

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 RESISTANCE TO
APPLICATION FOR FURTHER REVIEW OF COURT OF
APPEALS' DECISION FILED ON FEBRUARY 7, 2024**

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RESISTANCE

Defendant/Appellee Des Moines Area Community College (“DMACC”) presents the following two questions for further review:

1. May a co-defendant seek relief against another co-defendant in an Iowa Code Chapter 573 action without filing a claim against it?
2. Does a general contractor’s request for full release of retainage before completion of a public construction project constitute a request for early release of retainage under section 573.28? If so, does a general contractor’s subsequent request for retainage after bonding off a claim under 573.16(2) require a public owner to release funds in the amount of the bond even if doing so would reduce retainage to less than 200% of the value of unfinished work contrary to its rights under section 573.28(2)(c)?

Question #1 is not worthy of further review, and the Court should exercise its discretion on Question #2 and deny further review. If the Court grants further review, it should only review Question #3, which DMACC did not include in its Application: 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?

Question #1

DMACC's description of Question #1 is not quite accurate. In its appellate brief, DMACC described the issue as follows: 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? [Appellee's Brief pp. 7, 22-29]. The Court of Appeals correctly rejected DMACC's description of the issue as a "jurisdiction" issue, and correctly framed it as a "court authority" issue. *Graphite Constr. Group, Inc. v. Des Moines Area Cmty. College*, 2024 WL 466118, at *4-*5 (Iowa Ct. App. Feb. 7, 2024). After correctly framing the issue, the Court of Appeals correctly concluded that DMACC failed to preserve error on it, so the Court did not consider the issue further. *Id.*

DMACC attempted to raise the issue before the district court by filing an unauthorized "sur-reply brief" for which it never sought or obtained permission to file. *Id.* at *3, *5. Unsurprisingly, the district court never addressed it. [Application, pp. 5, 10-13]. Instead, the district court overruled Graphite's Motion, by "[t]aking a different tack altogether" than what the parties argued, and ruled that "section 573.16(2) is not triggered until after the project is completed and accepted." *Id.* at *3.

DMACC contends that the Court of Appeals erroneously failed to address the “court authority” issue under the rules that a “prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, as long as the prevailing party raised the alternative ground in the district court,” and that the “party can invoke the alternative ground even if the district court ‘ignored’ it.” *Graphite*, 2024 WL 466118, at *5 n.5. The Court of Appeals correctly refused to apply those rules, explaining,

We recognize that “[i]t is well-settled law that a prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, as long as the prevailing party raised the alternative ground in the district court.” *In re M.W.*, 876 N.W.2d 212, 221 (Iowa 2016) (citation omitted). And the party can invoke the alternative ground even if the district court “ignored” it. *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002). But DMACC's argument that the district court lacked authority is not an alternative ground for affirmance. *See, e.g., Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) (“[A] successful party in the district court may, without appealing, *save the judgment* ... based on ground urged in the district court but not included in that court's ruling.” (emphasis added) (citation omitted)).

An argument the court lacks authority to decide a case or issue is a claim the court should dismiss the action rather than enter a ruling on the merits. *See, e.g., State v. Mickey*, No. 22-0130, 2023 WL 1810518, at *1 (Iowa Ct. App. Feb. 8, 2023) (dismissing appeal where court lacked authority to decide the issue before it). So, if DMACC was successful in its “authority” argument here, we would vacate—not affirm—the district court's ruling interpreting and applying chapter 573. *See, e.g., Knutson*, 2023 WL 2673137, at *3–4 (vacating district court ruling after concluding the court lacked authority to decide the substantive issue). Because the argument is not an alternative

ground for affirmance, DMAACC's failure to preserve error on the issue prevents us from considering it.

Id. Vacating the district court's ruling because the district court had no authority to decide it would not "save" the ruling. It would treat it as if it never existed. The Court of Appeals' decision on this issue was correct.

This run-of-the mill error-preservation/court-authority issue is not one of the rare cases for which further review should be granted. Hon. Rosemary Sackett & Hon. Richard Doyle, *History of Iowa Court of Appeals*, 60 Drake L. Rev. 1, 39 ("The supreme court grants further review in very few cases. For example, in 2010, out of the 451 applications for further review filed, the supreme court granted further review in only sixty-seven cases."); *In re Marriage of Becker*, 756 N.W.2d 822, 824 (Iowa 2008) ("In considering an application for further review, "we have the discretion to review any issue raised on appeal regardless of whether such issue is expressly asserted in an application for further review. We also have the discretion not to review any of the issues the parties raised in their applications for further review.") (citations omitted).

Question #2

DMAACC's description of Question #2 is also not quite accurate. The Court of Appeals described the parties' competing arguments on this issue as follows:

To summarize the claims, Graphite Construction, relying on Iowa Code section 573.16(2), maintains that once it bonded off the claim filed by Metro Concrete, DMACC was statutorily required to release the full amount of the bond. DMACC responds that section 573.28(2)(c) provides it with authority to withhold certain retainage funds for the value of uncompleted work and materials while still complying with section 573.16(2).

Graphite, 2024 WL 466118, at *4. Put another way, DMACC contends that Section 573.16(2) is subject to and limited by Section 573.28, even if a prime contractor never invokes Section 573.28. *Id.* at *9 (“DMAAC asserts section 573.28(2)(c) comes into play at any time in the construction process when a principal contractor makes an early request for retainage (i.e. there remains work to be done on the project).”). The Court of Appeals correctly rejected that contention. *Id.* at *13 (“Because Graphite Construction's request for release of the full value of the surety bond from the retainage fund was timely and appropriate under section 573.16(2), and because DMACC cannot rely on section 573.28 to withhold some retainage based on the value of uncompleted labor and materials, we reverse the decision of the district court and remand for an order granting payment from the retention fund in the amount of \$82,627.78, plus interest as provided by section 573.16(2).”).¹

¹ Even if Graphite had invoked both Sections 573.16(2) and 573.28, the result would be the same because the two statutes are separate and independent means by which a prime contractor can access retainage “early,” namely prior to the default access date under Section 573.14(1). *See Graphite*, 2024 WL 466118, at *8 (“Contrast the language of section 573.16(2) with that of section 573.28—entitled ‘early release of retained funds.’ Both involve means to access retainage funds.”); *id.* at n.7 (“The parties acknowledge that

Graphite cannot deny that Question #2 is an issue of first impression for an Iowa appellate court, which Graphite acknowledged in its Routing Statement. Notwithstanding, the Court should exercise its discretion and deny further review on this issue.

Question #3

If the Court grants further review, it should limit its review to the following issue: 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? The district court answered “no,” and the Court of Appeals agreed. *Graphite*, 2024 WL 2024 WL 466118, at *10-*12.

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.

The Court of Appeals acknowledged “there appears to be a conflict between opinions offered by our court over the past twenty years. *Compare Midland Restoration Co. v. Sioux City Cmty. Sch. Dist.*, No. 02-0625, 2003 WL 21229272, at *5 (Iowa Ct. App. May 29, 2003) (awarding fees to a principal contractor where only the amount not the authority was disputed), *with Saydel*

both section 573.16(2) and section 573.28 constitute early access exceptions to the rules governing the payment of the retainage—the district court just interpreted section 573.16 differently.”); *id.* at *7 (“At the heart of our analysis, we must address the interplay, if any, between sections 573.16 and 573.28.”).

Cnty. Sch. Dist. v. Denis Della Vedova, Inc., No. 06-0070, 2007 WL 1201748, at *1–2 (Iowa Ct. App. Apr. 25, 2007) (refusing to award fees to the principal contractor and pointing out Midland was not controlling authority).” *Graphite*, 2024 WL 466118, at *11.

The gist of Graphite’s argument is this: Section 573.21 does not limit its scope of claimants to those who have specified contractual relationships. Iowa Code Section 573.21 (“any claimant for labor or materials who has, in whole or in part, established a claim.”). In contrast, Chapter 573 is littered with other provisions that limit their universe of claimants to those who have specified contractual relationships. Iowa Code Section 573.7(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. . . .”) (italics added); Iowa Code Section 573.7(2) (“A person furnishing only materials *to a subcontractor* who is furnishing only materials. . . .”) (italics added); Iowa Code Section 573.2(2) (“[A] person, firm, or corporation, *having a contract with the targeted small business or with subcontractors of the targeted small business. . . .*”) (italics added); Iowa Code Section 573.6(1) (“[A]ll persons, firms, or corporations *having contracts directly with the principal or with subcontractors. . . .*”); Iowa Code Section 573.15(1) (“A person, firm, or corporation that has performed labor for or

furnished materials, service, or transportation *to a subcontractor. . . .*”); Iowa Code Section 573.15A(1) (“Any person, firm, or corporation who has, *under contract with the principal contractor or with subcontractors. . . .*”) (italics added).

Normally, such statutory distinctions demand they be interpreted differently. *See Farmers Co-op Co. v. DeCoster*, 528 N.W.2d 536, 538-539 (Iowa 1995) (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). The Court of Appeals disagreed, and concluded with two questions and a comment to support its opinion. *Graphite*, 2024 WL 466118, at *12. *Graphite* will answer the Court of Appeals’ two concluding questions and respond to the comment.

1. Is it next going to argue that the public corporation must withhold a sum equal to double the total amount of the claim under section 573.14?

Graphite, 2024 WL 466118, at *12.

- a. Graphite's Response: No. Sections 573.12(1) and 573.13 establish that (1) retainage is money earned by a contractor but which a public owner can (but is not required to) hold, (2) the retainage amount can be no greater than 5% of the amount owed the contractor, and (3) the sole purpose of retainage is to serve as collateral to pay claims of unpaid subcontractors. It would be nonsensical for an owner to continue to hold any retainage from a contractor solely because the contractor makes a claim to it. The retainage is money already earned by the contractor, so refusing to pay it to the contractor solely because the contractor demands payment of it would create a type of situation similar to those described in Joseph Heller's novel, *Catch-22*. Furthermore, Section 573.14(1) is Chapter 573's main retainage-handling rule, and its express language shows that its reference to "claims" does not include claims by a prime contractor. Iowa Code 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.*”) (italics added). Section 573.14(1)’s distinction between contractors and others who have filed “claims” contrasts with Section 573.21’s failure to express such a distinction, which supports Graphite’s position.

2. Or that a principal contractor must secure a bond under section 573.16 in double the amount of its “claim”? *Graphite*, 2024 WL 466118, at *12.
 - a. Graphite’s Response: No. It would be nonsensical to require a contractor to secure a bond under Section 573.16 in order to obtain payment of its retainage when the owner is only holding it because the contractor has demanded payment of it. *See Star Equip., Ltd. v. State*, 843 N.W.2d 446, 452–53 (Iowa 2014) (discussing Chapter 573 bonds). This would be a worse *Catch-22* situation than that in the Section 573.14 example above. Furthermore, Section 573.16(2) expressly distinguishes between contractors and others who have filed claims. 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, 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. . . . 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.”) (italics added). Section 573.16(2)’s distinction between contractors and others who have filed “claims” contrasts with Section 573.21’s failure to express such a distinction, which supports Graphite’s position.

3. Finally, it would be very easy for the legislature to have clarified in section 573.21 that any principal contractor is also entitled to attorney fees. *Graphite*, 2024 WL 466118, at *12.

a. Graphite's Response: True, but that can be said for countless statutes. *See Lumberman's Wholesale Co. v. Ohio Farmers Ins. Co.*, 402 N.W.2d 413, 416 (Iowa 1987) ("Although the statutory language [573.15] is not a model of clarity. . . ."). Section 573.21's lack of statutory clarity does not doom Graphite's position. It just makes an appellate court's job more difficult.

The Court of Appeals described Graphite's position as "nonsensical when reviewing the entire chapter." *Graphite*, 2024 WL 466118, at *12. Maybe Graphite is wrong. Even if it is wrong, Graphite believes its position has a lot of sense. So much so that Graphite believes its position is correct. If the Court grants further review, it should limit its review to Question #3.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the cost of printing the foregoing
Resistance to Application for Further Review is \$ 0.00.

By /s/ Lisa R. Jones

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Resistance to Application for Further Review was served by electronic filing and electronic delivery via the EDMS system on March 12, 2024, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

By /s/ Lisa R. Jones
Lisa Jones

CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Appellant's Resistance to Application for Further Review was filed with the Iowa Supreme Court by electronically filing the same on March 12, 2024, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.302(1).

By /s/ Lisa R. Jones
Lisa Jones

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.1103(4) because: this resistance has been prepared in a proportionally spaced typeface using Times New Roman in 14-pt font and contains 2,676 words, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Lisa R. Jones
Signature

March 12, 2024
Date