

Reversed and Remanded and Opinion Filed December 18, 2025



In The  
**Court of Appeals**  
**Fifth District of Texas at Dallas**

**No. 05-24-00488-CV**

**IDP TM PROPERTIES, LLC D/B/A IDP TM, Appellant**  
**V.**  
**SELECT EXCAVATION, LLC, Appellee**

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**On Appeal from the County Court at Law No. 1**  
**Rockwall County, Texas**  
**Trial Court Cause No. 1-23-0478**

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**MEMORANDUM OPINION**

Before Justices Kennedy, Barbare, and Jackson  
Opinion by Justice Barbare

This is a commercial-construction case in which the property owner and a subcontractor dispute the validity of the subcontractor's lien. Select Excavation, LLC (Select) sued to foreclose its lien on a property owned by IDP TM Properties, LLC d/b/a IDP TM (IDP). Select filed a motion for partial summary judgment, which the trial court granted.<sup>1</sup> The trial court subsequently entered a final judgment, and IDP appealed.

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<sup>1</sup> After the trial court granted Select's motion for partial summary judgment, Select filed an unopposed motion for partial dismissal and entry of final judgment. The trial court entered an order of partial dismissal without prejudice as to Select's unadjudicated claims against IDP and then entered a final judgment.

In three issues, IDP argues that Select was not entitled to summary judgment because it failed to timely provide notice of its claim for unpaid retainage, file its lien affidavits, and provide a legally sufficient property description in the lien affidavits; IDP also asserts that the trial court incorrectly calculated damages. We reverse the trial court’s January 4, 2024 Order Granting Plaintiff Select Excavation, LLC’s Motion for Partial Summary Judgment and the January 23, 2024 Final Judgment Order. We remand this case to the trial court for further proceedings.

#### STANDARD OF REVIEW

We review a traditional summary judgment de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). A traditional motion for summary judgment requires the moving party to show that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lujan*, 555 S.W.3d at 84. If the movant satisfies its burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan*, 555 S.W.3d at 84. When “the trial court’s order does not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious.” *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

#### FACTUAL BACKGROUND

IDP owns property in Rockwall, Texas. In December 2021, IDP entered into a construction contract with Links Construction, Inc. (Links) to build its new

company headquarters (the Project). Links then subcontracted with Select in August 2022 to perform excavation services. Select furnished \$85,070.50 in labor and materials for the Project in October 2022.

IDP paid Links for the October 2022 work performed on the Project, but Links did not pay its subcontractors, including Select.<sup>2</sup> On December 2, 2022, Links sent a letter to IDP stating it could no longer serve as the general contractor for the Project. The penultimate sentence of Links' December 2 letter states: "Through a carbon copy of this letter, all the subcontractors and suppliers with direct contracts with Links are being notified of such action." Select presented evidence that it did not receive Links' notice.

Three days later, Select's project manager sent an email to IDP that referenced prior phone discussions between IDP and Select about Links' abandonment of the Project. The December 5, 2022 email states:

Good Afternoon[,] Brandon, as discussed earlier[,] here is [sic] the total amounts owed to us for the Rockwall IDP project from Links.

October: \$85,070.50  
November: \$35,472.35

Thank you[.]

Select's October and November "Application[s] for Payment" that it originally submitted to Links were attached to the email. The October Application for Payment

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<sup>2</sup> Select initially sought payment from IDP for its November 2022 work on the Project. Select subsequently was paid for that work by the second general contractor, and the November 2022 payment is not at issue in this appeal.

showed that the “Current Payment Due” amount was \$85,070.50 and the “Retainage” amount was \$25,542.91.

On December 17, 2022, Select mailed a document titled “Texas Notice of Claim for Unpaid Labor or Materials” to IDP. Select’s work is described as “Contractual Earthwork – Pay App #2 – October 2022 – First Notice.” The notice stated that the “Amount unpaid for work performed, or materials delivered” in October was \$85,070.50, which also was the “Total Amount Due to Claimant to date.” Select sent a substantially similar notice letter to IDP on January 13, 2023; however, the January letter was the “SECOND NOTICE.”

On February 15, 2023, Select filed a lien affidavit for unpaid work on the Project, which stated that it performed work in October 2022 valued at \$85,070.50. The lien affidavit provided: “The amount of this claim is \$85,070.50 and said amount is just and reasonable and is due and unpaid. Said claim constitutes the reasonable value of the materials furnished and/or labor performed after all credits, offsets, and payments have been allowed.” Approximately one month later, on March 13, 2023, counsel for Select sent a notice to IDP stating that Select had not been paid for the labor and materials it furnished in October 2022. The letter continued: “The total amount unpaid, due, and owing to Select through March 2023 is \$114,554.78, including all retainage accrued to date.” Counsel included Select’s October 2022 Application for Payment.

The following day, on March 14, 2023, Select filed an amended lien affidavit. The affidavit stated that Select “furnished labor, services, materials and/or equipment to the property in October 2022 and retainage for which payment has not been received.” Further, “[a]fter allowing all just credits, offsets, and payments, the amount of” \$114,554.78 “in progress payments and retainage, remains unpaid and is due and owing to” Select. Select claimed a lien on the property and its improvements.

Select sued IDP when it did not pay and subsequently moved for partial summary judgment to foreclose its lien. The trial court granted the motion. The order granting Select’s motion for partial summary judgment provided, in part, that the trial court found that Select had a valid and perfected mechanic’s and materialman’s lien against the property. Further, as to damages, the order stated: “The unpaid balance for [Select’s] work performed in October 2022 in the amount of \$85,070.50, and the retained funds withheld from [Select] in the amount of \$29,484.28<sup>3</sup> for a total amount of \$114,554.78.” Select’s remaining claims were dismissed, a final judgment was entered, and IDP filed this appeal.

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<sup>3</sup> The November Application for Payment, which Select attached to the December 5 email, shows the unpaid contractual retainage was \$29,484.28. The October Application for Payment lists the unpaid contractual retainage as \$25,542.91.

## LAW & ANALYSIS

The arguments in IDP’s third issue are dispositive of this appeal. Accordingly, we begin by considering whether Select timely filed notice of its claim for unpaid contractual retainage and a lien affidavit. *See* TEX. R. APP. P. 47.1.

Two types of retainage are at issue in this case: contractual and statutory. “‘Retained’ funds are funds withheld from the original contractor either under a contractual agreement or under [Texas Property Code] section 53.101, which requires a property owner to retain ten percent of the contract price for thirty days after the project is completed.” *Pham v. Harris Cnty. Rentals, L.L.C.*, 455 S.W.3d 702, 707 (Tex. App.—Houston [1st Dist.] 2014, no pet.). The subcontract between Links and Select provided that Links would withhold retainage from each progress payment made to Select and would retain ten percent of the subcontract price. Additionally, chapter 53 of the Texas Property Code<sup>4</sup> provides for statutory liens to contractors and suppliers such as Select who do not directly contract with a property owner. *Crawford Servs., Inc. v. Skillman Int’l Firm, L.L.C.*, 444 S.W.3d 265, 268 (Tex. App.—Dallas 2014, pet. dism’d); *see also Astra Ventures, LLC v. Serv. Steel*

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<sup>4</sup> In the 2021 legislative session, the Texas Legislature amended numerous provisions of Texas Property Code chapter 53, but it also provided that the amendments “apply only to an original contract entered into on or after the effective date of this Act”—January 1, 2022—while an original contract entered into before the effective date is “governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.” Act of May 28, 2021, 87th Leg., R.S., ch. 690, §§ 37–38, 2021 Tex. Gen. Laws 1423, 1436. The parties agree that, because the original contract was signed before January 1, 2022, the 2021 amendments to chapter 53 do not apply to this dispute. For ease of reading, all citations to property code chapter 53 in this opinion are to the version of the statute in effect before January 1, 2022.

*Warehouse Co., L.P.*, No. 01-23-00825-CV, 2025 WL 2470221, at \*6 (Tex. App.—Houston [1st Dist.] Aug. 28, 2025, no pet.) (mem. op.).

In its motion for partial summary judgment, Select argued that foreclosure of its lien is necessary and proper because

(i) Select is entitled to a lien against the Project’s property; (ii) Select has validly perfected its lien claim for its October 2022 progress payment; (iii) Select has validly perfected its lien claim for its retainage; (iv) Owner is withholding funds in an amount sufficient to satisfy Select’s total lien claims; and (v) Owner refuses to pay Select for its work, making foreclosure the principal option for protecting Select and swiftly enforcing its statutory lien under Chapter 53.

**A. Contractual Retainage**

*1. Waiver*

In its response to Select’s motion for partial summary judgment, IDP argued that Select failed to timely provide notice that it sought recovery of contractual retainage, as required by Texas Property Code section 53.057, and that it provided evidence consistent with its argument. In its reply in support of its motion for partial summary judgment, Select responded that its December 5 email, which was attached to its original motion, met the requirements of section 53.057 because that email was a notice of its outstanding debt and the attached Applications for Payment showed “not only the existence of a retainage agreement, *they expressly state the retainage amount still owed to Select.*”

After the trial court entered its final judgment, IDP filed a motion for reconsideration or new trial. In that motion, IDP reasserted its argument that Select

“failed to provide timely notice of its unpaid retainage claim” under section 53.057. In response, Select argued for the first time that IDP waived its right to challenge the timeliness of the notice.

Under Texas Rule of Civil Procedure 54, if the plaintiff pleads that all conditions precedent have been performed, the plaintiff is required to prove only those that the defendant specifically denies. *See* TEX. R. CIV. P. 54. “A defendant cannot generally deny that the plaintiff has not proved all conditions precedent, but must specifically deny which conditions precedent have not been met.” *Dallas Raceway, Inc. v. Pavecon, Ltd.*, No. 05-10-00712-CV, 2011 WL 1679869, at \*7 (Tex. App.—Dallas May 5, 2011, pet. denied) (mem. op.) (quoting *Wade & Sons, Inc. v. Am. Std., Inc.*, 127 S.W.3d 814, 826 (Tex. App.—Waco 2003, pet. denied)).

Select’s original petition included a claim to foreclose its mechanic’s and materialman’s lien. The petition stated that “[a]ll conditions precedent to Select’s right to bring these claims against Owner have been performed, have occurred, or have been excused.” In response, IDP filed a general denial and asserted affirmative defenses; it did not specifically deny that any condition precedent had not been performed. Because IDP did not specifically deny which conditions precedent had not been met, including the timeliness of the notice, Select believes that IDP waived its right to challenge the timeliness of the notice.

IDP “acknowledge[d] that lien notice and perfection issues are conditions precedent for purposes of Rule 54 and that its answer did not contain any specific

denials. Nevertheless, the notice and perfection issues were not waived in this case.” IDP contended that it could raise the timeliness and perfection issues in its summary judgment briefing. We consider whether the issue was tried by consent during the summary judgment proceedings.

“When both parties present evidence on an issue and the issue is developed during trial without objection, any defects in the pleadings are cured at trial, and the defects are waived.” *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009) (citing TEX. R. CIV. P. 67; *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445–46 (Tex.1993)). “Unpleaded claims or defenses that are tried by express or implied consent of the parties are treated as if they had been raised by the pleadings.” *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991).

To determine whether an issue has been tried by consent, we examine the record “not for evidence of the issue, but rather for evidence of trial of the issue.” *Mercadel v. Empire Vill. Apartments*, No. 14-22-00079-CV, 2023 WL 142408, at \*3 (Tex. App.—Houston [14th Dist.] Jan. 10, 2023, no pet.) (mem. op.) (quoting *Hamdan v. Hamdan*, No. 14-16-00648-CV, 2017 WL 4930933, at \*12 (Tex. App.—Houston [14th Dist.] Oct. 31, 2017, pet. denied) (mem. op.)); *see also Sage St. Assocs.*, 863 S.W.2d at 446. Parties may try an issue by consent in summary judgment proceedings. *See Roark*, 813 S.W.2d at 495.

The record shows that whether Select timely provided notice of its unpaid retainage claim was before the trial court when it considered Select’s motion for

partial summary judgment. IDP briefed the issue and provided evidence in support of its argument. Select then presented a substantive response explaining why it believed its notice was timely, including reliance on its December 5 email that it had attached to its motion for partial summary judgment. Both parties presented substantive arguments and evidence about whether the notice was timely provided, allowing the issue to be before the trial court during the summary judgment proceedings. Select did not object or posit that IDP had waived this argument. Select first raised its waiver argument in its response to IDP’s motion for reconsideration or for new trial. However, Select could not wait until the motion for new trial stage to raise IDP’s failure to specifically deny the allegations for the first time. *See Mercadel*, 2023 WL 142408, at \*3. We conclude that the issue was tried by consent. Accordingly, IDP’s failure to specifically deny that any condition precedent had not been satisfied did not preclude it from raising the issue on appeal. *See Ingram*, 288 S.W.3d at 893.

2. *Adequacy of the December 5 Email*

Texas Property Code section 53.057 is a notice provision that sets forth the procedure for a claimant to perfect a lien on contractual retainage. *See Precision Roofing, Inc. v. Zavelson*, No. 03-17-00550-CV, 2018 WL 5852680, at \*4 (Tex. App.—Austin Nov. 9, 2018, no pet.) (mem. op.) (“The plain statutory language reflects that the legislature intended Section 53.057 to address contractual, rather than statutory, retainage claims.”). Section 53.057 states that a claimant must give

an owner notice of contractual retainage not later than the 30th day after the date the original contract is abandoned. *See* TEX. PROP. CODE ANN. § 53.057(b)(2). As is relevant here, the “notice must generally state the existence of a requirement for retainage” and contain the name and address of the claimant and the subcontractor. *See id.* § 53.057(c).

Select argues that its December 5 email, including the attachments, which it sent to IDP three days after Links abandoned the Project, satisfied the statute because the Applications for Payment “show not only the existence of a retainage agreement, *they expressly state the retainage amount still owed to Select.*” IDP disagrees because the body of the December 5 email “only references the unpaid work amount and says nothing about retainage being owed,” and the attachments are merely Applications for Payment that Select addressed to and sent to Links.

Select’s motion for partial summary judgment included an affidavit from its office manager who averred that “[a] few days after Links’ abandonment, Dylan Jackson, a former project manager for Select, notified Owner that Select was owed \$85,070.50 for October’s progress payment and \$35,472.35 for November’s progress payment. Attached as Exhibit A-5 is a true and correct copy of email correspondence between Select and Owner, dated December 5, 2022 to March 3, 2023. Jackson attached the pending Applications for Payment for each of the outstanding payments owed to the December 5th notice.” The December 5 email stated that Select sought to recover the “total amount owed to us” for October, which

was \$85,070.50. The October Application for Payment that supported the email referred to the \$85,070.50 as the “CURRENT PAYMENT DUE,” which also is the amount that Select seeks to recover for its unpaid work claim in this case.

Neither the email nor attachments indicate that Select was seeking to recover unpaid contractual retainage from IDP on December 5. The affidavit, which was part of Select’s summary judgment evidence, shows that Select was only notifying IDP that it was owed \$85,070.50 for October’s progress payment and \$35,472.35 for November’s. Nothing about the December 5 email, including its attachments, indicated that Select was seeking to recover contractual retainage from IDP at that time. While the Applications for Payment, which were addressed to Links (not IDP), included a line item titled “RETAINAGE” and listed the October retainage amount as \$25,542.91, we cannot conclude that these line items satisfied the statutory notice requirement.<sup>5</sup>

To satisfy its summary judgment burden, Select was required to prove that it provided its contractual retainage notice no later than the 30th day after the date that Links abandoned the contract. *See* TEX. PROP. CODE ANN. § 53.057(b)(2). The December 5 email was insufficient. Likewise, the December 17, 2022 First Notice, which stated the “Amount unpaid for work performed, or materials delivered” in October and “Total Amount Due to Claimant to date” was \$85,070.50 did not do

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<sup>5</sup> We also note that Select did not send the December 5 email to IDP’s last known business address, as the statute requires. *See* TEX. PROP. CODE ANN. § 53.057(d).

so—nor does Select argue that it did. The First Notice, like the December 5 email, only gave notice that Select sought to recover money for unpaid work and materials rather than unpaid contractual retainage as well. Select did not send any other notices to IDP before the 30-day deadline.

In the trial court, Select urged a second reason to explain how it timely provided notice.<sup>6</sup> Select argued that “Section 53.057 expressly authorizes notice of retainage to be given pursuant to Section 53.056 instead of Section 53.057.” It believed that it gave notice as provided in section 53.056, thus satisfying the requirements of section 53.057.

Section 53.057(a) states in part that “[a] claimant may give notice under this section instead of or in addition to notice under Section 53.056.” TEX. PROP. CODE ANN. § 53.057(a). Select misinterpreted this provision and flipped the statutory language on its head—Select read the statute to allow the notice requirements of section 53.057 to be met by giving notice according to section 53.056, which Select believed that it did. However, the statute provides that the section 53.056 notice requirements may be met by giving notice under section 53.057. *See generally id.* Section 53.057 does not provide an alternative means to satisfy its notice requirement. *See id.*

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<sup>6</sup> Although Select does not advance this argument on appeal, it was a ground on which the trial court could have granted the motion for partial summary judgment. Accordingly, we address it on appeal. *See Knott*, 128 S.W.3d at 216.

We conclude that Select failed to meet its summary judgment burden to prove that it gave notice that it sought to recover contractual retainage from IDP as required by section 53.057. We sustain IDP's third issue to this extent.

### **B. Statutory Retainage**

IDP also argues that Select's lien for statutory retainage is invalid because Select did not timely file the required lien affidavit. A property owner must reserve funds while construction is in progress, and those funds secure payment for persons who furnish material and labor. *See generally* TEX. PROP. CODE ANN. §§ 53.101, 53.102. As applicable here, a claimant has a lien on the retained funds if the claimant (1) sends the required notices under chapter 53 and (2) with specific exceptions discussed below, files a lien affidavit within thirty days of the date the original contractor abandons performance. *See id.* § 53.103; *see also Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 722 (Tex. 2003) ("A subcontractor or other claimant who wants to make a claim on that retainage must properly give notice and file" an affidavit). A party such as Select who does not directly contract with the property owner must comply with chapter 53 to perfect a statutory mechanic's lien. *Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co., LC*, 437 S.W.3d 597, 602 (Tex. App.—Dallas 2014, no pet.).

To foreclose a statutory lien, the lienholder must prove it performed the labor or furnished the materials, the debt is valid, and it substantially complied with the statutory requirements for perfecting a lien. *See Crawford Servs., Inc.*, 444 S.W.3d

at 268. In this appeal, the parties disagree about whether Select timely perfected its lien as the statute requires because Select did not file a lien affidavit until February 15, 2023, which was more than thirty days after the date that Links abandoned its performance under the original contract. *See* TEX. PROP. CODE ANN. § 53.103.

Section 53.103 requires the lien affidavit to be filed within thirty days that the original contractor abandons performance, “except as allowed by Section 53.057(f).” *Id.* § 53.103. Select argues that it benefits from the section 53.057(f) exception, which states that a claimant has a lien on the retained funds if the claimant:

- (1) gives notice in accordance with this section and:
  - (A) complies with Subchapter E;<sup>7</sup> or
  - (B) files an affidavit claiming a lien not later than the earliest of:
    - (i) the date required for filing an affidavit under Section 53.052;<sup>8</sup> [or]
    - ...
    - (iii) the 40th day after the date of termination or abandonment of the original contract, if the owner sent the claimant a notice of such termination or abandonment in the time and manner required; [and]
    - ...
- (2) gives the notice of the filed affidavit as required by Section 53.055.<sup>9</sup>

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<sup>7</sup> Subchapter E is titled Funds Reserved for Benefit of Lien Claimants and includes sections 53.101 through 53.107. Neither party argues that Select failed to comply with the provisions in Subchapter E, except as they relate to section 53.103.

<sup>8</sup> Section 53.052, titled Filing of Affidavit, states that a person claiming the lien must file an affidavit with the county clerk of the county in which the property is located not later than the 15th day of the fourth calendar month after the day on which the indebtedness accrues. TEX. PROP. CODE ANN. § 53.052(a). Indebtedness to a subcontractor who furnished labor or material to an original contractor accrues on the last day of the last month in which the labor was performed or the material furnished. *Id.* § 53.053(c) (Accrual of Indebtedness).

<sup>9</sup> Section 53.055, titled Notice of Filed Affidavit, provides that “[a] person who files an affidavit must send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner’s last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk.” TEX. PROP. CODE ANN. § 53.055(a). Neither party argues that Select failed to comply with section 53.055.

*Id.* § 53.057(f). The parties disagree about whether Select was required to file its affidavit under prong (i) or (iii).

On appeal, Select maintains that the first prong is the only prong that applies, and it timely gave notice as required by section 53.052 when it filed its initial lien affidavit on February 15, 2023, and amended lien affidavit on March 14, 2023. In response, IDP argues that, if Select is going to rely on the exceptions in section 53.057(f), then the third prong applies, and Select was required to give notice not later than the fortieth day after the date that Links abandoned the original contract. Select believes that prong (iii) cannot be the relevant provision because IDP never provided notice that Links abandoned the contract. IDP responds that it was not required to give notice based on property code section 53.107(a).

Section 53.107 provides that, not later than the tenth day after the date that an original contractor abandons performance of the original contract, “the owner shall give notice to each subcontractor who, *before the date of termination or abandonment*, has” given notice to the owner as provided by section 53.056, 53.057, or 53.058 or has sent to the owner a written request for notice of termination or abandonment. *Id.* § 53.107(a) (emphasis added). The statute specifies what information must be contained in the notice from the owner to the subcontractor. *Id.* § 53.107(b). If an owner is required to send a section 53.107 notice to a subcontractor and fails to do so, the subcontractor is not required to comply with section 53.057 to

claim statutory retainage and may claim a lien by filing a lien affidavit as prescribed by section 53.052. *Id.* § 53.107(c).

Select presented no evidence that it gave any notices to IDP or sent a written request for notice of abandonment to IDP before the date that Links abandoned the original contract. IDP, however, presented evidence that “[p]rior to December 2, 2022, IDP did not receive any notice from Select of any unpaid work or retainage. Additionally, Select did not request that IDP provide written notice of termination or abandonment of the original contract prior to December 2, 2022.” We take this evidence as true. *See Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 131 (Tex. 2019) (appellate courts take evidence favorable to the nonmovant as true and indulge every reasonable inference and resolve every doubt in the nonmovant’s favor). Because Select did not provide the section 53.107 notice to IDP, IDP was not required to provide affirmative notice to Select in order for prong (iii) of section 53.057(f) to apply.

Section 53.057(f) states that a claimant must file its affidavit “claiming a lien not later than the *earliest of*” the provided deadlines. *See id.* § 53.057(f) (emphasis added). The “the 40th day after the date of termination or abandonment of the original contract” was earlier than “the date required for filing an affidavit under Section 53.052.” Accordingly, Select was required to file its lien affidavit by the fortieth day after the date that Links abandoned the contract, or January 11, 2023, as provided for in prong (iii) in order to benefit from the exception to the timing

requirement set forth in section 53.103. Select did not do so. Instead, it filed its first lien affidavit on February 15, 2023.

Because Select failed to meet its summary judgment burden to establish that a section 53.057(f) exception applied, the thirty-day deadline stated in section 53.103 is the relevant provision for our analysis. *See id.* §§ 53.057, 53.103. It is uncontested that Select did not provide evidence that it filed a lien affidavit within thirty days of the date that Links abandoned performance of the original contract. *See id.* § 53.103.

We conclude that Select did not meet its summary judgment burden to show that it timely perfected its statutory lien and complied with chapter 53. *See Addison Urban Dev. Partners, LLC*, 437 S.W.3d at 602 (a party who does not directly contract with the property owner must comply with chapter 53 to perfect a statutory mechanic's lien). We sustain IDP's third issue to this extent.

Having sustained IDP's third issue in part, we do not consider IDP's first and second issues in which it argues that the trial court erred by awarding damages that exceed the statutory maximum of the retainage fund under the property code and by awarding recovery to Select that exceeded Select's ratable share of the retainage fund. *See* TEX. R. APP. P. 47.1. We also do not consider the argument in its third issue that Select failed to timely provide a legally sufficient property description in its lien affidavits. *See id.*

## CONCLUSION

The trial court's order granting Select's motion for partial summary judgment states that Select has a valid and perfected mechanic's and materialman's lien against IDP's property for work and materials furnished in the construction of the property. It ordered that the property "be foreclosed so that Plaintiff may recover its debt, damages, and costs awarded herein." The trial court's damages award includes "[t]he unpaid balance for Plaintiff's work performed in October 2022 in the amount of \$85,070.50, and the retained funds withheld from Plaintiff in the amount of \$29,484.28 for a total amount of \$114,554.78."

Because Select failed to meet its summary judgment burden to prove that it timely noticed its claim for unpaid contractual retainage and filed its lien affidavits in order to recover statutory retainage, the trial court erred by granting Select's motion for partial summary judgment, ordering foreclosure of the property, and awarding damages.

We reverse the trial court's January 4, 2024 Order Granting Plaintiff Select Excavation, LLC's Partial Motion for Summary Judgment and January 23, 2024 Final Judgment Order. We remand this case to the trial court for further proceedings.

/Cynthia Barbare/  
CYNTHIA BARBARE  
JUSTICE



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

IDP TM PROPERTIES, LLC D/B/A  
IDP TM, Appellant

No. 05-24-00488-CV      V.

SELECT EXCAVATION, LLC,  
Appellee

On Appeal from the County Court at  
Law No. 1, Rockwall County, Texas  
Trial Court Cause No. 1-23-0478.  
Opinion delivered by Justice Barbare.  
Justices Kennedy and Jackson  
participating.

In accordance with this Court's opinion of this date, the trial court's January 4, 2024 Order Granting Plaintiff Select Excavation, LLC's Partial Motion for Summary Judgment and January 23, 2024 Final Judgment Order are **REVERSED**. This cause is **REMANDED** to the trial court further proceedings.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 18th day of December, 2025.