

**IN THE IOWA SUPREME COURT**

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**SUPREME COURT NO. 22-2098**

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

**v.**

**IOWA ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES,  
Defendant,**

**DES MOINES AREA COMMUNITY COLLEGE,  
Appellee/Defendant,**

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

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

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**APPELLANTS ROCHON CORPORATION OF IOWA, INC.'S AND  
GRAPHITE CONSTRUCTION GROUP, INC.'S BRIEF**

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IOWA, INC. AND GRAPHITE CONSTRUCTION GROUP, INC

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

- 1. IS A PRIME CONTRACTOR, WHO BONDS OFF AN IOWA CODE SECTION 573.7 CLAIM AS PERMITTED BY IOWA CODE SECTION 573.16(2), ENTITLED TO IMMEDIATE RECEIPT OF THE RETAINAGE BEING HELD BY THE PROJECT OWNER FOR THE CLAIM, OR, AS THE DISTRICT COURT RULED, DOES THE PRIME CONTRACTOR HAVE TO WAIT FOR THE PAYMENT UNTIL AFTER EXPIRATION OF THIRTY DAYS AFTER COMPLETION AND FINAL ACCEPTANCE OF THE PROJECT?**

### Cases

*Biermann Elec. v. Larson & Larson Constr., LLC*, 2014 WL 69672 (Iowa Ct. App. 2014)

*Charnock v. Dist. Twp. of Colfax*, 50 N.W. 286 (Iowa 1879)

*Cities Serv. Oil Co. v. Longerbone*, 6 N.W.2d 325 (Iowa 1942)

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*Employers Mut. Cas. Co. v. City of Marion*, 577 N.W.2d 657 (Iowa 1998)

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**2. IS A PRIME CONTRACTOR, WHO PREVAILS ON AN IOWA CODE SECTION 573.16 RETAINAGE DISPUTE WITH A PUBLIC OWNER, ENTITLED TO RECOVER ATTORNEY FEES UNDER IOWA CODE SECTION 573.21?**

**Cases**

*City of Marion v. Nat'l Cas. Co.*, 431 N.W.2d 370 (Iowa 1988)

*Dico, Inc. v. Employers Ins. of Wausau*, 581 N.W.2d 607, 613 (Iowa 1998)

*Farmers Co-op Co. v. DeCoster*, 528 N.W.2d 536 (Iowa 1995)

*Marquart Block Co. v. Denis Della Vedova, Inc.*, 2006 WL 3108227  
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*Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11 (Iowa 2001)

*Star Equip., Ltd. v. State*, 843 N.W.2d 446 (Iowa 2014)

## **Statutes**

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## **Other Authorities**

Webster's Collegiate Dictionary 210 (10th ed. 1993)

## ROUTING STATEMENT

Both issues on appeal are of first impression for the Court. The first issue is whether a prime contractor, who bonds off an Iowa Code Section 573.7 claim as permitted by Iowa Code Section 573.16(2), is entitled to immediate payment of the retainage held by the project owner for the claim, or, as the district court ruled, does it have to wait for payment until after expiration of thirty days after completion and final acceptance of the project? No Iowa appellate court has addressed this issue.

The other issue is a substantial one on which the court of appeals has issued conflicting decisions, namely whether a prime contractor, who prevails on an Iowa Code Section 573.16 retainage dispute with a public owner, is entitled to recover attorney fees under Iowa Code Section 573.21. *Compare Midland Restoration Co. v. Sioux City Cmty. Sch. Dist.*, 2003 WL 21229272 (Iowa Ct. App. 2003) (awarded fees), *with Saydel Cmty. Sch. Dist. v. The Denis Della Vedova, Inc.*, 2007 WL 1201748 (Iowa Ct. App. 2007) (refused to award fees).

The Supreme Court should retain this case pursuant to Iowa Rules of Appellate Procedure 6.1101(2)(b), (c) & (f).

## STATEMENT OF THE CASE

The first issue involves the proper interpretation of Iowa Code Section 573.16(2) concerning a prime contractor's right to retainage payment when it bonds off an Iowa Code Section 573.7 claim. Upon bonding off a claim, is a prime contractor entitled to immediate payment, as Graphite believes Iowa Code Section 573.16(2) requires, or, as the district court ruled, does that statute incorporate an alleged requirement in Iowa Code Section 573.16(1) that the prime contractor wait for such payment until after expiration of thirty days after completion and final acceptance of the project? [District Court Ruling on Motion to Compel Release of Retainage Funds; App. 273-280]. Graphite disagrees with the district court. Section 573.16(1) does not address or mention payment let alone contain the requirement found by the district court, Section 573.16(2) does not contain any language incorporating any such alleged requirement, and the district court's interpretation frustrates the purpose of Section 573.16(2) and renders part of it superfluous.

The other issue, involving attorney fees, is one on which the court of appeals has issued conflicting decisions. Does Section 573.21 apply to a prime contractor who prevails on an Iowa Code Section 573.16 retainage dispute with a public owner, or is it limited to claimants described in Iowa Code Section 573.7(1)? Reasonable arguments can be made on both sides, as

evidenced by the conflicting court of appeals' decisions. Graphite urges the Court to interpret the statute as applying to prevailing prime contractors in Section 573.16 retainage-payment disputes with public owners.

## STATEMENT OF FACTS

Des Moines Area Community College (“DMACC”) is owner of a public-construction project located in Ankeny, Iowa named the DMACC Building 13 Automotive Additions & Renovation Project. [District Court Ruling on Motion to Compel Release of Retainage Funds, p. 1; App. 273]; [DMACC’s Sur-Reply Brief in Support of Resistance to Motion to Compel Release, p. 2, ¶ 1; App. 136]; [Exhibit A to DMACC’s Sur-Reply Brief; App. 147-173]. On or about March 11, 2019, DMACC and Graphite entered into a written Agreement for the Project whereby Graphite was the prime contractor. [DMACC’s Sur-Reply, p. 2, ¶ 1; App. 136]; [Exhibit A to DMACC’s Sur-Reply; App. 147-173]. On or about April 1, 2019, Graphite and Metro Concrete, Inc. entered into a written Subcontract Agreement whereby Metro Concrete was one of Graphite’s subcontractors on the Project. [Petition, p. 3, ¶ 13; App. 011]; [Ruling on Motion to Compel Release, p. 1; App. 273]; [Exhibit 1 to Graphite’s Motion to Compel Arbitration; App. 029-043].

On November 20, 2020, Metro Concrete filed for Chapter 11 bankruptcy, which was later converted to a Chapter 7 bankruptcy. Charles L. Smith was appointed as the Trustee for Metro Concrete’s bankruptcy. [Petition, pp. 1 & 2, ¶¶ 1 & 11; App. 009-010]; [Ruling, p. 2; App. 274]. On or about January 26, 2022, the Trustee filed an Iowa Code Section 573.7 claim

with DMACC in the principal amount of \$217,221.32. [Exhibit 1 to Petition; App. 013-014]. On March 29, 2022, Graphite served upon Smith a demand that he file suit on his Section 573.7 claim within 30 days, as provided in Iowa Code Section 573.16(2). [Graphite’s Answer, p. 4, ¶ 4; App. 049]. The Trustee complied, and on April 22, 2022 he filed his Petition on Claim Against Public Improvement by Subcontractor, which named, among others, DMACC and Graphite as defendants. [Petition; App. 009-018]. On or about May 4, 2022, Graphite furnished to DMACC a Bond for Release of Contract Funds – Iowa Code §573.16 in the amount of \$434,442.64 (double the amount the claim), which bonded off Smith’s Section 573.7 claim, as provided in Iowa Code Section 573.16. [Exhibit 1 to Graphite’s Motion to Compel Release; App. 062-064].

Despite furnishing the Bond, DMACC refused to pay Graphite all of the retainage it was holding for Smith’s Section 573.7 claim. [Graphite’s Motion to Compel Release, p.2; App. 058]; [DMACC’s Resistance to Motion to Compel Release, p.3; App. 067]; [DMACC’s Sur-Reply, pp. 4-5, ¶ 11; App. 138-139]; [Exhibit G to DMACC’s Sur-Reply, ¶¶ 14-16; App. 268] [Exhibit H to DMACC’s Sur-Reply; App. 269]. Therefore, on July 21, 2022, Graphite filed a Motion to Compel Defendant DMACC to Release Retainage in which it requested the district court “enter an order compelling DMACC to pay to



Graphite out of the retainage it is holding the amount of the lesser of the following: double the amount of Metro Concrete’s 573 Claim (\$434,442.64) or the full amount of retainage.” [Graphite’s Motion to Compel Release; App. 057-064]. Graphite also requested an award of attorney fees under Iowa Code Section 573.21. [Graphite’s Reply Brief in Support of Motion to Compel Release, p. 5; App. 133]. DMACC resisted the Motion. [DMACC’s Resistance; App. 065-128]. On September 22, 2022, the district court heard oral arguments, [Ruling, p. 2; App. 274]; [Court Reporter Memorandum and Certificate; App. 270-272], and on December 22, 2022, the district court entered its Ruling to Compel Release of Retainage Funds. [Ruling; App. 273-280]. In relevant part, the Ruling states,

Iowa Code section 573.16(1) sets forth the circumstances under which issuance of a surety bond requires the project owner to release the amount stated in section 573.16(2). That circumstance is “after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of said improvement . . . .” Iowa Code § 573.16(1).

...

The plain language of Iowa Code section 573.16 demands that there be final completion and acceptance of the project for Graphite to receive twice the amount of Metro Concrete’s claim. Graphite does not contend that final completion or acceptance of the project has occurred and DMACC contends that the project remains unfinished. Therefore, the Court concludes that Graphite’s Motion to Compel DMACC to Release Retainage Funds is without merit.

[Ruling, pp. 4 & 6; App. 276 & 278]. The district court also denied Graphite's request for attorney fees. [Ruling, p. 7; App. 279]. On December 27, 2022, Graphite filed its Notice of Appeal [Certified Notice of Appeal; App. 281-283].

## ARGUMENT

- 1. IS A PRIME CONTRACTOR, WHO BONDS OFF AN IOWA CODE SECTION 573.7 CLAIM AS PERMITTED BY IOWA CODE SECTION 573.16(2), ENTITLED TO IMMEDIATE RECEIPT OF THE RETAINAGE BEING HELD BY THE PROJECT OWNER FOR THE CLAIM, OR, AS THE DISTRICT COURT RULED, DOES THE PRIME CONTRACTOR HAVE TO WAIT FOR THE PAYMENT UNTIL AFTER EXPIRATION OF THIRTY DAYS AFTER COMPLETION AND FINAL ACCEPTANCE OF THE PROJECT?**

This issue was raised and addressed by the parties with respect to Graphite's Motion to Compel Defendant DMACC to Release Retainage [Graphite's Motion to Compel Release; App. 057-064]; [DMACC's Resistance; App. 065-128]; [Graphite's Reply; App. 129-134]; [DMACC's Sur-Reply; App. 135-269], and the district court decided the issue in its December 22, 2022 Ruling to Compel Release of Retainage Fund [Ruling; App. 273-280]. This issue is a legal one concerning the interpretation and application of Iowa Code Section 573.16, which is reviewed for correction of errors at law. *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014); *Marquart Block Co. v. Denis Della Vedova, Inc.*, 2006 WL 3108227, at \*2 (Iowa Ct. App. 2006).

The parties' dispute revolves around retainage on a public-construction project, and what Section 573.16 has to say about it. This Court recently provided an overview of retainage.

Entitled “Labor and Material on Public Improvements,” chapter 573 is Iowa's counterpart to the Federal Miller Act. Chapter 573 protects subcontractors and materialmen through retainage procedures and by requiring general contractors to obtain surety bonds for state government construction projects

Bonds on public projects serve as a substitute for the protection of mechanics' liens, which are unavailable when the landowner is the government:

To provide protection in public works projects for contractors, subcontractors and materialmen unable to utilize a mechanic's lien, chapter 573 requires that the general contractor execute and deliver a bond running to the public corporation sufficient to insure the fulfillment of the conditions of the contract. See Iowa Code §§ 573.2, .5 (1987). This bond can be the object of a subcontractor's or materialman's claim, see Iowa Code § 573.7 (1987), and serves as a substitute for the protection of a mechanic's lien.

Iowa Code section 573.5 (2011) states that the amount of the bond must be “sufficient to comply with all requirements of [the] contract and to insure the fulfillment of every condition, expressly or impliedly embraced in [the] bond.” Bonds are typically required on all projects when the contract price equals or exceeds \$25,000 and may also be required for contracts below that threshold.

A performance bond underwriter assesses “the unique characteristics of a given principal and only issues a bond if claims are not expected.” The capital of the principal is an important consideration in bond underwriting, and a surety will likely refuse to issue a bond if the principal does not have adequate financing, cash flow, and financial reporting. Bonds can represent a significant cost: Premiums for construction bonds often fall in a range of one to three percent of the amount of the bonded contract. “The bond premium is effectively an administrative fee based upon the surety's assessment that its underwriting is sufficiently rigorous that there will be few or no

defaults under its bonded contracts.”

Chapter 573 provides an additional protection for subcontractors in the form of a retained percentage fund. Section 573.12(1) requires the state entity, or “public corporation,” in charge of the project to pay the general contractor monthly. From the amount payable to the general contractor, the public corporation is allowed—but not required—to retain up to five percent of the amount owed. Section 573.13 specifies that the retained amount “constitutes a fund for the payment of claims for materials furnished and labor performed.”

Subcontractors owed money on public construction projects may submit their claims to the responsible public corporation. If necessary, the court is tasked with adjudicating these claims and is directed to award a claimant the costs of the action. The court may tax reasonable attorney fees as costs. If the retained percentage is sufficient, the public corporation pays the claimants from that fund. If no claims are submitted against the retained funds, or if excess funds remain after all claims have been satisfied, the balance is released to the general contractor.

*Star Equip.*, 843 N.W.2d at 452-453 (citations and footnote omitted). Because mechanic’s liens are unavailable on public projects, *id.*; *Cities Serv. Oil Co. v. Longerbone*, 6 N.W.2d 325, 327 (Iowa 1942); *Charnock v. Dist. Twp. of Colfax*, 50 N.W. 286, 286 (Iowa 1879), Chapter 573 establishes a claims procedure where retainage and bonds serve the same purpose as real property does in the mechanic’s lien context: collateral to serve as security to pay subcontractors. Claimants are allowed to “lien” the contractor’s retainage and bonds.

Statutorily, the concept of retainage is found in Section 573.12(1)(a):

Payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered, as determined by the project architect or engineer. The public corporation shall retain from each monthly payment not more than five percent of that amount which is determined to be due according to the estimate of the architect or engineer.

This provision establishes that (1) retainage is money earned by a contractor but which a public owner can (but is not required to) hold, and (2) the retainage amount can be no greater than 5% of the amount owed the contractor. *Star Equip.*, 843 N.W.2d at 453 (“From the amount payable to the general contractor, the public corporation is allowed—but not required—to retain up to five percent of the amount owed.”); Iowa Code Section 573.13 (“[T]he retained percentage of the contract price, which in no case shall be more than five percent. . . .”). Section 573.13 provides that the sole purpose of retainage is to serve as collateral to pay claims of unpaid subcontractors.

A public corporation shall not be permitted to plead noncompliance with section 573.12 and the retained percentage of the contract price, which in no case shall be more than five percent, constitutes a fund for the payment of claims for materials furnished and labor performed on the improvement and shall be held and disposed of by the public corporation as provided in this chapter.

*Star Equip.*, 843 N.W.2d at 453 (“Chapter 573 provides an additional protection for subcontractors in the form of a retained percentage fund.”); Iowa Code Section 573.7 (defining those who have the right to file claims

against the retainage and bonds).

Though a public owner is not required to hold any retainage, if it chooses to do so it must follow Chapter 573's strict rules on the handling and disposition of it. Iowa Code Section 573.13 (“[T]he retained percentage . . . shall be held and disposed of by the public corporation as provided in this chapter.”); Iowa Code Section 573.25 (“The filing of any claim shall not work the withholding of any funds from the contractor except the retained percentage, as provided in this chapter.”). The main retainage-handling rule is found in Section 573.14(1):

The fund provided for in section 573.13 shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement. If at the end of the thirty-day period claims are on file, the public corporation shall continue to retain from the unpaid funds a sum equal to double the total amount of all claims on file. The remaining balance of the unpaid fund, or if no claims are on file, the entire unpaid fund, shall be released and paid to the contractor.

This provision requires a public owner to hold retainage for thirty days after completion and final acceptance of the project. Upon expiration of that 30-day period, if no claims have been filed, the public owner must pay all of the retainage to the contractor. If any claims have been filed, the public owner must continue holding retainage in the following amount: double the amount of all filed claims, or the full amount of retainage, whichever is less. Any

excess retainage above that amount must be paid to the contractor. *Econ. Forms Corp. v. City of Cedar Rapids*, 340 N.W.2d 259, 262-263 (Iowa 1983); *Employers Mut. Cas. Co. v. City of Marion*, 577 N.W.2d 657, 661 (Iowa 1998); *Hercules Mfg. Co. v. Burch*, 16 N.W.2d 350, 354 (Iowa 1944); *S. Sur. Co. v. Jenner Bros*, 237 N.W. 500, 504 (Iowa 1931). There are exceptions to Section 573.14(1)'s rules, and they are contained in Section 573.16(2), which is the statute in dispute in this appeal.

Section 573.16 reads,

**573.16. Optional and mandatory actions--bond to release**

1. The public corporation, the principal contractor, any claimant for labor or material who has filed a claim, or the surety on any bond given for the performance of the contract, may, at any time after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of said improvement, bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.

2. Upon written demand of the contractor served, in the manner prescribed for original notices, on the person filing a claim, requiring the claimant to commence action in court to enforce the claim, an action shall be commenced within thirty days, otherwise the retained and unpaid funds due the contractor shall be released. Unpaid funds shall be paid to the contractor within twenty days of the receipt by the public corporation of the release as determined pursuant to this section. Failure to make payment by that date shall cause interest to accrue on the unpaid amount. Interest shall accrue during the period commencing the twenty-first day after the date of release and ending on the date of the payment. The rate of interest shall be determined pursuant to section 573.14. After an action is commenced, upon the general



contractor filing with the public corporation or person withholding the funds, a surety bond in double the amount of the claim in controversy, conditioned to pay any final judgment rendered for the claims so filed, the public corporation or person shall pay to the contractor the amount of funds withheld.<sup>1</sup>

The first paragraph is Chapter 573's general statute of limitations, and it provides a deadline of 60 days after completion and final acceptance of the project for the filing of lawsuits to adjudicate rights to the retainage held by the public owner, or to enforce liability on the bond.<sup>2</sup> *Employers Mut.*, 577 N.W.2d at 662 ("Section 573.16 is the statute of limitations governing suits on the claims. In clear language, section 573.16 gives subcontractors sixty days 'following the completion and final acceptance of the improvement' in which to bring suit on their claims."); *NW Limestone Co., Inc. v. State Dept. of Transp.*, 499 N.W.2d 8, (Iowa 1993); *Perkins Builders' Supply & Fuel Co. v. Ind. Sch. Dist. of Des Moines*, 221 N.W.2d 793, 795 (Iowa 1928); *Biermann Elec. v. Larson & Larson Constr., LLC*, 2014 WL 69672, at \*2-\*3 (Iowa Ct. App. 2014); *Giese Sheet Metal Co., Inc. v. Prairie Constr. Co., Inc.*, 2013 WL

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<sup>1</sup> The genesis of what is now Section 573.16(2) occurred in 1931 with an amendment to Iowa Code Chapter 452, Section 10313. In 1945, Section 10313 was renumbered as Iowa Code Section 573.16, which remains today.

<sup>2</sup> The bond referred to in Section 573.16(1) is the performance bond described in Iowa Code Sections 573.2-573.6. *See Star Equip.*, 843 N.W.2d at 452-453. It is not the Section 573.16(2) bond a contractor uses to bond-off Section 573.7 claims.

4505125, at \*4 (Iowa Ct. App. 2013). Section 573.16(1) also contains a “reverse” statute of limitations, which prohibits lawsuits from being filed until after expiration of the 30-day period after completion and final acceptance of the project. *Biermann Elec.*, 2014 WL 69672, at \* 3 (“To judicially enforce their [chapter 573] claims, subcontractors must file suit no sooner than thirty days and no later than sixty days following completion and final acceptance of the improvement.”) (citation omitted).

In contrast to the first paragraph, Section 573.16’s second paragraph does two things:

- 1) Creates a special limitations period applicable when a contractor serves a lawsuit-demand upon a Section 573.7 claimant, with the limitations period being 30 days after service of the demand. *Ewing Concrete LLC v. Rochon Corp. of Iowa, Inc.*, 2016 WL 146275, at \*1 (Iowa Ct. App. 2016) (“Rochon personally served Ewing with a thirty-day demand letter under Iowa Code section 573.16, requiring Ewing ‘commence action in court, within [thirty] days of service of this letter, to enforce its Iowa Code chapter 573 claim’ . . . . Iowa Code section 573.16 and relevant case law interpreting this section provide that if Ewing fails to timely file its petition, its statutory claim is time barred.”) (citations omitted), and

2) Provides two ways by which a contractor can obtain payment of retainage earlier than provided in Section 573.14(1):

- a. By serving a lawsuit-demand upon the Section 573.7 claimant, and, if the claimant does not file a lawsuit within 30 days of the demand, the public owner must pay the contractor the retainage being held for the claim. *See Ewing Concrete*, 2016 WL 146275, at \*2 (quoting the district court as stating that “[Rochon], on March 31, 2014, served on Ewing, a section 573.16 demand, requiring that suit be filed to enforce a claim within thirty days, or retained and unpaid funds would be released”); or
- b. By bonding-off the claim, which then requires the public owner to pay the contractor the retainage being held for the claim. *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692, 694 (Iowa 1980) (“Knudson filed a bond to secure any possible judgments as provided in section 573.16 in order to obtain payment of the retainage.”); *Biermann Elec.*, 2014 WL 69672, at \*3 n.4 (noting that district court ordered public owner to release all of the retainage to general contractor upon its filing of a Section 573.16 bond in double the amount of the claim at issue); *see Marquart Block*, 2006 WL 3018227, at \*1; *see also Star Equip.*, 843

N.W.2d at 452-453; *Sinclair Refining Co. v. Burch*, 16 N.W.2d 359, 362 (Iowa 1944); *Hercules*, 16 N.W.2d at 356.

The last option, bonding-off a Section 573.7 claim, is the one at issue in this appeal.

The amount of the Trustee's claim is \$217,221.32 [Exhibit 1 to Petition; App. 013-014], which obligated DMACC to hold \$434,442.64<sup>3</sup> worth of retainage for that claim. Iowa Code Section 573.14(1). Per Section 573.16(2), Graphite served a lawsuit-demand upon the Trustee [Graphite's Answer, p. 4, ¶ 4; App. 049], and the Trustee filed his lawsuit within the 30-day limitations period. [Petition; App. 009-018]. Graphite thereafter bonded off the Trustee's claim, as provided in Section 573.16(2) [Exhibit 1 to Graphite's Motion to Compel Release; App. 062-064]. Despite these facts, which meet all of Section 573.16(2)'s requirements to trigger DMACC's obligation to pay Graphite the \$434,442.64 in retainage being held for the Trustee's claim, DMACC refused to make that payment to Graphite. [Graphite's Motion to Compel Release, p. 2; App. 058]; [DMACC's Resistance to Motion to Compel Release, p. 3; App. 067]; [DMACC's Sur-Reply, pp. 4-5, ¶ 11; App. 138-139]; [Exhibit G to DMACC's Sur-Reply, ¶¶ 14-16; App. 268]; [Exhibit

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<sup>3</sup> The total amount of Project retainage held by DMACC exceeded this amount.

H to DMACC’s Sur-Reply; App. 269]. Graphite then filed its Motion to Compel Defendant DMACC to Release Retainage. [Graphite’s Motion to Compel Release; App. 057-064].<sup>4</sup> In its Ruling, the district court concluded:

Iowa Code section 573.16(1) sets forth the circumstances under which issuance of a surety bond requires the project owner to release the amount stated in section 573.16(2). That circumstance is “after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of said improvement . . . .” Iowa Code § 573.16(1).

...

The plain language of Iowa Code section 573.16 demands that there be final completion and acceptance of the project for Graphite to receive twice the amount of Metro Concrete’s claim. Graphite does not contend that final completion or acceptance of the project has occurred and DMACC contends that the project remains unfinished. Therefore, the Court concludes that Graphite’s Motion to Compel DMACC to Release Retainage Funds is without merit.

[Ruling, pp. 4 & 6; App. 274 & 278]. Respectfully, the plain language of Section 573.16 plainly contradicts the district court’s conclusion.

Section 573.16 (2) reads in relevant part,

2. Upon written demand of the contractor served, in the manner prescribed for original notices, on the person filing a claim, requiring the claimant to commence action in court to enforce the claim, an action shall be commenced within thirty

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<sup>4</sup> After Graphite filed its Motion, DMACC paid Graphite \$351,814.00 of the \$434,442.64 retainage amount being held for the Trustee’s claim, which leaves \$82,628.64 of retainage in dispute. [DMACC’s Sur-Reply, pp. 4-5, ¶ 11; App. 138-139]; [Exhibit G to DMACC’s Sur-Reply, ¶¶ 14-16; App. 268]; [Exhibit H to DMACC’s Sur-Reply; App. 269].

days, otherwise the retained and unpaid funds due the contractor shall be released. . . . After an action is commenced, upon the general contractor filing with the public corporation or person withholding the funds, a surety bond in double the amount of the claim in controversy, conditioned to pay any final judgment rendered for the claims so filed, the public corporation or person shall pay to the contractor the amount of funds withheld.

This only requirement this language contains to trigger the public owner's mandatory retainage payment is the existence of one of the following scenarios: (1) service of a demand with no lawsuit filed within 30 days, or (2) service of a demand with a lawsuit filed within 30 days, followed by bonding off the claim. Yet, according to the district court, there is incorporated into both scenarios an additional requirement, purportedly contained in Section 573.16(1), that retainage payment is not required until after expiration of thirty days after completion and final acceptance of the project.

Section 573.16(2) does not contain the words, "completion and final acceptance," so it cannot serve as the basis for the district court's conclusion. Though Section 573.16(1) contains those words, it says nothing about payment; it only provides the general limitations period for lawsuits on claims. So where does the district's court's additional statutory requirement exist? The answer is nowhere. It does not exist. There is no language in Chapter 573 that grafts onto Section 573.16(2) a thirty-days-after-completion-and-final-acceptance-of-the-project waiting period before retainage must be

paid. The district court's contrary conclusion constitutes impermissible judicial re-writing of the statute. *See Goche v. WMG, L.C.*, 970 N.W.2d 860, 866 (Iowa 2022); *Marek v. Johnson*, 958 N.W.2d 172, 177 (Iowa 2021); *State v. Walden*, 870 N.W.2d 842, 849 (Iowa 2015).

The district court's interpretation also frustrates the purpose of Section 573.16(2), which is to allow contractors to eliminate claims against the retainage (which is money the contractors have already earned) so they can obtain payment of the retainage earlier than allowed under Section 573.14(1) and its thirty-days-after-completion-and-final-acceptance waiting period. *Dobbs*, 292 N.W.2d at 694; *see Biermann Elec.*, 2014 WL 69672, at \*3 n.4. Similar provisions in Iowa's mechanic's lien statute at Iowa Code Chapter 572 confirm that this is the purpose of Section 573.16(2).<sup>5</sup>

Lawsuit-demand language similar to Section 573.16(2) is found in Iowa Section 572.28:

**572.28. Demand for bringing suit**

1. Upon the written demand of the owner served on the claimant requiring the claimant to commence action to enforce the lien, such action shall be commenced within thirty days

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<sup>5</sup> It is appropriate to look to Iowa Code Chapter 572 for insight into the purpose and interpretation of Chapter 573 because the two Chapters are *in pari materia*. *Farmers Co-op Co. v. DeCoster*, 528 N.W.2d 536, 537-538 (Iowa 1995) (holding that Chapters 572 and 573 are *in pari materia* and “must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation”).

thereafter, or the lien and all benefits derived therefrom shall be forfeited.

2. If an action is not filed within thirty days after demand to commence action is served, the party serving the demand or causing the demand to be served may post with the administrator a copy of the demand with proofs of service attached and endorsed and, in case of service by publication, a personal affidavit that personal service could not be made within this state. Upon completion of the requirements of this subsection, the record shall be constructive notice to all parties of the due forfeiture and cancellation of the lien. Upon the posting of the demand with the required attachments, the administrator shall mail a date-stamped copy of the demand to both parties.

Bonding-off language similar to Section 573.16(2) is found in Iowa Section 572.15:

**572.15. Discharge of mechanic's lien--bond**

A mechanic's lien may be discharged at any time by submitting a bond to the administrator in twice the amount of the sum for which the claim for the lien is posted, with surety or sureties, to be approved by the administrator, conditioned for the payment of any sum for which the claimant may obtain judgment upon the claim.

Together, Sections 572.28 and 572.15 provide private property owners with the same lawsuit-demand and bonding-off tools available to contractors on public projects under Section 573.16(2), and those tools serve the same purpose under each Chapter.

The purpose of Sections 572.28 and 572.15 is to provide property owners with the ability to clear clouds on their properties caused by



mechanic's liens, and to do so earlier than the limitations period for lien claimants to file lawsuits to foreclose their liens, which, under Section 572.27, is two years and 90 days after a claimant's last date of work. *Woodruff & Son v. Rhoton*, 101 N.W.2d 720, 723 (Iowa 1960) (“[I]t is no less than a statute of limitations for the benefit of the owner. It was intended as a way to force the issue on the validity of claims filed, and provide a method to clear the cloud on an owner's property created by the filing of claims under this chapter.”); *Keith Young & Sons Constr. Co. v. Victor Senior Citizens Housing, Inc.*, 262 N.W.2d 554, 556 (Iowa 1978) (“Moreover, the owner is not helpless against the lien; by the simple expedient of written demand, he can compel the lienholder to commence foreclosure within 30 days or lose the lien. . . . The lien terminates after 30 days unless the lienholder forecloses. . . . This statutory scheme, giving the mechanic and materialman protection prior to suit without ejecting the owner from his property, and giving the owner power at any time to require a plenary suit within 30 days, appears to us to constitute a tolerable legislative adjustment between security for those who improve the property and the interest of the owner.”); *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 15, 19 (Iowa 2001) (stating that the effect of bonding off a mechanic's lien is to “discharge[] [the] mechanic's lien on the property” thereby “leaving the property free of any encumbrance.”).

Section 573.16(2)'s purpose is the same. Retainage is money already earned by contractors, Iowa Code Section 573.12(1)(a), so it constitutes property in which contractors have an ownership interest. Therefore, a contractor's interest in its retainage is similar to a real estate owner's interest in its real property. Both Chapters allow: **(1)** the owners' respective property to be used as collateral to serve as security for unpaid subcontractors, **(2)** utilization of the same two demand-and-bonding-off tools to eliminate claims against the collateral, **(3)** use of those two tools before expiration of the limitations period for filing lawsuits on claims/liens against the collateral, and **(4)** immediate access and use of the collateral by its owners. When real estate owners eliminate mechanic's liens against their real estate using those two tools, they are actually and immediately able to use their real estate unencumbered by the previously-existing liens. In contrast, when contractors eliminate claims against their retainage using those same two tools, they are only potentially able to use the retainage money unencumbered by the previously-existing claims; they are actually and immediately able to use the retainage money unencumbered by the previously-existing claims only if they are immediately paid the retainage money. If public owners continue to hold the retainage after elimination of the claims, the retainage is encumbered in exactly the same way it was when the claims existed, namely by public owners

holding the retainage and not paying it to the contractors. Therefore, the only way to fulfill the purpose of Section 573.16(2) and to harmonize it with Sections 572.28 and 572.15 is by requiring public owners to pay contractors the retainage immediately after Section 573.7 claims are bonded-off. Such a requirement does no harm to Section 573.7 claimants because, just like in the mechanic's lien context, the bond serves as replacement collateral to secure payment to the claimants. Iowa Code Section 573.16(2) (“[B]ond in double the amount of the claim in controversy, conditioned to pay any final judgment rendered for the claims so filed”); *see Dobbs*, 292 N.W.2d at 694 (Iowa 1980); *Star Equip.*, 843 N.W.2d at 456; *Schaffer*, 628 N.W.2d at 15, 19; *Quad City Bank & Trust Co. v. JDHP Dev., LLC*, 2011 WL 5867060, at \*3 n.5 (Iowa Ct. App. 2011).

The district court's interpretation frustrates the purpose of Section 573.16(2) by reading the 30-day demand provision out of the statute and making the act of bonding-off a Section 573.7 claim pointless. As previously discussed, Section 573.14(1)'s main retainage-handling rule says that public owners must hold retainage for thirty days after the completion and final acceptance of the project, and, upon expiration of that 30-day period, if any claims have been filed, the public owners must continue holding retainage for those claims. Prior to expiration of that 30-day period, claimants cannot file

lawsuits on their claims because of Section 573.16(1)'s "reverse" limitations period, *Biermann Elec.*, 2014 WL 69672, at \*3, which prevents contractors from bonding-off those claims because Section 573.16(2) does not allow bonding-off until after a lawsuit has been filed. Therefore, the default rule is that contractors have no ability receive any retainage payments until after expiration of the Section 573.14(1) thirty-days-after-completion-and-final-acceptance waiting period. The district court's interpretation imposes the exact same waiting period into Section 573.16(2), thereby neutering the entire statute.

According to the district court, if a claimant files a claim one year before completion and final acceptance of the project, the contractor serves a 30-day demand upon the claimant the next day, the claimant files a lawsuit the following day, and the contractor bonds-off the claim the next day, the contractor is still not entitled to payment of retainage for about another year, namely after expiration of thirty days after completion and final acceptance. This means the retainage-payment result is the same regardless of when (or if) contractors serve 30-day demands and bond-off claims, which necessarily renders Section 573.16(2)'s meaningless and judicially excised from Chapter 573. Not only does such a statutory interpretation violate the rule that courts "do not interpret statutes so they contain surplusage," *Star Equip.*, 843

N.W.2d at 455, but it engages in the exact same Chapter 573 interpretive error the Iowa Supreme Court corrected in *Star Equipment. Id.* at 454-457 (reversing district court’s interpretation of Section 573.2 because, among other reasons, under its interpretation “the second paragraph is surplusage”).

**2. IS A PRIME CONTRACTOR, WHO PREVAILS ON AN IOWA CODE SECTION 573.16 RETAINAGE DISPUTE WITH A PUBLIC OWNER, ENTITLED TO RECOVER ATTORNEY FEES UNDER IOWA CODE SECTION 573.21?**

This issue was raised and addressed by the parties with respect to Graphite’s Motion to Compel Defendant DMACC to Release Retainage [Graphite’s Motion to Compel Release; App. 057-064]; [DMACC’s Resistance; Graphite’s Reply; App. 129-134]; [DMACC’s Sur-Reply; App. 135-269]. The district court did not address or rule on the legal issue presented on appeal because, under its Ruling, Graphite was not a prevailing party. [Ruling; App. 273-280]. The issue on appeal is a legal one concerning the interpretation and application of Iowa Code Section 573.21, which is reviewed for correction of errors at law. *Star Equip.*, 843 N.W.2d at 451; *Marquart Block*, 2006 WL 3108227, at \*2.

Iowa Code Section 573.21 reads,

The court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole or in part, established a claim.

This provision clearly encompasses claimants described in Section 573.7(1),

such as the Trustee in this case. The question is whether the provision only encompasses those claimants, or whether it also encompasses other claimants, particularly contractors who successfully establish claims against public owners for payment of retainage under Section 573.16(2). Graphite submits that the latter is the better interpretation.

Graphite's actions in this case qualify as asserting a "claim," which has been defined as "the assertion, demand or challenge of something as a right; the assertion of a liability to the party making it to do some service or pay a sum of money. . . . A claim connotes an assertion of a legal right, as distinguished from a recognition of that right," or a "demand of a right or supposed right; a calling on another for something due or supposed to be due; an assertion of a right or fact." *City of Marion v. Nat'l Cas. Co.*, 431 N.W.2d 370, 373 (Iowa 1988) (citations omitted); *Dico, Inc. v. Employers Ins. of Wausau*, 581 N.W.2d 607, 613 (Iowa 1998) (stating the "commonly understood definition of 'claim' as 'a demand for something due or believed to be due. . . .'" (quoting Webster's Collegiate Dictionary 210 (10th ed. 1993))). Here, Graphite is demanding immediate payment of retainage by DMACC based the asserted right to it under Section 573.16(2). Therefore, in the general sense, Graphite is a "claimant."

Graphite's claim is also for labor and materials it furnished for the

Project. [Exhibit A to DMACC’s Sur-Reply, p. 2, Article 2; App. 148] (“The Contractor shall fully execute the Work described in the Contract Documents. . . .”); [*id.* pp. 22-27; App. 168-173] (Project specifications Table of Contents listing the work for the Project)). After all, retainage, by definition, is money earned by and owed to a prime contractor for work performed, but is statutorily allowed to be held by the public owner. Iowa Code Section 573.12(1)(a) (“The public corporation shall retain from each monthly payment not more than five percent of that amount which is determined to be due according to the estimate of the architect or engineer.”). If Graphite prevails in this case, then falls squarely within the scope of Section 573.21’s ambit as a “claimant for labor or materials who has, in whole or in part, established a claim.”

DMACC argued to the district court that Section 573.21 claimants are limited to Section 573.7 claimants. Though this is a reasonable argument, upon close analysis it is incorrect. Section 573.7 reads:

**573.7. Claims for material or labor**

1. Any person, firm, or corporation who has, under a contract with the principal contractor or with subcontractors, performed labor, or furnished material, service, or transportation, in the construction of a public improvement, may file, with the officer, board, or commission authorized by law to let contracts for such improvement, an itemized, sworn, written statement of the claim for such labor, or material, service, or transportation.

2. A person furnishing only materials to a subcontractor who is furnishing only materials is not entitled to a claim against the retainage or bond under this chapter and is not an obligee or person protected under the bond pursuant to section 573.6.

It defines the scope of permissible persons, firms, and corporations who may file payment “claims” with public owners for the labor, materials, services, or transportation they have furnished for projects. A successful Section 573.7 claimant clearly falls within the scope of “claimants” defined in Section 573.21 because it is a “claimant for labor or materials who has, in whole or in part, established a claim.” But this does not mean Section 573.21 is limited to such claimants. In fact, the disparate language in Sections 573.7 and 573.21 supports the conclusion that Section 573.21 is not so limited.

Section 573.7 claimants are limited to those who have “a contract with the principal contractor or with subcontractors,” and it even specifically excludes from its scope those claimants furnishing only materials “to a subcontractor.” In contrast, Section 573.21 does not contain any limiting language related to the identity of the party with whom the claimant contracts. This is a substantive distinction that impacts the interpretation of each provision and requires the “claimants” described in each to be interpreted differently. *See DeCoster*, 528 N.W.2d at 538-539 (concluding that “gasoline, diesel fuel and petroleum are not included within the ‘ordinary meaning’ of ‘material’ under section 572.1(2)” because, among other reasons, “the



legislature listed fuel as additional to the ordinary meaning of material in section 10299(4) [now in Chapter 573] while limiting the meaning of material to machinery and fixtures in section 10270(4) [now in Chapter 572]”); *id.* at 539 (“[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed.”) (citation omitted). This means Section 573.21 cannot be limited to those claimants who have contracts only with “the principal contractor or with subcontractors,” which begs the question of the identity of other potential non-Section 573.7 claimants who furnish labor and materials but do not have contracts with “principal contractors or with subcontractors.” The only entity who fits that definition is a prime contractor, who holds a contract with the public owner. If Sections 573.7 and 573.21 encompass different scopes of claimants, as their disparate language strongly suggests, then Section 573.21 must include prime contractors lest its language be judicially re-written to include an unwritten substantive limitation making its scope of claimants mirror exactly that of Section 573.7. *Star Equip.*, 843 N.W.2d at 455-457.

Interpreting Section 573.21 to include prime contractors is also supported by the fact that other Chapter 573 provisions contain language similar to Section 573.7 in limiting their scopes to those with certain

contractual relationships:

- Section 573.2(2): “If the requirement for a bond is waived pursuant to section 12.44, a person, firm, or corporation, *having a contract with the targeted small business or with subcontractors of the targeted small business*, for labor performed or materials furnished, in the performance of the contract on account of which the bond was waived, is entitled to any remedy provided under this chapter.” (italics added).
- Section 573.6(1): “The principal and sureties on this bond hereby agree to pay to all persons, firms, or corporations *having contracts directly with the principal or with subcontractors*, all just claims due them for labor performed or materials furnished, in the performance of the contract on account of which this bond is given, when the same are not satisfied out of the portion of the contract price which the public corporation is required to retain until completion of the public improvement, but the principal and sureties shall not be liable to said persons, firms, or corporations unless the claims of said claimants against said portion of the contract price shall have been established as provided by law.” (italics added).
- Section 573.15(1): “A person, firm, or corporation that has performed labor for or furnished materials, service, or transportation *to a subcontractor* shall not be entitled to a claim against the retainage or bond under this chapter unless the person, firm, or corporation that performed the labor or furnished the materials, service, or transportation does all of the following. . . .” (italics added).
- Section 573.15A(1): “Any person, firm, or corporation who has, *under contract with the principal contractor or with subcontractors*, performed labor, or furnished materials, service, or transportation, in the construction of the public improvement, may file with the public corporation an itemized, sworn, written statement of the claim for the labor, or materials, service, or transportation.” (italics added).

Another distinction between these statutes (including Section 573.7) and Section 573.21 is that the latter expressly describes claimants as “claimants” instead of as, for example, “persons, firms, or corporations.”

Graphite's position is further supported by the fact that Section 573.16(1) specifically identifies, among others, prime contractors as one of the entities permitted to initiate lawsuits to "adjudicate all rights to said fund." Some of the claims prime contractors can pursue in such lawsuits include: (1) payment of retainage and interest when a Section 573.7 claimant does not file suit within 30 days of a demand under Section 573.16(2); (2) payment of retainage and interest when a Section 573.7 claimant does file suit within 30 days of a demand and the prime contractor bonds-off the claim, as provided in Section 573.16(2), and (3) early payment of retainage and interest under Section 573.28. It would be odd to exclude prime contractors from Section 573.21's scope when they can assert claims for labor and materials they have furnished on projects, and they can initiate lawsuits on such claims.

### **CONCLUSION**

Graphite requests that this Court reverse the district court's Ruling, and remand to the district court with directions to order DMACC to pay to Graphite \$82,628.64, plus interest on that amount as provided in Sections 573.14(2) and 573.16(2), plus attorney fees, costs, and expenses under Section 573.21. Graphite also requests an award of appellate attorney fees, costs, and expenses, and it requests that the court remand to the district court to determine the amount to award. *Schaffer*, 628 N.W.2d at 23-24.

## **REQUEST FOR ORAL ARGUMENT**

Graphite requests oral argument in this case.

**ATTORNEY’S COST CERTIFICATE**

The undersigned hereby certifies that the cost of printing the foregoing Appellant’s Brief is \$ 0.00 \_\_\_\_\_.

By  /s/ Stephen D. Marso

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Appellant’s Brief was served by electronic filing and electronic delivery via the EDMS system on April 14, 2023, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

By  /s/ Stephen D. Marso

**CERTIFICATE OF FILING**

The undersigned hereby certifies that the foregoing Appellant’s Brief was filed with the Iowa Supreme Court by electronically filing the same on April 14, 2023, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.302(1).

By  /s/ Stephen D. Marso

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This 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 pt and contains 7,502 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Stephen D. Marso

April 14, 2023

Signature

Date