

IN THE IOWA SUPREME COURT

SUPREME COURT NO. 22-2098

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

v.

**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
HONORABLE ROBERT B. HANSON**

**APPELLEE DES MOINES AREA COMMUNITY COLLEGE'S
AMENDED FINAL BRIEF**

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court lacked subject matter jurisdiction and/or authority to rule on Graphite's motion due to Graphite's failure to initiate an action against DMACC?

Cases

Christie v. Rolscreen Co., 448 N.W.2d 447 (Iowa 1989)

City of Des Moines v. Des Moines Police Bargaining Unit Association, 360 N.W.2d 729 (Iowa 1985)

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004)

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Klinge v. Bentien, 725 N.W.2d 13 (Iowa 2006)

Milks v. Iowa Oto-Head & Neck Specialists, P.C., 519 N.W.2d 801 (Iowa 1994)

Mollan v. Torrance, 9 Wheat. 537, 6 L.Ed. 154 (1824)

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State v. Bear, 452 N.W.2d 430 (Iowa 1990)

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Rules

Iowa R. Civ. P. 1.421(4)

Iowa R. Civ. P. 1.517

Iowa R. Civ. P. 175(b)

Iowa R. Civ. P. 1.808(b)

Iowa R. Civ. P. 1.981(1)–(8)

Statutes

Iowa Code § 573.15A(3)

Iowa Code § 573.16(1)

Iowa Code § 602.6101

Iowa Const. art. V, § 6

II. Whether the District Court properly denied Graphite’s motion under Iowa Code Chapter 573?

Cases

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

Statutes

Iowa Code § 573.12(1)(a)

Iowa Code § 573.14

Iowa Code § 573.15

Iowa Code § 573.16

Iowa Code § 573.16(1)

Iowa Code § 573.16(2)

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Iowa Code § 537.28(2)(f)

Iowa Code § 537.28(2)(g)

III. Whether the District Court properly denied Graphite’s request for attorney fees under Iowa Code section 573.21?

Cases

Midland Restoration Company v. Sioux City Community School District, No. 3-127/ 02-0625, 2003 WL 21229272 (Iowa Ct. App. May 29, 2003)

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

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Iowa Code § 573.15

Iowa Code § 573.21

Other Authorities

Stephen D. Marso, *Public Construction Liens in Iowa: A History and Analysis of Iowa Code Chapter 573*, 60 Drake L. Rev. 101 (2011)

ROUTING STATEMENT

This case involves the application of existing legal principles. The Iowa Supreme Court should transfer this case to the court of appeals pursuant to Iowa Rule of Appellate Procedure 6.1101.

STATEMENT OF THE CASE

As a threshold matter, this case presents a jurisdictional issue regarding the District Court’s power to hear Graphite’s so-called “Motion to Compel [DMACC] to Release Retainage.” Despite its caption, this court filing is not a discovery motion to “compel” documents, testimony, or other information from DMACC. Rather, Graphite’s motion asks the Court to order DMACC to pay retainage funds it holds under Iowa Code Chapter 573. Thus, Graphite’s motion is a motion for injunction or summary judgment. In either instance, Graphite has not filed and served on DMACC a petition, cross-claim, third-party petition, or any other action that would permit Graphite to file such a motion under the Iowa Rules of Civil Procedure. Furthermore, Graphite’s motion did not attach, and was not otherwise accompanied by, any admissible evidence—or indeed, *any* evidence whatsoever—in support of its motion, which is a requirement under Iowa Rules Civil Procedure 1.1502(2) (injunctive relief) and 1.981(1)–(8) (summary judgment).

Alternatively, if this case is ripe for adjudication, the District Court properly denied Graphite’s request for release of the remaining retainage funds because Iowa Code section 573.28(2)(c) permits DMACC to withhold 200% of labor and materials yet to be provided at the time of the request for early release is made. DMACC was permitted by section 573.28(2)(c) to

retain \$158,190.00 of the retainage funds because the Architect on the project, as well as DMACC, determined that Graphite had a significant amount of remaining work to be completed and otherwise performed equating to \$79,095.00 of labor and materials.

Finally, the District Court properly denied Graphite's application for attorney fees because Graphite is not a "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" entitled to file a claim under Iowa Code section 573.7(1) and, therefore, not a "claimant" entitled to request attorney fees under Iowa Code section 573.21.

For these reasons, the District Court did not have subject matter jurisdiction or authority to enter the Order, and as such, this appeal should be dismissed, the District Court's order should be vacated, and this case should be remanded for further proceedings. Alternatively, if this Court reaches the merits of Graphite's appeal, the District Court's order should be affirmed in its entirety.

STATEMENT OF FACTS

This case arises out of a lawsuit initiated by Charles L. Smith, Trustee in the Bankruptcy of Metro Concrete Inc. (“Metro”) against Defendants, Rochon Corporation of Iowa, Inc. n/k/a Graphite Construction Group, Inc. (“Graphite”),¹ the Appellants, and Des Moines Area Community College (“DMACC”), the Appellee.² This lawsuit involved the public construction project identified as the “Building 13 Automotive Addition & Renovation” (the “Project”) owned by DMACC. Graphite was the principal contractor awarded the contract for this public construction project by DMACC. Graphite hired Metro as a subcontractor to provide labor and materials on the Project.

Disputes arose between Metro and Graphite on the Project, and ultimately, on January 26, 2022, Metro filed a Claim for Payment of Labor and Materials under Iowa Code Chapter 573 (“Claim”) in the amount of \$217,221.32. Then, on April 22, 2022, Metro filed an action in equity under Chapter 573 to enforce its Claim and seeking payment for the labor and materials provided for the Project identified in the Claim, as it had not

¹ On October 30, 2020, Rochon Corporation of Iowa, Inc. changed its name to Graphite Construction Group, Inc. *See* Graphite’s Answer to Paragraph 5 of Metro’s Petition, App. 047.

² Iowa Association of Community College Trustees was also a named defendant but was dismissed without prejudice by Metro on September 30, 2022.

received such payment from Graphite.

Graphite filed its Answer to Metro's Petition on May 12, 2022. DMACC filed its Answer on June 23, 2022.

Importantly, Graphite did not file a cross-claim against DMACC in this litigation and did not otherwise file and serve upon DMACC a petition, cross-claim, third-party petition, or other action in law or equity against DMACC in this litigation or any other litigation proceeding. *See* Iowa Code §§ 573.15A(3); 573.16(1) (referencing actions in equity filed under Chapter 573).

Despite the fact that Metro is the only plaintiff in this action, its involvement in this appeal is periphery. This appeal is about a dispute of the amount of retainage funds held by DMACC to which Graphite claims it is entitled under Iowa Code Chapter 573. Because of this, a greater factual backdrop about Graphite and DMACC's relationship is necessary.

On March 11, 2019, DMACC, as the public owner, and Graphite, as the principal and general contractor, entered a contract (the "Contract") for the construction of the Project. *See generally* Contract, App. 147–173; General Conditions, App. 174–230.³ In relevant part, the Contract, at section 5.1.2,

³ DMACC's applicable project contract with Graphite is AIA Document A101-2017, *Standard Form of Agreement Between Owner and Contractor*, between DMACC and Graphite dated March 11, 2019 ("Contract") which incorporates AIA Document A201-

provided that DMACC would make monthly payments to Graphite upon receipt and approval of properly submitted applications for payment, which were to be reviewed and approved or denied, in whole or part, by the Project architect, DLR Group (“DLR”) per section 5.1.3 of the Contract. *See* Contract, App. 150. In addition, the Contract, section 5.1.7.1, provided that DMACC would retain five percent (5%) of all payments to hold as retainage funds. *See* Contract, App. 15.

On January 4, 2022, Graphite submitted Payment Application No. 29 to DLR, seeking release of the full amount of the retainage being held by DMACC. *See* Baxter Affidavit, ¶ 4, App. 266. Payment Application No. 29 amounted to Graphite’s final invoice, requesting final payment, under the Contract. As of January 4, 2022, DMACC’s retainage being withheld under the Contract totaled \$510,004.86, **which was the full five percent (5%) retainage of the contract price under the Contract; all other contract amounts owed to Graphite had been previously paid out by DMACC to Graphite.** *See* Baxter Affidavit, ¶ 7, App. 267.

2017, *General Conditions to the Contract for Construction* (referred to separately as “General Conditions”). *See generally* Contract, App. 147–173; General Conditions, App. 174–230; *see also* Baxter Affidavit, ¶ 3, App. 266.

As of January 4, 2022, the Project was far from final completion or final acceptance. *See* Baxter Affidavit, ¶ 5, App. 267. As of January 4, 2022, there was a significant amount of work that Graphite had not yet completed under the Contract. *See* Baxter Affidavit, ¶ 6, App. 267. In fact, at that time, the typical punch list that is created at or around substantial completion and that is contemplated under section 9.8.6 of the General Conditions, had not even been created by the parties, let alone completed by Graphite. *See* January 5 Email from DLR, App. 233; Baxter Affidavit, ¶ 6, App. 267. Per the eventual punch list that was created in June of 2022, such incomplete work by Graphite as of that later date equated to \$79,095.00 worth of work. *See* July 21 Letter from DLR to Graphite with enclosed punch list, App. 243; Baxter Affidavit, ¶ 11, App. 268. In addition, as of January 4, 2022, Graphite had yet to fulfill other contractual requirements necessary to receive the final retainage payment. *See* January 5 Email from DLR, App. 233; Baxter Affidavit, ¶ 6, App. 267. In particular, Graphite had not yet submitted the required operations and maintenance manuals and warranties or required consent of surety forms. *Id.*

As noted, under Payment Application No. 29 dated January 4, 2022, Graphite was seeking release of the full \$510,004.86 of the retainage being held by DMACC. *See* January 4 Havel Email to Warnemunde, App. 234;

Baxter Affidavit, ¶ 4, App. 266. On January 5, 2022, DLR responded to Graphite, stating that DLR could not certify Payment Application No. 29 for final payment and release of the retainage funds. January 5, 2022 Warnemunde email, App. 233. DLR explained that its reasons for rejecting the Payment Application included that Graphite had not completed its work and had failed to comply with multiple contractual and statutory requirements necessary for final payment and release of all retainage. *See* January 5 Email from DLR, App. 233; Baxter Affidavit, ¶ 6, App. 267. Specifically, at the time of its request, Graphite had not fulfilled the following contractual requirements for final payment and release of retainage:

- a. All work under the Contract was incomplete. A punch list had not even been created by the parties, let alone completed by Graphite;⁴
- b. Graphite had not submitted the required operations and maintenance manuals and warranties required by the Contract;⁵ and

⁴ *See* General Conditions at section 9.8.7.1, App. 210 (regarding requests for early release of retainage funds prior to final completion, expressly providing that Owner “may retain . . . an amount equal to 200% of the value of labor or materials yet to be provided on the Project”); *see also* General Conditions at section 9.10.1-2, App. 211–212 (providing that final payment shall not be due and paid until “Contractor has completed or corrected all items on the final Punch List” and until “the Work has been fully completed and is acceptable under the Contract Documents.”); *see also* Iowa Code § 573.28(2)(c) (providing “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.”).

⁵ *See* General Conditions at section 9.10.3, including subsections 9.10.3.8-9, App. 212–213 (providing that final payment shall not be due and paid until Contractor has submitted all required closeout documents under the Contract).

- c. Graphite had not submitted the required consent of surety for release or reduction of retainage under AIA form G707.⁶

See Baxter Affidavit, ¶ 6, App. 267. Thus, at that point, DMACC continued to hold the \$510,004.86 of retainage.

Three weeks later, on January 26, 2022, Metro filed its Claim under Iowa Code Chapter 573 (“Claim”) in the amount of \$217,221.32. Again, at that point, DMACC was still holding the full five-percent retainage of \$510,004.86, and all other contract amounts had been paid out to Graphite, so DMACC was not able to retain any additional retainage funds. *See* Baxter Affidavit, ¶ 8, App. 267.

As noted, on April 22, 2022, Metro filed an action in equity under Chapter 573 to enforce its Claim and seeking payment for the labor and materials provided for the Project identified in the Claim.

Then, Graphite secured a bond discharging the Claim and provided it to DMACC and DLR on or about May 4, 2022.

On June 8, 2022, DLR sent another correspondence to Graphite, reiterating the outstanding items needed to be satisfied, per the Contract

⁶ *See* General Conditions at section 9.8.5, App. 210 (providing “Upon such acceptance, and consent of surety if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof.”); *see also* General Conditions at section 9.10.3.5, App. 212 (providing that final payment shall not be due and paid until Contractor has “Consent of surety to final payment, submitted on AIA Document G707.”).

and/or Iowa Code Chapter 573, prior to any final payment and release of the retainage. *See* June 8 Email from DLR to Graphite, App. 232; Baxter Affidavit, ¶ 10; App. 268. In particular, DLR noted therein that there was still work left to be completed on the Project. *Id.* Per DLR’s most recent site observations on June 13, 2022, DLR created a monetized punch list. *See* July 21 Letter from DLR to Graphite with enclosed punch list, App. 245; (referencing “Date(s) of Observation: updated June 13, 2022”); Baxter Affidavit, ¶ 11, App. 268. Also, DLR noted that Graphite had failed to provide DLR with Consent of Surety to Partial Release of Retainage (the “Consent”) at that time. *Id.* Without the Consent, and per section 9.8.5 of the General Conditions, DLR could not release the retainage. *See* General Conditions § 9.8.5, App. 210.

On July 21, 2022, DLR sent a letter to Graphite, enclosing the punch list of work Graphite had not yet performed, which DLR valued at \$79,095. *See* July 21 Letter from DLR to Graphite with enclosed punch list, App. 243; Baxter Affidavit, ¶ 11, App. 268. To date, this punch list work remains to be completed, and thus, the Project is still not at final completion. *See* Baxter Affidavit ¶ 12, App. 268.

On August 4, 2022, Graphite finally provided the Consent of Surety to Partial Release of Retainage to DLR. *See* Baxter Affidavit, ¶ 13, App. 268.

Consequently, on August 5, 2022, DLR sent a letter to DMACC partially certifying Graphite's Payment Application No. 29, to allow for a partial release and payment of the retainage in the amount of \$351,814.86, which was the amount of all retainage (\$510,004.86) minus double (\$158,190) the amount of the value of the work left to be completed (\$79,095). *See* August 5 Letter from DLR to DMACC with partial certification of PA 29, App. 247; *see also* Baxter Affidavit, ¶ 14, App. 268.

On August 5, 2022, DMACC sent out notice of a special meeting for August 12 for the purpose of DMACC's Board formally approving payment to Graphite in the amount of \$351,814.86, which equates to release of all retainage minus double (\$158,190) the amount of the work left to be completed (\$79,095). On August 12, DMACC's Board approved the payment and issued payment in the amount of \$351,814. *See* Proof of Payment, App. 269; *see also* Baxter Affidavit, ¶ 15, App. 268.

To confirm, as of August 12, 2022 and the time of Graphite's motion, DMACC was only holding retainage in the amount of \$158,190, which was double the value of the work left to be completed (\$79,095), which it is authorized to do under both section 9.8.7.1 of the General Conditions and Iowa Code section 573.28(2)(c). *See* General Conditions, App. 210; Baxter Affidavit, ¶ 16, App. 268. Specifically, Iowa Code Section 573.28(2)(c)

provides that, “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.” Consistent with such statutory section, section 9.8.7.1 of the General Conditions states, “If proper documentation is received from the Contractor, the Owner will release all retainage funds at the next monthly Board meeting or within thirty (30) days, whichever is less, except it may retain the following to the extent authorized by law: .1 An amount equal to 200% of the value of labor or materials yet to be provided on the Project as determined by the Owner and its authorized contract representative.” General Conditions section 9.8.7.1, App. 210.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION AND/OR AUTHORITY TO RULE ON GRAPHITE'S MOTION DUE TO GRAPHITE'S FAILURE TO INITIATE AN ACTION AGAINST DMACC.

A. DMACC challenged the District Court's jurisdiction and authority and, thereby, preserved this issue for appeal.

As a threshold matter, DMACC preserved error on this issue in its Sur Reply to Graphite's Motion to Compel DMACC to Release Retainage. *See* DMACC Sur Reply, pgs. 5–6, App. 139–140. Review of rulings on subject matter jurisdiction are for corrections of error at law. *See Klinge v. Bentien*, 725 N.W.2d 13, 15 (Iowa 2006).

Further, although the District Court did not address the issue in its December 22, 2022, ruling, a challenge to subject matter jurisdiction “can be raised at any time, even for the first time on appeal.” *State v. Lasley*, 705 N.W.2d 481, 485 (Iowa 2005), citing *State v. Bear*, 452 N.W.2d 430, 432 (Iowa 1990) (holding, “[s]ubject matter jurisdiction may be raised at any time” and “[i]n addition, this court may raise the issue sua sponte.”); *see also Hutcherson v. Iowa Dist. Court for Lee County*, 480 N.W.2d 260, 262 (Iowa 1992) (same) (citing *Pierce v. Pierce*, 287 N.W.2d 879 (Iowa 1980)). Likewise, in *State ex rel. Vega v. Medina*, the Iowa Supreme Court held: “Because the defense of lack of subject matter jurisdiction may not be waived

and subject matter jurisdiction may not be established by consent or estoppel, such a challenge may be raised at any time, even for the first time on appeal, and this court may also raise the issue sua sponte.” 549 N.W.2d 507, 508 (Iowa 1996) (citing *Milks v. Iowa Oto–Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 803 (Iowa 1994)).

“The effect of an action taken by the court without jurisdiction of the subject matter is that the action is void.” *In re Gardiner*, 287 N.W.2d 555, 559 (Iowa 1980). Where subject matter jurisdiction is lacking, the only appropriate disposition is to dismiss the claim regardless of the stage of proceedings. *See Pierce*, 287 N.W.2d 879 at 882 (Iowa 1980); Iowa R. Civ. P. 1.421(4).

B. The District Court lacked subject matter jurisdiction over Graphite’s motion because Graphite did not initiate an action against DMACC.

District courts possess subject matter jurisdiction over a controversy only as a result of their constitutional or statutory authority. A district court cannot obtain subject matter jurisdiction through the exercise of its inherent judicial power or by the consent of the parties. *Klinge v. Bentien*, 725 N.W.2d 13, 15 (Iowa 2006) (“Subject matter jurisdiction is conferred by constitutional or statutory power. The parties themselves cannot confer subject matter jurisdiction on a court by an act or procedure.”) (internal citations omitted).

Iowa district courts are courts of general jurisdiction and are empowered by the Iowa Constitution and state legislature with the “exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile.” Iowa Code section 602.6101; *see also* Iowa Const. art. V, § 6 (“The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.”). “It has long been the case that ‘the jurisdiction of the Court depends upon the state of things *at the time of the action brought.*’” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004) (emphasis added) (citing *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L.Ed. 154 (1824)); *see also Heartland Express v. Gardner*, 675 N.W.2d 259, 266 (Iowa 2003) (applying the subject matter jurisdiction rules under a workers compensation law at the time the suit was filed, not as it was later amended).

In the present case, the District Court lacked subject matter jurisdiction over Graphite’s motion because Graphite did not assert any action in equity or law against DMACC under the Iowa Rules of Civil Procedure. As noted, Graphite did not file any cross-claim against DMACC in this litigation and did not otherwise file and serve upon DMACC a petition, cross-claim, third-party petition, or other action in law or equity against DMACC in this

litigation or any other litigation proceeding. *See* Iowa Code §§ 573.15A(3); 573.16(1) (both referencing actions filed under Chapter 573).

As a result, the District Court was not presented with a case or controversy relevant to Graphite’s motion. Thus, the remedy Graphite seeks—an order granting its motion and mandating that DMACC engage in the positive act of release of the retainage—is legally impossible because Graphite has not asserted any substantive claim against DMACC upon which the Court is permitted to rule. *See* Iowa Code § 602.6101 (empowering the district court with jurisdiction over “actions” and “proceedings”). The conclusion is buttressed by countless other considerations. For instance, if Metro were to dismiss its action, there would be no legal vessel for Graphite’s motion to persist. Because Graphite failed to assert an action of any stripe against DMACC, Graphite’s appeal must be dismissed.

This case of *Wederath v. Brant*, 287 N.W.2d 591 (Iowa 1980) is illustrative on this topic. In *Wederath*, the plaintiffs brought an eviction action in Carroll County for nonpayment of farm rents against the defendants. *Id.* at 592. The defendants appeared specially and moved to have the case moved to Greene County—the county where the farmland at issue was located. *Id.* The district court granted the defendants’ motion. *Id.* Pursuant to Iowa R. Civ. P. 175(b) (now Iowa R. Civ. P. 1.808(b)), plaintiffs were required to file their

action in Green County within 20 days of the district court’s order but failed to do so within that timeframe. *Id.* Subsequently—after the 20-day time limit—plaintiffs filed their action in Greene County and ultimately obtained summary judgment. *Id.* The defendants appealed, arguing that the summary judgment order was void because of the plaintiffs’ failure to file their action within the statute’s proscribed timeframe deprived the district court of jurisdiction and authority to enter judgment. *Id.* at 593. The Iowa Supreme Court agreed. *Id.* at 594–95. The Court stated:

[W]e conclude the 1975 proceeding did not result in a judgment because there was no action before the court. Pertinent here is Iowa R.Civ.P. 219: “*Judgment defined.* Every final adjudication of any of the rights of the parties *in an action* is a judgment.” (Emphasis supplied.) Ordinarily, then, a judgment must be foundationed on an *action*. *Cf.* Chapter 677, The Code (“Offer to Confess Judgment”). In our jurisprudence, the *sine qua non* of an action formerly was an original notice, now it is a petition. Iowa R.Civ.P. 48 (“A civil action is commenced by filing a petition with the court.”). A case which has been dismissed is no longer an action. This was the basis of the *Hall* court’s 1881 decision when it wrote, “This omission [to timely file the papers in the proper county] was not cured by the defendant’s appearance, and moving to strike the cause. ***No action was pending, because it had been discontinued by operation of law.***” 56 Iowa at 361, 9 N.W. at 296 (emphasis supplied).

Id. (bolded emphasis added) (citing *Hall v. Royce*, 56 Iowa 359, 9 N.W. 295 (Iowa 1881)). Similarly, because Graphite has failed to file an action against DMACC, the district court lacked jurisdiction to hear and rule on its motion.

C. The District Court lacked authority to grant Graphite’s motion because Graphite did not initiate an action against DMAACC.

Additionally, the District Court lacked authority to grant Graphite’s motion. “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 the particular case.’” *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993) (quoting *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989)).

Even if the District Court possessed subject matter jurisdiction in this case, it lacked authority to grant Graphite’s motion because Graphite failed to file an actionable claim against DMAACC. When a litigant fails to satisfy statutory requirements in a case where the district court has subject matter jurisdiction, the district court lacks authority to hear the case. For example, in *City of Des Moines v. Des Moines Police Bargaining Unit Association*, the City of Des Moines brought a declaratory judgment action contending that its collective bargaining agreement with the Des Moines Police Bargaining Unit Association was illegal. *See* 360 N.W.2d 729, 729 (Iowa 1985). On appeal from the district court’s ruling in favor of the City, the Iowa Supreme Court determined, *sua sponte*, that the City’s failure to exhaust administrative

remedies resulted in a failure to invoke the district court's authority to hear the case. *Id.* at 733.

This was also the result in *Christie v. Rolscreen Co.* There, the Court affirmed the district court's directed verdict in favor of the defendant, holding that the plaintiffs' failure to bring their suit in the judicial district where their employer's allegedly discriminatory acts occurred, a requirement of Iowa's employment discrimination statute, failed to invoke the court's authority to hear the case. 448 N.W.2d at 451. Similarly here, Graphite's failure to bring an action against DMACC precluded the District Court from exercising its authority to hear Graphite's motion.

D. Graphite's motion sought injunctive relief or summary judgment but did not satisfy the evidentiary requirements for such motions.

Although captioned as a "Motion to Compel [DMACC] to Release Retainage," Graphite's motion was not filed as a discovery motion under Iowa R. Civ. P. 1.517, and it did not seek an order compelling DMACC to produce documents, testimony, or other information. Instead, Graphite's motion sought an order forcing DMACC to pay disputed money to Graphite. This is not a motion to compel; it is a motion for affirmative injunctive relief or for partial summary judgment finding that the disputed money was owed to Graphite. But motions for injunctive relief or summary judgment must be

supported by admissible evidence. *See, e.g., PIC USA v. N.C. Farm P'ship*, 672 N.W.2d 718 (Iowa 2003) (requiring applicant to show likelihood of success on the merits for the court to grant an injunction); Iowa R. Civ. P. 1.981(1)–(8) (requiring a statement of undisputed material facts; appendix with specific reference to pleadings, depositions, interrogatories and affidavits; and memorandum of authorities).

Graphite did not support its motion with admissible evidence in its motion or by live witness testimony at the hearing. Instead, Graphite attempts to rely solely on arguments made by its counsel, which carry no evidentiary weight. Graphite should not be permitted to file a *de facto* motion for injunctive relief or summary judgment without complying with the evidentiary requirements imposed by Iowa courts to obtain such relief.

For the foregoing reasons, this Court should dismiss this appeal, vacate the District Court's ruling, and remand for further proceedings.

II. THE DISTRICT COURT PROPERLY DENIED GRAPHITE'S MOTION UNDER IOWA CODE CHAPTER 573.

DMACC reiterates that this Court should not reach the merits of Graphite's appeal because it lacks subject matter jurisdiction and authority, and this appeal should be dismissed. Notwithstanding, if the Court reaches the merits of Graphite's claim, DMACC agrees with Graphite that error was preserved on this issue. DMACC also agrees with Graphite that the standard

of review on issues of statutory interpretation is for corrections of error at law. *See Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014).

Importantly, despite 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. However, despite Graphite’s briefing, the present controversy is also not governed, or at least not solely governed, by subsection 573.16(2). Instead, section 572.28 is directly on point and controls in this situation, as explained in detail later herein.

As a starting point, Iowa Code section 573.12(1)(a) allows public owners to withhold up to 5% of monthly payments for retainage. Under section 573.15, subcontractors may make a claim against that retainage. Then, per section 573.14, the public owner is generally prohibited from releasing retainage to the principal contractor if any subcontractor or supplier has filed a claim against the owner’s retainage. *See* Iowa Code § 573.14. In such event, that section mandates the public owner “shall retain from the unpaid funds a sum equal to double the total amount of all claims on file.” *Id.* To remove this impediment to the release of retainage, section 573.16(2) permits the principal contractor to provide a surety bond in double the amount of the claim(s) filed. *See* Iowa Code § 573.16(2). Upon receipt of that bond, “the public corporation

or person shall pay to the contractor the amount of funds withheld.” *Id.* In its entirety, the last sentence of subpart (2) reads as follows:

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**.

Iowa Code § 573.16(2) (bolded emphasis added).

The bond, in double the amount of a single claim or multiple claims, is intended to nullify the impact *of such claims* filed against the retainage—that is, the funds within the retainage being withheld *for such claims*. Once the principal contractor provides the bond, the owner can no longer withhold retainage on the basis of the claim for which the bond guarantees payment. But this section *does not* require the owner to ignore other statutory bases for withholding retainage; it merely removes the impediment caused by the filed claims. It does not state, for example, “the public corporation shall pay to the contractor the *entire* amount of funds withheld *for any reason*.” Instead, it can be more correctly read as “the public corporation shall pay to the contractor the amount of funds withheld *for such claims*.”

Section 573.16(2) operated exactly as it was intended in this case. Graphite requested early release of all retainage on January 4, 2022. At the time of the request, DMACC was withholding the full five-percent retainage

totaling \$510,004.86. DMACC's architect and authorized representative, DLR, did not certify the payment because substantial work on the Project was not complete. From the later created punch list, we know that the incomplete work at that point was at least \$79,095.00. As is relevant to another section of this Chapter, section 573.28(2), which will be discussed below, double the amount of such incomplete work equated to \$158,190.00.

Soon thereafter, on January 26, 2022, Metro filed its \$217,221.32 Claim with DMACC. As is relevant to section 573.16(2), double the amount of the Claim is \$434,442.64. Thus, the sum of those two figures—that is, the total amount that could be withheld under 573.28(2)(c) and Metro's Claim—is \$592,632.64. Though, as noted, DMACC's full retainage, which was being withheld at that time, was \$510,004.86.

By May 4, 2020, Graphite had secured, and provided to DMACC and DLR a bond to discharge Metro's Claim. DLR again did not certify the requested payment because Graphite had not produced a Consent of Surety to Partial Release of Retainage. On August 4, 2022, Graphite produced the Consent and DLR certified partial payment of \$351,814.86, which was the total amount of retainage (\$510,004.86) less double the amount held for labor and materials yet to be provided by Graphite ($\$79,095 \times 2 = \$158,190$), which DMACC was entitled to withhold under the Contract and Iowa Code section

537.28(2)(c), and of which it gave notice to Graphite on July 21, 2022. On August 12, 2022, DMACC's board of directors approved payment of \$351,814.86 to Graphite.

In other words, Graphite "bonded off" Metro's 537.7 Claim and DMACC paid all the retainage except for the 200% of the amount of labor and materials Graphite had not yet provided ($\$79,095 \times 2 = \$158,190$). This is exactly how section 573.16 is supposed to operate.

What remains of this controversy is whether DMACC should have issued an additional \$82,627.78 of retainage ($\$434,442.64 - \$351,814.86$) to Graphite, or not. This question is answered expressly by section 573.28(2) and is not complicated. Section 573.28(2) provides, in relevant part:

2. Payments made by a governmental entity . . . for the construction of public improvements . . . 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 . . . 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 . . . 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. . . .

c. If labor and materials are yet to be provided at the time of the request for 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 . . . authorized contract representative, may be ***withheld until such labor or materials are provided.***

Iowa Code § 573.28(2) (bolded and italicized emphasis added). The law regarding payment for Graphite's request for early release of retainage is set out in Iowa Code section 573.28(2)(b) and is expressly subject to the terms of subsection 573.28(2)(c).⁷ *Id.* Section 573.28(2)(c) specifically permits DMACC to withhold \$158,190.00 of retainage "until such labor or materials are provided," as such an amount is equal to two hundred percent of the labor and materials not yet provided by Graphite, as noted by DLR's letter to Graphite on June 21, 2022. As such, Graphite's request for an additional \$82,627.78 of retainage must be denied.

⁷ To be sure, the Contract provides an almost identical provision:

If proper documentation is received from the Contractor, the Owner will release all retainage funds at the next monthly Board meeting or within thirty (30) days, whichever is less, except it may retain the following to the extent authorized by law: .1 An amount equal to 200% of the value of labor or materials yet to be provided on the Project as determined by the Owner and its authorized contract representative.

General Conditions, § 9.8.7.1; App. 210.

While not relevant to this case, per section 573.28(2), a public owner would not be required to release retainage or otherwise make payments referenced in section 573.28 for other bases as well, including if the principal contractor had not complied with the 10-day subcontractor notice requirements for requests for early release of retainage per subsections 573.28(2)(f) and (g) and/or had not complied with the sworn statement requirement for requests for early release of retainage per subsection 573.28(2)(a).

Indeed, DMACC agrees with Graphite's statement within its appeal brief that "[t]hough 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." *See* Appellant's Brief at p. 23. However, Graphite ignores that the fact Chapter 573's strict rules on the handling and disposition of retainage include the rules set forth in section 572.28, which are directly applicable to this situation of a principal contractor requesting early release of retainage prior to final completion.

Also, Graphite ignores the fact that DMACC's retainage did not fully secure DMACC for 200% of the Claim and 200% of the work left to be complete. Indeed, if the five percent retainage that DMACC was holding at the relevant time was, for example \$600,000, then the result would have been

different. As noted, at the relevant time, the incomplete work equated to \$79,095 (which, doubled, is \$158,190) and the Claim was in the amount of \$217,221.32 (which, doubled is, \$434,442.64), with the sum of those two figures being \$592,632.64. If DMACC's retainage had, at the relevant time, been \$600,000, then DMACC would have released \$434,442.64 (plus \$7367.36 more) in retainage once the bond for the Claim was filed, leaving DMACC to continue to withhold \$158,190.00.

However, here, DMACC's full retainage, which was being withheld at that time, was \$510,004.86. Per section 573.28(2), "payments made by a governmental entity . . . for the construction of public improvements . . . shall be made "in accordance with the provisions of this chapter [including section 573.16(2)], *except as provided in this section.*" That section, section 573.28(2) at subpart (c), goes on to expressly and clearly state that "if labor and materials are yet to be provided at the time of the request for 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 . . . authorized contract representative, may be *withheld until such labor or materials are provided.*"

As such, the District Court's reliance on the requirements of section 573.16 in support of its order, and Graphite's extensive briefing

about how the District Court got it wrong, both miss the point. DMACC is permitted to withhold the current amount of \$158,190.00 in retainage because Iowa Code section 573.28(2)(c) expressly says it is entitled to do so, based upon Graphite's incomplete work. It's that simple.⁸

Finally, to reiterate DMACC's position as set forth herein, DMACC will address Graphite's first Statement of Issue within its brief, which is articulated as follows:

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?

Appellant's Brief at p. 7. The answers to Graphite's two questions stated above are as follows: First, a prime contractor, who bonds off a Chapter 573 Claim, is indeed permitted to receipt of the **portion of the** retainage being held by the project owner **solely** for **such bonded off** Chapter 573 Claim,

⁸ In Graphite's Statement of Facts section within its brief, it states: "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 Brief at p. 16). To reiterate, DMACC did indeed pay the retainage that it had been withholding **solely** due to the Claim. The remaining retainage continued to be withheld due to the incomplete work.

assuming there are no other bases for withholding under section 573.28 (e.g., the principal contractor failed to comply with the 10-day subcontractor notice requirement per subsections 573.28(f)-(g) and/or with the sworn statement requirement per subsection 573.28(a)). Second, in the situation at issue in this litigation, no, the prime contractor does not necessarily have to wait for the payment of retainage until expiration of 30 days after final completion and acceptance; instead, section 572.28(2) governs this situation as described above.

Based upon the foregoing, should this Court reach the merits of this appeal, the District Court's order denying Graphite's motion should be affirmed for the reasons set forth above.

III. IOWA CODE SECTION 573.21 DOES NOT PERMIT PRINCIPAL CONTRACTORS TO RECOVER ATTORNEY FEES.

DMACC agrees with Graphite that error has been preserved on this issue. DMACC also agrees with Graphite that issues of statutory interpretation on appeal are reviewed for correction of errors at law. *See Star Equip.*, 843 N.W.2d at 451.

Graphite alleges that it is a "claimant" entitled to recover attorney fees under Iowa Code section 573.21. Based on the plain language of Iowa Code Chapter 573, however, it is not. Iowa Code section 573.7(1) specifies the

persons entitled to make a “claim” for unpaid labor or materials under this Chapter. It provides:

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.

Iowa Code section 573.7(1) (emphasis added). Importantly, section 573.7(1) does not include “principal contractor” in its list of those that may file a claim. Obviously, a principal contractor cannot be “under a contract” with itself.⁹ Under this section, therefore, Graphite cannot make a claim—and therefore, is not a “claimant”—because it is not under a contract with itself nor has it “performed labor, or furnished material, service, or transportation” for a subcontractor. Because it is not a “claimant” under this section, it cannot seek attorney fees under section 573.21. This issue isn’t any more complicated than that.

The only Iowa appellate decision to award attorney fees to a principal

⁹ Similarly, Iowa Code sections 573.2 and .3 obligate the principal contractor to obtain a surety bond under which the principal contractor is the obligee. As the obligee, the principal contractor cannot make a direct claim against that bond, which is exactly what section 573.15 permits. *See* Iowa Code section 573.15 (setting forth prerequisites for any “person, firm, or corporation” to file a claim against principal contractor’s bond). This absurd outcome further demonstrates that a principal contractor cannot be a “claimant” under Iowa Code section 573.21.

contractor under section 573.21 did not address the issue head-on. *See Midland Restoration Company v. Sioux City Community School District*, No. 3-127/ 02-0625, 2003 WL 21229272 (Iowa Ct. App. May 29, 2003). Based on the lack of analysis on this issue in the *Midland* decision, it appears that the defendant did not raise the issue. *See Midland*, 2003 WL 21229272 at *5. As such, *Midland* is not instructive and should be ignored.

One of the secondary authorities on Iowa Code Chapter 573, authored by counsel for Graphite, directly supports DMACC's position:

The conclusion that a prime contractor is not a "claimant" [under Iowa Code § 573.21] is supported by both caselaw and logic. 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.

Stephen D. Marso, *Public Construction Liens in Iowa: A History and Analysis of Iowa Code Chapter 573*, 60 Drake L. Rev. 101, 186 (2011) (internal citations omitted). This author also argues that *Midland* is not instructive on this issue. The author opines that *Midland* was based on the specific procedural circumstances of that case, including the owner's (defendant) failure to challenge the principal contractor's right to assert a claim for its attorney's fees:

Why then did the Iowa Court of Appeals suggest in *Midland Restoration Co. v. Sioux City Community School District* that prime contractors were "claimants" under chapter 573 and could obtain attorney fees pursuant to section 573.21? The answer may

be that the parties to the lawsuit did not dispute that prime contractors were “claimants” who had attorney-fee rights under the statute. A subsequent Iowa Court of Appeals case suggests that was the reason. To the extent that *Midland* stands for the proposition that a prime contractor is a “claimant” under chapter 573 and is entitled to attorney-fee rights under the section 573.21, it is incorrect. It appears the *Saydel* court recognized this and correctly took steps to disavow any such holding.

Id. at 187 (internal citations omitted).

Graphite identifies no other legal authority supporting its claim for attorney fees because there is none. As discussed above, the plain language of the statute makes it clear that Graphite is not a claimant under section 573.7(1) and, therefore, is not entitled to attorney fees under section 573.21. For this reason, if the Court reaches the merits of Graphite’s appeal, the District Court’s decision on attorney fees should be affirmed.

CONCLUSION

For the reasons set forth in Section I, DMACC respectfully requests that this Court dismiss Graphite’s appeal, vacate the District Court’s order, and remand for further proceedings.

Alternatively, for the reasons set forth in Sections II and III, DMACC respectfully requests this Court affirm the District Court’s order in its entirety.

REQUEST FOR ORAL ARGUMENT

Des Moines Area Community College respectfully requests oral argument in this case.

ATTORNEY'S COST CERTIFICATE

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

By /s/ Jodie McDougal

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Appellee's Amended Final Brief was served by electronic filing and electronic delivery via EDMS system on April 19, 2023, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

By /s/ Jodie McDougal

CERTIFICATE OF FILING

The undersigned certifies that the foregoing Appellee's Amended Final Brief was filed with the Iowa Supreme Court by electronically filing the same on April 19, 2023, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.302(1).

By /s/ Jodie McDougal

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 7450 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By /s/ Jodie McDougal
Signature

April 19, 2023
Date