor was performed and for which notices were properly posted to the mechanics' notice and lien registry internet site pursuant to sections 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.
>
> 2. Construction 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. For purposes of this section, a

> lien is a "construction mortgage lien" to the extent that it secures loans or advancements made to directly finance work or improvements upon the real estate which secures the lien.

IOWA CODE § 572.18. As noted above, "[p]roperly posted" mechanic's liens are superior to "all other liens" and may only be bumped in terms of priority by mortgages recorded *prior to the commencement* of a contractor's work.

As noted by the Court of Appeals, Borst commenced work on July 3, 2017, and FAC asserts it recorded its mortgages between November 10, 2017 and December 20, 2017. (*See* Slip Op. at pp. 5 and 9.) Borst's commencement of work predated FAC's recording of its mortgage. Borst posted its Notice of Commencement forty-five days after it last furnished labor and/or materials, well within the ninety-day deadline to do the same and for the reasons set forth above, properly posted notice required by 572.13B. Again, a plain reading of Iowa Code Section 572.18(1) demonstrates that Borst's lien is superior to FAC's as Borst's commencement of work predated FAC's lien. The Court of Appeals correctly found that priority, on such plain reading. (Slip Op. at p. 10.) There is no need for further review of such a decision based on such clear statutory language.

This conclusion is also supported by case law such as *Northwestern Nat. Bank of Sioux City v. Metro Center, Inc.*, 303 N.W.2d 395 (Iowa 1981)

holding "(t)he mechanic's lien arises upon furnished labor or material; not upon its filing." S*ee also Society Linnea v. Wilbois*, 113 N.W.2d 603, 606–07 (Iowa 1962) (stating a mechanics lien is effective "from the day [a party] commences work or furnishes material …."). The Iowa Supreme Court 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. FAC's argument is inconsistent with both Iowa Code Section 572.18 and binding Supreme Court authority.

The District Court and the Court of Appeals both applied the plain language of the statute, consistent with the approach outlined in Supreme Court precedent, to the facts of this case. The District Court found:

> [p]ursuant 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.

(*Ruling*, p. 21, App. 824.) The Court of Appeals agreed and after setting forth the text of the statute, held:

> …Borst and Kelly began their work in July and September 2017 respectively, well before FAC recorded its mortgages. A plain reading of section 572.18(1) affords the mechanic's lien holders priority over FAC. We discern no error in the district court's interpretation of the statute, and on our de novo review we conclude the court acted

> equitably in granting the liens of Borst and Kelly priority over the mortgages of FAC.

Slip Op. at pp. 9-10 (Iowa Ct. App. Aug. 18, 2021).

In response to the above findings, FAC now argues:

> The Court of Appeals determined that only a general contractor or owner-builder has an obligation to post a Notice of Commencement. Slip op. at 6. The Court of Appeals decided that a subcontractor, like Kelly and Borst, may post the Notice of Commencement, but is not required to. *Id*. (quoting Iowa Code § 572.13B) (emphasis in original).
>
> The appellate court discounted FACo's argument that such a holding eviscerates the purpose of Iowa Code Chapter 572, which was promulgated to give third parties prior notice of work that may result in liens on property. The Court of Appeals evidently accepted that FACo, as a mortgage lender, is not entitled to notice of potential liens despite the Iowa Legislature establishing a law precisely intended to give the public notice of such potential liens. Slip Op. at 7.

FAC Application, p. 12 (emphasis supplied). FAC complains of the Court of Appeals findings in a way that suggests the Court engaged in interpretation or analysis of the applicable statutory language. Neither the District Court nor the Court of Appeals in this case did so, instead taking the plain language of the mechanic's lien statute and applying those clear legislative directives to the facts of this case.

For example, FAC's complaint that the lower courts erred in concluding that a subcontractor "may post" notice is language the Court copied straight from the mechanic lien statute. Specifically, Section 572.13A(2) which

prescribes that in the event a general contractor or owner-builder fails to post notice required under 572.13A(1), "a subcontractor may post the notice." FAC's assertion that the Iowa Legislature established the mechanic lien statute "to give the public notice of such potential liens," is similarly misplaced as the text of the statute makes it clear that the legislative intent was to provide owners with notice of potential liens.

FAC's Application, therefore, is not a challenge to the Court's decisions, but an attempt to either ignore or rewrite clear legislative directives. Iowa law is clear that the Court is prohibited from doing so. *See, e.g. 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."); *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.").

II. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY DETERMINED BORST WAS A PREVAILING PARTY AT TRIAL AND ENTITLED TO RECOVER ATTORNEY FEES

FAC's argument regarding attorney fees is wholly contingent on its success in overturning the District Court and Court of Appeals Rulings in favor of Borst. Since FAC has failed to establish a basis for overturning either of the lower court's well-reasoned decisions, its arguments regarding attorney

fees must similarly fail. As Borst has prevailed, and for the reasons set forth above, Borst should continue to prevail, in its enforcement of its lien, it is entitled to the recovery of attorney fees. *See* IOWA CODE § 572.32(1) (authorizing an award of attorney fees to any prevailing plaintiff in an action to enforce a mechanic's lien); *see also* Slip Op. at p. 12 (Iowa Ct. App. Aug. 18, 2021) ("having affirmed [Borst's and Kelly's] lien positions, we also affirm the attorney fee awards.").

CONCLUSION

At a procedural level, FAC's Application fails to articulate a viable basis for further review and should be denied on that basis alone. FAC's regurgitation of the arguments raised on eight separate occasions before the District Court and again on appeal, all of which were properly rejected, does nothing to meet one of the four established criteria for further review, or similar meritorious bases, and does not warrant further consideration by the Iowa Supreme Court. If the Court elects to reach the merits of FAC's arguments, the District Court's and the Court of Appeals' plain reading of the applicable statutes should not be rejected in favor FAC's misinterpretation of the same.

FAC's Application for Further Review should, therefore, be denied in its entirety and the Rulings of the District Court and Iowa Court of Appeals should be left undisturbed.

/s/ Matthew L. Preston
Matthew L. Preston, PIN: AT0006314
Brad J. Brady, PIN: AT0001138
BRADY PRESTON GRONLUND PC
2735 First Avenue SE
Cedar Rapids, IA 52402
Phone: 319/866-9277
Fax: 319/866-9280
MPreston@BPGLegal.com
BBrady@BPGLegal.com

ATTORNEYS FOR PLAINTIFF-APPELLEEE BORST BROTHERS CONSTRUCTION, INC.

CERTIFICATE OF COMPLIANCE

This Resistance complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.1103(4) because this Resistance has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font and contains 3,498 words, excluding the parts of the Resistance exempted by Iowa Rule of Appellate Procedure 6.1103(4)(a).

/s/ Matthew L. Preston
Signature

September 17, 2021
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on September 17, 2021, the foregoing Appellee's Resistance to Application for Further Review was filed with the Iowa Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the parties via the EDMS system. Pursuant to Iowa R. App. P. 6.1103 and 6.701 and Iowa Rule of Electronic Procedure 16.315, this constitutes services for purpose of the Iowa Court Rules.

/s/ Matthew L. Preston