IN THE IOWA SUPREME COURT

SUPREME COURT NO. 22-2098

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.

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

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

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ARGUMENT

1. DMAAC'S "JURISDICTIONAL" ARGUMENT IS NOT PRESERVED FOR APPEAL, AND, EVEN IF IT IS, IT LACKS MERIT

DMACC's "jurisdictional" argument is not preserved for appeal because DMACC never raised it in its Resistance to Graphite's Motion to Compel Defendant DMACC to Release Retainage. DMACC's raising the issue for the first time in its unauthorized Sur-Reply in response to Graphite's Motion did not preserve the argument. Lack of preservation also exists because, as DMACC admits [DMACC Proof Brief, p. 22], the district court never ruled on the argument in its Ruling to Compel Release of Retainage Funds.

Iowa Rule of Civil Procedure 1.431 governs motion practice and permits the filing of a motion, resistance, and reply. It does not permit the filing of a sur-reply. Post-reply filings are allowed only if permitted by the district court. *Matter of Estate of Bacon*, 2017 WL 1088112, at *4 (Iowa Ct. App. 2017) ("By granting both parties an opportunity to submit briefs or memoranda . . . the court recognized the insufficiency of the record before it and implicitly permitted the inclusion of additional evidence.") (citing *Lewison v. Howard R. Green Co.*, 2009 WL 1066514, at *2–3 (Iowa Ct. App. 2009)). DMACC never asked for or was granted permission to file its

Sur-Reply. It unilaterally filed it, and, for the first time, raised the "jurisdictional" argument. Inclusion of the argument for the first time in the unauthorized Sur-Reply does not preserve it for appeal. *See State v. Nebinger*, 2022 WL 16630313, at *2 (Iowa Ct. App. 2022) ("[A]n issue cannot be asserted for the first time in a reply brief. The State's volunteered concession of an issue not raised does not change this outcome.") (citation omitted); *see also Great Western Bank v. Clement*, 2020 WL 7383144, at *1 n.1 (Iowa Ct. App. 2020) ("Dougan's reply brief includes a non-authorized sur-reply. . . . The rules contemplate a brief, a responsive brief, and a reply brief—no more. The rules do not contemplate a reply to a reply brief. . . . Dougan was not entitled to another bite at the apple regarding issues first raised in the appellant's brief. Dougan had already responded to those issues in his opening brief.") (citation omitted).

Lack of preservation also exists because the district court never mentioned the "jurisdictional" issue, let alone ruled on it. DMACC did not file a Rule 1.904(2) Motion asking the district court to rule on the argument, which waived it for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *Stammeyer v. Div. of Narcotics Enforcement of Iowa Dep't of Public Safety*, 721 N.W.2d 541 (Iowa 2006) (holding that party failed to preserve its "even-if argument" for appeal by failing to file a Rule 1.904(2) Motion even

though district court dismissed the claim on jurisdictional grounds).

DMACC attempts to avoid the consequences of its preservation failure by framing its "jurisdictional" argument as one involving subject-matter jurisdiction, which can be raised at any time, even for the first time on appeal. DMACC's attempt to re-frame its argument should be rejected because the actual argument is about court authority, not jurisdiction.

"Subject matter jurisdiction refers to the power of a court 'to hear and determine cases of the general class to which the proceedings in question belong.'" *State v. Mandacino*, 509 N.W.2d 481, 482-483 (Iowa 1993). DMACC never raised such an argument before the district court, and for good reason. There is no question that district courts have subject matter jurisdiction to hear and decide disputes under Iowa Code Chapter 573, as expressly stated by Iowa Code Section 573.18(1) ("The court shall adjudicate all claims for which an action is filed under section 573.16."), and as confirmed by a plethora of Iowa appellate cases. *See, e.g., Star Equip., Ltd. v. State*, 843 N.W.2d 446 (Iowa 2014); *Employers Mut. Cas. Co. v. City of Marion*, 577 N.W.2d 657 (Iowa 1998); *N.W. Limestone Co. v. State Dep't of Transp.*, 499 N.W.2d 8 (Iowa 1993); *Lumberman's Wholesale Co. v. Ohio Farmers Ins. Co.*, 402 N.W.2d 413 (Iowa 1987); *Giese Sheet Metal Co. v. Prairie Constr. Co., Inc.*, 2013 WL 4505125 (Iowa Ct. App. 2013); *Trustees*

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The argument DMACC made in its Sur-Reply concerned the district court's authority to hear and decide Graphite's Motion. Specifically, DMACC argued, on pages 5-6 of its Sur-Reply under the heading, "Graphite's Motion is Procedurally Improper," [DMACC Sur-Reply Brief, pp. 5-6; App. 139-140], that the district court did not have authority to decide Graphite's Motion because of alleged procedural improprieties. DMACC did not mention the word "jurisdiction" let alone argue that the district court lacked subject matter jurisdiction. The concept of a court's authority is substantively distinct from a court's subject matter jurisdiction. *Mandacino,* 509 N.W.2d at 482-483 ("The flaw in Mandicino's position is in confusing subject matter jurisdiction for authority. Subject matter jurisdiction refers to the power of a court 'to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention. . . .' Subject matter jurisdiction should not be confused with authority. 'A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case.' 'In such a situation we say the court lacks

authority to hear that particular case.'") (citations omitted); *Knutson v. Oellrich*, 2023 WL 2673137, at *2-*3 (Iowa Ct. App. 2023). Because DMACC's "jurisdictional" argument was actually a court-authority argument, and because error-preservation rules apply to authority arguments, *Schooler v. Iowa Dep't of Transp.*, 576 N.W.2d 604, 607 (Iowa 1998); *State v. Emery*, 636 N.W.2d 116, 120 (Iowa 2001), DMACC's preservation failure bars its attempt to raise the authority argument on appeal.

Even if DMACC did preserve the authority argument for appeal, it lacks merit. The relevant undisputed facts are that Trustee Charles L. Smith filed his Iowa Code Chapter 573 lawsuit, as permitted by Iowa Code Section 573.16(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 . . . 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."), and Iowa Code Section 573.16(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. . . ."); the lawsuit names Graphite and DMACC as defendants, as required by Iowa Code Section 573.17 ("The

official board or officer letting the contract, the principal contractor, all claimants for labor and material who have filed their claim, and the surety on any bond given for the performance of the contract shall be joined as plaintiffs or defendants."); the Trustee's Petition asks for the following relief:

> WHEREFORE, Plaintiff, Metro Concrete, Inc., requests that the Court enter judgment for it and against the Iowa Association of Community College Trustees, Des Moines Area Community College, Rochon Corporation of Iowa, Inc., and Graphite Construction Group Inc. on the retainage and any Chapter 573 bond, if any, relating to the Project in an amount not less than $217,221.32, plus reasonable attorneys' fees as authorized by Iowa Code § 573.21, costs, interest and any other relief this Court determines is appropriate, just, and equitable.

[Petition, App. 009-018]; Graphite and DMACC both filed Answers and Affirmative Defenses denying the Trustee's claims and asking that the Petition be dismissed; [Graphite Answer, App. 046-052] [DMACC Answer, App. 053-056]; Graphite bonded off the Trustee's claim, as permitted by Iowa Code Section 573.16(2); and Graphite asserted its claim to the retainage funds held by DMACC by filing its Motion asking the court to adjudicate its rights to the retainage vis-à-vis the Trustee and DMACC. [Graphite's Motion, App. 057-064]. Based on these facts, the district court had authority to decide the dispute and rule on Graphite's Motion. Iowa Code Section 573.16(1) (upon filing of an action, authorizing the district

court to "adjudicate all rights to said fund"); Iowa Code Section 573.18(1) ("The court shall adjudicate all claims for which an action is filed under section 573.16.").

Contrary to DMACC's argument, Graphite was not required to file a counterclaim against the Trustee and a cross-claim against DMACC before the district court had authority to rule on Graphite's Motion. The Trustee had already filed a Chapter 573 action naming Graphite and DMACC as defendants and asking the court to adjudicate all rights to the retainage being held by DMACC, and Graphite and DMACC both filed Answers denying the Trustee's claim. Procedurally, Iowa Code Chapter 573 requires nothing more before giving the district court authority to rule on Graphite's Motion. The three cases DMACC cites to bolster its argument do not support it.

- *Wederath v. Brant*, 287 N.W.2d 591 (Iowa 1980).
    - The Iowa District Court for Carroll County granted the defendants' motion to change venue to Greene County, but the plaintiff failed to file the Carroll County papers with the Greene County court within 20 days of the order granting the venue change. *Id.* at 593.
    - Iowa Rule of Civil Procedure 175(b) stated in relevant part that if the "papers are not filed in the proper court within twenty days after such order, the action shall be dismissed." *Id.*
    - Because plaintiff failed to comply with Rule 175(b), this Court concluded, "In the case before us there was no petition before the court and no action pending in district court after plaintiffs failed to file the papers in Greene County within twenty days. It was their burden to carry out the appropriate procedural steps to keep the action alive. Nothing defendants did or could do thereafter could resurrect it." *Id.* at 595.

- This case is inapposite because there is no similar counterpart to former Rule 175(b) in Iowa Code Chapter 573. In fact, Iowa Code Chapter 573 contains no language stating that a named defendant in an Iowa Code Chapter 573 action must file a counterclaim against the plaintiff and a cross-claim against the other defendants lest the district court has no authority to decide a given defendant's claim to the retainage.

- *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n*, 360 N.W.2d 729 (Iowa 1985).
  - Involved a declaratory action filed by the plaintiff challenging the validity of a provision in a collective bargaining agreement between the City and the Des Moines Police Bargaining Association. *Id.* at 730.
  - This Court dismissed the action on appeal because the plaintiff failed to exhaust its administrative remedies before filing a lawsuit. *Id.* at 730-731.
  - This case is irrelevant because there is no alleged administrative remedy that was not exhausted prior to the Trustee filing the lawsuit.

- *Christie v. Rolscreen Co.*, 448 N.W.2d 447 (Iowa 1989), *criticized in In re Marriage of Seyler*, 559 N.W.2d 7, 10 n.3 (Iowa 1997).
  - Plaintiffs failed to file their action in the statutorily-required county, so this Court dismissed the action because the district court lacked authority to hear the case. 448 N.W.2d at 450-451.
  - This case is also inapposite because there is no contention that the Trustee failed to file this action in the correct county as required by Iowa Code 573.16(1). In fact, the Trustee filed in the correct county because the DMACC construction project at issue is located in Ankeny, Polk County, and the Trustee filed the lawsuit in Polk County.

DMACC's final procedural-based argument is that Graphite did not support its Motion with *admissible* evidence. Graphite is unclear of the exact argument being made because DMACC does not identify any specific evidence to which it objects, that it contends the district court should not

have considered, or that causes it undue prejudice. Further, Graphite is unaware of any material-fact disputes relevant to the legal issues on appeal, and DMACC does not identify any either. Regardless, DMACC never lodged any evidentiary objections to the district court in its Resistance or Su-Reply Brief, so any objections are waived.

2. IOWA CODE SECTION 572.28 HAS NO APPLICATION TO THE RETAINAGE DISPUTE BECAUSE GRAPHITE NEVER INVOKED IT AND BECAUSE SECTION 573.16(2) IS NOT SUBJECT TO SECTION 573.28

DMACC does not support the reasoning upon which the district court based its Ruling, and it expressly agrees with Graphite's contention that the district court's reasoning in its Ruling is erroneous. [DMACC Proof Brief p. 30] ("[D]espite the District Court's ruling, the present controversy over the remaining retainage funds is not governed by section 573.16(1); DMACC and Graphite agree in this regard.") (underlining in original). DMACC nevertheless defends the Ruling by arguing that Iowa Code Section 573.28 applies to justify DMACC's continued holding of the retainage.[1] DMACC is

[1] DMACC abandons its main argument before the district court, namely that the DMACC/Graphite contract documents trump Iowa Code Chapter 573 and allow DMACC to hold the retainage in contravention of Iowa Code Chapter 573. That is a wise abandonment because this Court squarely rejected it almost 80 years ago. *Hercules Mfg. Co. v. Burch*, 16 N.W.2d 350, 356 (Iowa 1944) ("[W]e think the rights of the parties are governed by the provisions of statute which are, in effect, written into the contract. . . . If there were a conflict between the terms of the contract and the statutes, the

incorrect for at least two reasons: Iowa Code Section 573.28 is inapplicable because Graphite never invoked it, and, even if Graphite had invoked it, Section 573.16(2) is not subject to Section 573.28.

Iowa Code Section 573.28 is entitled, "Early Release of Retained Funds,"[2] and it is another exception to Section 573.14(1)'s main retainage-handling rule that does not allow a contractor access to its retainage until the expiration of thirty days after completion and final acceptance of the entire project. As its title suggests, Section 573.28 allows a contractor access to its retainage "early," specifically upon substantial completion of all or part of the project. Iowa Code Section 573.28(1)(f) & (2)(a). But that early access is tempered by the fact that the owner is allowed to withhold from the early-retainage payment the amount of 200% of the value of any labor and materials the contractor has not yet provided on the project. Iowa Code Section 573.28(2)(c). It is this 200% provision upon which DMACC relies as justification to continue holding retainage from Graphite in contravention of

latter should prevail. The highway commission was powerless to enter into a contract except in accordance with the statutory provisions which we have analyzed.").

[2] Iowa Code Section 573.28 was originally included in Iowa Code Chapter 26's Iowa Construction Bidding Procedures Act as Section 26.13, which was passed in 2006. In 2018, the legislature moved it to Chapter 573, where it more properly belongs because it deals with retainage.

Section 573.16(2).

The first reason DMACC's argument lacks merit is that Graphite never invoked the statute. A prime contractor must invoke Section 573.28 before it is triggered; if it does not, the statute is not triggered and has no application to a retainage dispute. The statutory language confirms Graphite's position.

> 2. Payments made by a governmental entity or the department for the construction of public improvements and highway, bridge, or culvert projects shall be made in accordance with the provisions of this chapter, except as provided in this section:
>
> > a. At any time after all or any part of the work on the public improvement or highway, bridge, or culvert project is substantially completed, *the contractor may request the release of all or part of the retained funds owed. The request shall be accompanied by a sworn statement of the contractor* that, ten calendar days prior to filing the request, notice was given as required by paragraphs "f" and "g" to all known subcontractors, sub-subcontractors, and suppliers.
> >
> > b. Except as provided under paragraph "c", *upon receipt of the request*, the governmental entity or the department shall release all or part of the retained funds. Retained funds that are approved as payable shall be paid at the time of the next monthly payment or within thirty days, whichever is sooner. If partial retained funds are released *pursuant to a contractor's request*, no retained funds shall be subsequently held based on that portion of the work. If within thirty days of when payment becomes due the governmental entity or the department does not release the retained funds due, interest shall accrue on the amount of retained funds at the rate of

interest that is calculated as the prime rate plus one percent per year as of the day interest begins to accrue until the amount is paid.

c. If labor and materials are yet to be provided *at the time the request for the release of the retained funds is made*, an amount equal to two hundred percent of the value of the labor or materials yet to be provided, as determined by the governmental entity's or the department's authorized contract representative, may be withheld until such labor or materials are provided.

d. An itemization of the labor or materials yet to be provided, *or the reason that the request for release of retained funds is denied*, shall be provided to the contractor in writing within thirty calendar days of the *receipt of the request for release of retained funds*.

e. The contractor shall release retained funds to the subcontractor or subcontractors in the same manner as retained funds are released to the contractor by the governmental entity or the department. Each subcontractor shall pass through to each lower-tier subcontractor all retained fund payments from the contractor.

f. *Prior to applying for release of retained funds*, the contractor shall send a notice to all known subcontractors, sub-subcontractors, and suppliers that provided labor or materials for the public improvement project or the highway, bridge, or culvert project.

g. The notice shall be substantially similar to the following:

NOTICE OF CONTRACTOR'S REQUEST

FOR EARLY RELEASE OF RETAINED FUNDS

> You are hereby notified that [name of contractor] *will be requesting an early release of funds on a public improvement project or a highway, bridge, or culvert project* designated as [name of project] for which you have or may have provided labor or materials. *The request will be made pursuant to Iowa Code section 573.28*. *The request may be filed* with the [name of governmental entity or department] after ten calendar days from the date of this notice. *The purpose of the request* is to have [name of governmental entity or department] release and pay funds for all work that has been performed and charged to [name of governmental entity or department] as of the date of this notice. This notice is provided in accordance with Iowa Code section 573.28.

(italics and underlining added). Section 573.28 is one arrow in a prime contractor's quiver that it can use to access its retainage earlier than Section 573.14(1) otherwise allows. It is not part of an owner's coat of arms that it can unilaterally wield to defend against a contractor's early access to retainage under other provisions in Chapter 573, such as Section 573.16(2). Graphite never invoked Section 573.28, its Motion does not rely on it, so it was never triggered. Consequently, the current dispute is not a Section 573.28 dispute. Rather, it is a Section 573.16(2) dispute to which Section 573.28 has no relevance.

Even if Graphite had invoked Section 573.28, DMACC's argument fails for a second reason: Sections 573.16(2) and 573.28 are two separate

and independent exceptions to Section 573.14(1)'s main retainage-handling rule, and they each provide separate and independent ways a contractor can access its retainage early. Neither exception limits the other, as an analysis of each confirms.

Under Section 573.16(2) the following requirements must be satisfied before a contractor is entitled to early access to its retainage:

1. A Section 573.7 claim has been filed, and

2. The contractor serves a lawsuit-demand upon the Section 573.7 claimant, and the claimant does not file a lawsuit within 30 days of the demand; the public owner must then pay the contractor the retainage that was being held for the claim, or

3. The contractor serves a lawsuit-demand upon the Section 573.7 claimant, the claimant files a timely lawsuit in response, and the contractor bonds-off the claim; the public owner must then pay the contractor the retainage that was being held for the claim.

In contrast, Section 573.28 allows a contractor early access to its retainage even if no Section 573.7 claim or lawsuit has been filed. Its requirements are:

1. Substantial completion of all or part of the project, and

2. The contractor sends a specified written "notice to all known subcontractors, sub-subcontractors, and suppliers that provided labor or materials for the" project, Iowa Code Section 573.28(2)(f) & (g), and,

3. Upon expiration of no less than ten calendar days after sending the written notice described above, the contractor submits to the owner a written request for early release of retainage with a sworn statement

> that the contractor complied with the written notice requirement. Iowa Code Section 573.28(2)(a).

Unlike Section 573.16(2), Section 573.28 does not necessarily require the owner to pay the contractor all of the retainage being held. Rather, it provides the owner with retainage hold-back authority, specifically 200% of the value of any labor and materials the contractor has not yet provided on the project. Iowa Code Section 573.28(2)(c). Any retainage amount above that 200% value must be paid to the contractor.

Each statute has its advantages and disadvantages for a contractor. Section 573.16(2) does not allow the owner to hold-back any retainage for labor and materials yet to be provided, nor does it require the project be substantially completed, but it does require a filed Section 573.7 claim, and the contractor must purchase a bond to bond-off the claim if the claimant files a lawsuit. Section 573.28 does not mandate there be any Section 573.7 claim or related lawsuit, nor does it require the contractor to purchase a bond, but it does require the project be substantially completed, and it gives the owner hold-back authority of 200% of the value of any labor and materials yet to be provided. DMACC's argument seeks to re-write the language of each statute to allow an owner to use the contractor disadvantages in one exception to offset and eviscerate the contractor advantages of the other. The result of this attempted statutory re-write would

thwart the very purpose of each statute, which is to allow the contractor early access to its retainage, and would frustrate the purpose of Chapter 573, which is to "secure or protect the persons performing work or providing materials toward the improvement of property belonging to another." *Farmers Co-op v. DeCoster*, 528 N.W.2d 536, 537 (Iowa 1995).

DMACC contends that Section 573.28(2) permits such a result by saying, "Payments made by a governmental entity or the department for the construction of public improvements and highway, bridge, or culvert projects shall be made in accordance with the provisions of this chapter, *except as provided in this section*." (italics and underlining added). The emphasized language does not perform the heavy lifting DMACC demands of it.

Section 573.28(2) is nothing more than an introductory paragraph confirming that subparagraphs (2)(a)-(g) contain the statute's substantive provisions. It just says that payment shall be made as provided elsewhere in Chapter 573, "except as provided in this section." Following that unremarkable and nondescript language are seven separate sub-paragraphs which state, at least twelve different times, that Section 573.28 is triggered only if the contractor invokes it, and that its rules apply only in determining what retainage payment is owed to a contractor on a retainage claim made

under Section 573.28. It does not say that 573.28 is a super-exception that trumps and displaces any other independent exception to Section 573.14(1), or that its rules apply to determine what retainage payment is owed to a contractor on a retainage claim made under Section 573.16(2) or any other provision in Chapter 573. Section 573.28 offers nothing to Section 573.16(2) and vice versa. They are independent of one another, and whether or not payment is owed under one of them does not impact whether payment is owed under the other. Some examples confirm that Graphite is correct.

First example: no Section 573.7 claims or lawsuits have been filed, the project is substantially completed but not completed and finally accepted, the contractor has not complied with or invoked Section 573.28, and the contractor demands payment of retainage. In this scenario, Section 573.14(1) is the applicable provision, and it requires the owner to hold all of the retainage until expiration of thirty days after completion and final acceptance. Yet, under DMACC's position that Section 573.28 also applies to this example, the contractor could demand payment of all retainage less 200% of the value of any labor and materials not yet provided, as provided in Section 573.28, even though the contractor never invoked or complied with Section 573.28.

Second example: no Section 573.7 claims or lawsuits have been filed,

the project is substantially completed but not completed and finally accepted, the contractor has complied with and invoked Section 573.28, and the contractor demands early payment of retainage under Section 573.28. In this scenario, Section 573.28 is the applicable provision, and it requires the owner to release all retainage to the contractor less 200% of the value of labor and materials yet to be provided. Yet, under DMACC's position that Section 573.16(2) also applies to this example, the owner could deny any retainage payment to the contractor by invoking Section 573.16(2) under the reasoning that, because no lawsuit has been filed and no bond has been purchased to bond off any claims, no retainage is owed.

Third example: the project is not substantially completed nor is it completed and finally accepted, the contractor has not complied with or invoked Section 573.28, a Section 573.7 claim and a lawsuit (in response to the contractor's Section 573.16(2) thirty-day demand) have been filed, the contractor has bonded off the Section 573.7 claim as permitted by Section 573.16(2), and the contractor has demanded retainage payment under Section 573.16(2). In this scenario, Section 573.16(2) is the applicable provision, and it requires the owner to pay the contractor double the amount of the bonded-off claim. Yet, under DMACC's position that both Sections 573.16(2) and 573.28 apply to this example, the owner has to calculate the

amount of retainage owed under Section 573.16(2), calculate the value of 200% of the amount of labor and materials yet to be provided, compare the two calculations, and only pay the contractor *any* retainage if the 200%-value amount is less than the bonded-off amount, and then only pay the difference between the two. Furthermore, because the contractor never invoked Section 573.28 or made any written request under it, there is no fixed date against which the 200%-value analysis and calculation can be made, which raises the issue whether the 200%-value analysis and calculation must be repeated by the owner periodically over time as the contractor continues to complete work that reduces the 200%-value amount, and if so, how often.

In the three examples (the third example being the factual situation in the case on appeal), all of the requirements of one of the three statutes (Sections 573.14(1), 573.16(2) or 573.28) are satisfied, and the other two statutes are not invoked and none of their requirements are met. The three resulting absurdities from applying DMACC's argument confirm that DMACC seeks to make all three statutes potentially applicable to any set of facts, with the owner being the final arbiter of applicability using as its only decision-making guide its goal of withholding retainage payment from the contractor. This speaks loudly in support of the conclusion that Sections

573.16(2) and 573.28 are separate and independent exceptions to Section 573.14(1)'s main retainage-handling rule, and they have no impact on each other. This necessarily means that a contractor can satisfy and invoke both statutes at the same time, resulting in separate and independent analyses of the retainage amount owed under each statute. If the owed amounts are different under each statute, the owner has the obligation to pay the contractor the higher amount.[3]

3. GRAPHITE IS ENTITLED TO ATTORNEY FEES UNDER IOWA CODE SECTION 573.21

DMACC contends that Graphite is not entitled to attorney fees under Section 573.21, even if it is successful on its Section 573.16(2) claim. DMACC primarily relies on the following law review article for support: Stephen D. Marso, *Public Construction Liens in Iowa: A History and Analysis*

[3] Even if Sections 573.16(2) and 573.28 both had potential relevance to the dispute on appeal, Section 573.16(2) would still prevail to the exclusion of Section 573.28 because it specifically covers the subject matter of the present dispute involving a bond to discharge a Section 573.7 claim. *See McElroy v. State*, 637 N.W.2d 488, 494 (Iowa 2001) ("Typically, when a general and specific statute cover the same matter, the specific statute governs over any conflict with the general statute.") (citations omitted); *Niles v. Iowa Dist. Ct. for Polk County*, 683 N.W.2d 539 (Iowa 2004) ("The apparent meaning of the latter statute, which is specific in nature, should control over the general venue provision contained in section 598.2. *See Burton v. Univ. of Iowa Hosps. & Clinics*, 566 N.W.2d 182, 189 (Iowa 1997) (in statutory interpretation the specific governs the general); *Christenson v. Iowa Dist. Ct.*, 557 N.W.2d 259, 262–63 (Iowa 1996) (same).").

of Iowa Code Chapter 573, 60 Drake L. Rev. 101, 186 (Fall 2011) [hereinafter "573 Article"].

It is true that the 573 Article gives the opinion that a prime contractor is not a "claimant for labor or materials who has, in whole or in part, established a claim" under Section 573.21. But the opinion is premised on the assumption, for purposes of the Article, that there was no retainage dispute between the prime contractor and owner. This is expressly confirmed by the 573 Article where, immediately after the comment, "Payment disputes regarding monies owed between public owners and prime contractors are contract disputes governed by the terms of their contracts, not the claim provisions of chapter 573," 573 Article, p. 186, it states in a footnote, "Nonetheless, if the dispute between the owner and prime contractor revolved around the timeliness of monthly payments, final payment, ***retainage***, or the amount of interest owed for any late payment 'for labor performed and material delivered,' then chapter 573 would be relevant to resolve such a dispute." *Id.* at p. 186 n. 412 (emphasis added).

The premise's existence is confirmed by the 573 Article's quotation from the case of *First Federal State Bank v. Town of Malvern*, 270 N.W.2d 818, 822 (Iowa 1978), "Nothing in chapter 573 would apply to this dispute." 573 Article, p. 186 & n. 411. What was the dispute referred to in this quote?

The immediately prior sentence in the *Malvern* decision provides the answer: "The section simply has no application to a dispute between the town and the contractor *over progress payments* which are earned before the contractor's default." *Id.* (emphasis added). That progress-payment dispute was distinct from the retainage dispute in the case, as shown by the second sentence of the Court's opinion: "The prize is a fund consisting of the remainder of *progress payments* which the contractor had earned but had not received *and certain retained percentages*." *Id.* at 819 (emphasis added). The amount in controversy was $10,500.00, with $5829.00 being unpaid progress payments and $4671.00 being retainage. *Id.* at 820. The dispute over the $4671.00 in retainage was resolved by the Court in Section I of its opinion, *id.* at 821, and the Court's language quoted by the 573 Article is *not* found in that Section. The dispute over the $5829.00 in unpaid progress payments was resolved in Section II of the opinion, *id.* at 821-822, and the Court's language quoted by the 573 Article *is* located in that Section. Therefore, the quoted language does not apply to the retainage dispute between a contractor and the owner, but only to the "dispute between [the owner] and the contractor over progress payments which are earned before the contractor's default." *Id.* at 822.

The 573 Article's premise of there being no retainage dispute between the prime contractor and owner is also shown by the 573 Article's statement,

"It would make little sense for a prime contractor to make a 'claim' against the retainage it earned because, absent the filing of any claims, the retainage must be paid over to the prime contractor upon expiration of thirty days after completion and final acceptance of the improvement." 573 Article, p. 186; *see id.* p. 186 nn. 415 & 417. But what if the owner fails to make an "early" retainage payment to the contractor as required by Section 573.16(2)? The 573 Article does not address that or any other similar retainage-dispute issue because its premise was the existence of no retainage dispute between the prime contractor and the owner.

One of the questions addressed by the 573 Article is whether a prime contractor can assert a Chapter 573 claim for unpaid progress payments. The answer to that question is "no" because, as the *Malvern* Court states, "Nothing in chapter 573 would apply to this dispute." 270 N.W.2d at 822. Progress-payment disputes between an owner and contractor are contract disputes, as confirmed by Iowa Code Section 573.14(2), which says in relevant part, "The public corporation shall order payment of any amount due the contractor to be made in accordance with the terms of the contract." Therefore, because a prime contractor has no Chapter 573 claim rights to unpaid progress payments, it necessarily follows that a contractor cannot recover attorney fees under Section 573.21 based on such a progress-payment claim. That is the

opinion the 573 Article.

The 573 Article does not address the questions whether a prime contractor can be a Chapter 573 claimant in a retainage dispute, and if so, whether it can recover attorney fees under Section 573.21 if it prevails. In this case, the precise question is: in a Section 573.16(2) retainage dispute between an owner and prime contractor, is a prevailing prime contractor a "claimant for labor or materials who has, in whole or in part, established a claim" under Section 573.21? The 573 Article does not answer that question. This case presents the Court an opportunity to do so. For the reasons discussed above and in Graphite's opening Brief, the Court should answer "yes" to that question.

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 Reply Brief is $ 0.00 .

By */s/ Stephen D. Marso*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Reply 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 Reply 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 5,888 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By */s/ Stephen D. Marso* April 14, 2023

Signature Date