No. 19-1852

IN THE SUPREME COURT OF IOWA

LARRY C. BEVERAGE, Individually and as Personal Representative of the Estate of CHARLES E. BEVERAGE, deceased, LINDA K. ANDERSON, and BONNIE K. VALENTINE,
Plaintiffs/Appellants

vs.

ALCOA, INC., a Pennsylvania Corporation, and IOWA-ILLINOIS TAYLOR INSULATION, INC., successor-in-interest to IOWA ILLINOIS THERMAL INSULATION, INC., an Iowa Corporation,
Defendants/Appellees.

Appeal from the Scott County District Court,
District Court No. LACE129455,
The Honorable Patrick A. McElyea, presiding

APPELLANTS' AMENDED PROOF BRIEF

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STATEMENT OF THE ISSUES

The district court's grant of summary judgment to Defendants/Appellees Alcoa, Inc. and Iowa-Illinois Taylor Insulation ("IITI") raises the following issues for review:

I. Does retroactive application of Iowa Code § 686B.7(5) to bar the Beverages' vested claims against Alcoa and IITI violate their rights to due process under the United States and Iowa constitutions?

Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007)

In re Estate of Adams, 599 N.W.2d 707 (Iowa 1999)

Greenwell v. Meredith Corp., 189 N.W.2d 901 (Iowa 1971)

Kragel v. Wal-Mart Stores, Inc., 537 N.W.2d 699 (Iowa 1995)

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Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967)

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Scott v. City of Sioux City, 432 N.W.2d 144 (Iowa 1988).

Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981)

Audubon-Exira Ready Mix, Inc. v. Ill. Cent. Gulf R. Co., 335 N.W.2d 148 (Iowa 1983)

In re Estate of Hoover, 251 N.W.2d 529 (Iowa 1977)

II. Did the district court err in interpreting Iowa Code § 686B.7(5) to bar all asbestos exposure claims against premises owners and product suppliers when the statute is clearly intended only to protect product manufacturers through the "bare metal" defense?

Insituform Techs., Inc. v. Employment Appeal Bd., 728 N.W.2d 781 (Iowa 2007)

In re Det. of Johnson, 805 N.W.2d 750 (Iowa 2011)

Primm v. Iowa Dep't of Transp., 561 N.W.2d 80 (Iowa 1997)

Doe v. Iowa Dep't of Human Servs., 786 N.W.2d 853 (Iowa 2010)

State v. Carpenter, 616 N.W.2d 540 (Iowa 2000)

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Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990)

Trainer v. Kossuth County, 199 Iowa 55, 201 N.W. 66 (1924)

Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019)

Thurmon v. Georgia Pac., LLC, 650 F. App'x 752 (11th Cir. 2016)

Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791 (E.D. Pa. 2012)

In re: Asbestos Prod. Liab. Litig. (DeVries), 873 F.3d 232 (3d Cir. 2017)

Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019)

III. Does Iowa Code § 686B.7(5) violate the equal protection provisions of the United States and Iowa constitutions by singling out the class of persons injured by asbestos exposure to deprive them of a remedy against premises owners and product suppliers?

Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007)

In re Estate of Adams, 599 N.W.2d 707 (Iowa 1999)

Miller v. Boone Cty. Hosp., 394 N.W.2d 776 (Iowa 1986)

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ROUTING STATEMENT

This appeal should be decided by the Iowa Supreme Court as it presents substantial constitutional questions as to the validity of a statute, substantial issues of first impression, and involves fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(a), (c), & (d).

STATEMENT OF THE CASE

This lawsuit arises out of Decedent Charles E. Beverage's exposure to asbestos insulation at the Alcoa plant in Bettendorf, Iowa for twenty years, from the 1950s to the 1970s. The plant was owned by Defendant/Appellee Alcoa, and much of the asbestos insulation was installed by Defendant/Appellee IITI. Charles[1] died from malignant mesothelioma, a cancer uniquely caused by asbestos exposure, on October 7, 2015. Wrongful death and survival claims were brought by Charles's children: his son, who was appointed the representative of his estate, and his two daughters.

Alcoa and IITI moved for summary judgment, arguing that the Beverage family's claims were barred by a provision in the recently enacted tort reform provision for asbestos and silica claims, Iowa Code § 686B.7(5). This section provides that "[a] defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." The provision "applies to

[1] Charles Beverage is referred to herein as "Charles" to avoid confusion with his son, Larry Beverage, who is a plaintiff and also a witness in the case. No disrespect is intended.

all asbestos actions and silica actions filed on or after July 1, 2017." Iowa Code § 686B.9.

The trial court agreed with Defendants/Appellees and interpreted the statute to bar asbestos exposure claims against premises owners and insulation contractors that did not actually make the asbestos products at issue. He granted summary judgment to Alcoa and IITI via order dated October 1, 2019.

The trial court's summary judgment ruling is in error for three reasons. First, application of Iowa Code § 686B.7(5) unconstitutionally deprives the Beverage family of a vested right against Alcoa and IITI. Their right to bring wrongful death and survival claims accrued at the time of Charles's death in 2015, but the statute did not go into effect until July 1, 2017. Under established Iowa law, it violates due process to apply the statute retroactively to deprive them of a vested right.

Second, the district court's interpretation of Section 686B.7(5) is not supported by the language or intent of the statute. The district court's interpretation contravenes established rules of statutory construction, failing to consider the statutory language as a whole and adopting an overly broad and unsupported definition of "defendant."

The court further failed to consider the legislative intent, which was clearly to adopt the "bare metal defense" to limit the liability of asbestos product manufacturers for asbestos replacement parts made by third parties. The district court's interpretation leads to an absurd result of completely abolishing all causes of action against premises owners that created dangerous conditions on their property through careless use of asbestos, and asbestos insulation contractors that sold asbestos products.

Third, if the statute is properly interpreted to abolish asbestos exposure claims against premises owners and asbestos product suppliers, it violates the equal protection provisions of the United States and Iowa constitutions. Those suffering asbestos-related injuries are unconstitutionally singled out and deprived of a remedy for their injuries against premises owners and product suppliers, whereas persons with other types of injuries still have claims against these categories of defendants. This violates equal protection because there is no rational basis for this disparate treatment. Section 686B.7(5) is unconstitutional and should be stricken in its entirety.

STATEMENT OF FACTS

I. Charles Beverage's asbestos exposures at Alcoa.

Charles Beverage was diagnosed with malignant mesothelioma in September 2015 and died of mesothelioma on October 7, 2015. (Death Certificate; Holstein Report, at 5). Although Charles was not able to give a deposition before he died, testimony from his son, former employee, and others who worked at Alcoa establish his exposure.

Charles worked at Alcoa's Davenport aluminum plant in Bettendorf, Iowa, between the 1950s and mid-1970s. (Larry Beverage Dep. at 10:16-24, 16:5-12; Allers Dep. at 21:6-9). He was not an employee of Alcoa. (Larry Beverage Dep. at 18:2-10). He was a general construction contractor at Alcoa and his own company, Beverage Construction Company, had an office inside the plant. (Larry Beverage Dep. at 14:15-17:21; Allers Dep. at 17:1-6, 18:4-10, 18:16-19:15). His work took him into all areas of the plant. (Allers Dep. at 17:7-16).

One of his co-workers, Edward Allers, worked with Charles at Alcoa from 1961 to 1971. (Allers Dep. at 10:10-11:15, 28:21-24, 33:21-34:8). He saw Charles working around the installation and removal of insulation on steam lines. (Allers Dep. at 40:14-41:19, 65:1-5). Charles

was also exposed to other asbestos products like transite board, insulating cement, and insulation blankets. (Allers Dep. at 59:4-60:14, 46:8-53:7, 144:13-145:25).

In Allers' experience, IITI was the only insulation contractor at the plant and they installed insulation throughout the whole plant. (Allers Dep. at 42:1-21, 114:23-115:2, 149:7-15). IITI installed asbestos insulation at the plant between 1965 and 1972. (Allers Dep. at 110:3-111:22, 113:21-25, 119:4-120:17).

Alcoa has acknowledged that it used asbestos insulation and other asbestos materials for processes associated with the manufacture of aluminum in the 1960s. (Shockey Dep. at 30:12-19; Alcoa Asbestos Program Status Report, Jan. 20, 1989). Alcoa installed asbestos-containing insulation in the 1960s. (Shockey Dep. at 79:11-20, 71:17-72:23, 79:11-20). Alcoa's standard specification for steam piping required asbestos-containing insulation. (Alcoa Construction Department Engineering Standard, Apr. 7, 1966, at §2.4). Even as late as 2008, 85 percent of thermal insulation that was in the plant still contained asbestos. (Shockey Dep. at 95:13-96:7).

Despite the widespread use of asbestos insulation at its Davenport plant in the 1960s and 1970s, Alcoa had no communication protocols to warn contractors about asbestos at the plant. (Shockey Dep. at 123:16-21). Allers never saw any warning signs about the hazards of dust at the plant, no requirements to use respirators, no wet-down methods used on the insulation, and no plastic sheeting used to section off insulation work. (Allers Dep. at 61:22-63:1).

This despite the fact that Alcoa has been aware of the hazards of asbestos in relation to causing asbestosis since the 1940s. (Shockey Dep. at 43:3-6). Alcoa became aware that asbestos can cause cancer in the 1950s. (Shockey Dep. at 43:24-44:20). Alcoa was aware of the studies linking asbestos to mesothelioma in the 1960s. (Shockey Dep. at 44:22-45:16).

In addition to acting as an insulation contractor, IITI also sold asbestos-containing material to various customers, including Alcoa. (Groves Dep., 7/26/19, at 112:3-19; 112:30-113:10; IITI Discovery Resp. at 2). It sold asbestos insulation and insulating cement. (Groves Dep., 5/2/06, at 47:6-49:15, 52:14-53:4). Documents establish that IITI sold

substantial quantities of asbestos-containing insulation to Alcoa in the 1960s and 1970s. (Groves Dep., 5/2/06, at 109:9-19, 84:1-17).

Iowa has long had employment standards regulating asbestos exposure. Iowa began compensating workers for occupational diseases related to exposure to asbestos in 1936. (Groves Dep. 7/26/19**,** at 182:4-186:15). In 1968, Iowa published employment safety rules establishing threshold limit values for air-borne concentrations of substances which could cause occupational illnesses. (Iowa Dept. Rules at pg. 32-33).

Soon thereafter, in 1971, the Occupational Safety and Health Administration (OSHA) was created by act of Congress. (Holstein Report at 21). Its first regulatory activity was an emergency standard for asbestos of twelve fibers per cubic centimeter of air (f/cc). (Holstein Report at 21). This was quickly lowered to 5 f/cc, and in 1976 to 2 f/cc. Since then, the asbestos standard was progressively lowered to its present value of 0.1 f/cc. (Holstein Report at 21).

Asbestos fibers are invisible to the naked eye, even at very high concentrations. (Holstein Report at 10). Workers usually do not even know they are being exposed to a carcinogen. (Holstein Report at 23).

Plaintiffs' medical causation expert, Dr. Holstein, concluded that Charles experienced exposures to asbestos beginning no later than 1967 and continuing to about 1976 on the premises of the Alcoa plant in Bettendorf, Iowa. (Holstein Report at 7). He explained that "[t]he aluminum operations described in the testimony of Larry Beverage would certainly have involved the ubiquitous usage of asbestos-containing thermal insulation products throughout the plant in that era. Maintenance, repair, and new construction activities that tied into the old equipment would most certainly have caused large releases of asbestos dust from such equipment and from installation of new equipment." (Holstein Report at 7).

Given that Charles was "continually in the production areas throughout the plant, and because he was there for construction activities of the type that would cause disruption of asbestos-containing thermal insulation products, it is inevitable that he would have inhaled asbestos dust on many occasions and often at very substantial concentrations." (Holstein Report at 7). Charles's asbestos exposures cumulatively constituted the direct and sole cause of his malignant pleural mesothelioma, which caused his death. (Holstein Report at 7).

II. Procedural history of this case.

The Beverage family filed their Original Petition at Law, asserting wrongful death and survival claims against Alcoa and IITI, on September 27, 2017. (Petition). Therein, they alleged that Charles had died of malignant mesothelioma. (Petition at 3).

Alcoa and IITI sought summary judgment on the grounds that the Beverages' claims were barred by Iowa Code § 686B.7(5). After briefing and argument, the trial court agreed and granted summary judgment to Defendants/Appellees. (Dist. Ct. Order at 9). This timely appeal followed.

ARGUMENT

I. The district court erred in applying Iowa Code § 686B.7(5) in a manner that unconstitutionally deprived the Beverages of their vested rights against Alcoa and IITI.

While the due process clause was not invoked below, the Beverages argued in the trial court that they retained their premises liability claims against Alcoa and that the statute does not override longstanding Iowa premises liability law. (Alcoa MSJ Response at 11-14; Hearing Tr. at 30-34). They similarly argued that they retained

their product liability claims against IITI. (IITI MSJ Response at 10-11, 13-15). The trial court disagreed. (Dist. Ct. Order at 8-9).

A constitutional challenge to a district court's order is reviewed *de novo*. *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 258 (Iowa 2007); *In re Estate of Adams*, 599 N.W.2d 707, 709 (Iowa 1999).

A. The Beverage family's common law claims accrued against Alcoa and IITI at the time of Charles's death.

At the time of Charles's death in October 2015, the law provided for premises liability claims against Alcoa and product liability claims against IITI.

With regard to Alcoa, Iowa law provided (and still provides) that landowners who hire independent contractors have a non-contractual duty to take reasonable precautions to keep the premises in a safe condition. *See Greenwell v. Meredith Corp.*, 189 N.W.2d 901, 905 (Iowa 1971). "The weight of authority supports the rule that, independently of contract or statute, one who is having work done on his premises by an independent contractor is under the obligation to use ordinary care to keep the premises in a reasonably safe condition for the servants of the contractor." *Id.* Reiterating this holding, this Court later held that "a

possessor of land is subject to liability to its invitees if its premises are not in a reasonably safe condition whether the possessor maintained the premises itself or hired an independent contractor to do so." *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 704 (Iowa 1995).

After *Kragel*, this Court abolished the distinctions between invitees and licensees in premises liability cases. In *Koenig v. Koenig*, 766 N.W.2d 635, 645-46 (Iowa 2009), the Court officially abandoned the invitee-licensee distinction and "impose[d] upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors."

Alcoa thus had a duty to exercise reasonable care to maintain its premises in a manner that would be safe for Charles, a lawful (and long term) visitor at Alcoa's Bettendorf plant. The Beverages' evidence showed that, in contravention of this duty, Charles was routinely exposed to asbestos insulation on Alcoa's premises in the 1950s, 1960s, and 1970s, that Alcoa was aware that asbestos was being used on its premises, that Alcoa had known since the 1940s that asbestos exposure could cause fatal disease, and that Alcoa did not take precautions to warn or protect Charles from asbestos exposure.

Further, with regard to IITI, under Iowa products liability law, a plaintiff may state a claim by showing that their injury was caused by a product that was manufactured *or supplied* by the defendant. *Spaur v. Owens–Corning Fiberglas Corp.,* 510 N.W.2d 854, 858 (Iowa 1994) (quoting *Mulcahy v. Eli Lilly & Co.,* 386 N.W.2d 67, 76 (Iowa 1986)). As noted, IITI supplied and installed asbestos insulation at Alcoa. (Groves Dep., at 112:3-19).

The Beverage family brought forth evidence that Charles's exposure to asbestos at Alcoa, and from thermal insulation installed by IITI, was the cause of his mesothelioma. (Holstein Report at 7). This satisfies the causation requirements for an asbestos case in Iowa. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 859–60 (Iowa 1994).

Importantly, these claims against Alcoa and IITI accrued when Charles was diagnosed with mesothelioma in 2014. Generally, a "cause of action accrues when an aggrieved party has a right to institute and maintain a suit." *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 460 (Iowa 1989); *Chrischilles v. Griswold*, 260 Iowa 453, 461, 150 N.W.2d 94, 99 (1967). Tort actions accrue when all elements of the cause of action have occurred and are known to the plaintiff. *Thorp*, 446

N.W.2d at 460; *LeBeau v. Dimig*, 446 N.W.2d 800, 801 (Iowa 1989). As a general rule, no cause of action accrues under Iowa law until the wrongful act produces injury to the claimant. *Scott v. City of Sioux City*, 432 N.W.2d 144, 147 (Iowa 1988).

When Charles died of mesothelioma in 2015, his claims survived in his heirs. Iowa Code § 611.20; *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981), *overruled on other grounds by Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R. Co.*, 335 N.W.2d 148 (Iowa 1983). In addition, upon his death from mesothelioma, a wrongful death claim accrued to his children for loss of parental consortium. Iowa Code § 613.15; *Audubon-Exira Ready Mix,* 335 N.W.2d at 151-52; *see also Thorp*, 446 N.W.2d at 460 (holding that in tort cases involving death, the cause of action accrues upon the date of death when the statute of limitations begins to run) (citing *In re Estate of Hoover*, 251 N.W.2d 529, 531 (Iowa 1977)).

Here, the Beverage family had accrued causes of action against Alcoa and IITI for Charles's asbestos-related cancer at the time of his death in 2015, long before the Iowa legislature enacted Iowa Code § 686B.7(5).

B. The district court's retroactive application of Iowa Code § 686B.7(5) deprived the Beverage family of their vested property rights in violation of state and federal due process protections.

By applying Iowa Code § 686B.7(5) retroactively to deprive the Beverage family of their accrued causes of action against Alcoa and IITI, the district court deprived them of a vested right in violation of due process guarantees.[2]

The Fourteenth Amendment of the United States Constitution provides that the states shall not "deprive any person of . . . property, without due process of law." The Iowa Constitution likewise guarantees that "no person shall be deprived of . . . property without due process of law." Iowa Const. art. I, § 9.

This Court has recognized that an accrued cause of action is a vested property right protected by the due process guarantees of the U.S. and Iowa constitutions. *Thorp*, 446 N.W.2d at 460. Both the federal and state constitutions "preclude legislative changes that disturb the vested rights of" Iowa citizens. *Id.* at 463; *see also W. Des Moines State*

[2] This argument assumes that Iowa Code § 686B.7(5) was intended to abolish asbestos claims against premises owners and product suppliers, a claim which Plaintiffs/Appellants disagree with and that is challenged in Section III.

Bank v. Mills, 482 N.W.2d 432, 435–36 (Iowa 1992) ("A retrospective law that extinguishes a vested right in property violates due process.").

Due process protects vested rights from a retroactive application of substantive changes in the law. *Id.* at 461-62. "Substantive law is 'that part of the law which creates, defines, and regulates rights.'" *Id.* (quoting *Schmitt v. Jenkins Truck Lines, Inc.*, 260 Iowa 556, 560, 149 N.W.2d 789, 791 (1967)). "[A] statutory amendment that takes away a cause of action 'that previously existed and does not give a remedy where none or a different one existed previously' is substantive, rather than merely remedial, legislation." *Id.* at 461 (quoting *Vinson v. Linn-Marr Community School Dist.*, 360 N.W.2d 108, 121 (Iowa 1984)).[3]

The principle that substantive changes in the law may not be applied retroactively was applied by this Court in *Pfiffner v. Roth*, 379 N.W.2d 357 (Iowa 1985). There, the Court considered an amendment to the Iowa Competition Law that exempted cities from prohibitions on

[3] By contrast, changes that are remedial or procedural in nature may be applied retroactively with no due process concerns. For example, retroactive application of a statute discontinuing unlimited joint and several liability in tort cases was permitted because plaintiffs still retained their causes of action against the same tortfeasors and the burden of proof remained unchanged. *See Baldwin v. City of Waterloo*, 372 N.W.2d 486, 492 (Iowa 1985).

state-run monopolies. *Id.* at 358. At issue was a city ambulance licensing system that stifled an ambulance business attempting to compete with city services. *Id.* The Court held that "a change such as this, which provided for an exemption where none existed before, would have to be considered a substantive change." *Id.* at 359. And "[i]n interpreting such an amendment to a statute, there is a presumption of a change in legal rights." *Id.* Quite simply, because "this plaintiff had a right of recovery against the city under the old law but would have none under the new one," it could not be given retrospective effect. *Id.* at 360.

In *Thorp*, this Court considered the retroactive application of a dramshop law that had been amended to narrow the class of persons liable for selling alcohol to an intoxicated person that caused injury to others. 446 N.W.2d at 459. Prior to the amendment, the law provided a cause of action against anyone who sold or gave alcohol to a person that was intoxicated. *Id.* After the amendment, liability was limited to those who "sold and served" the alcohol to a person they knew or should have known was intoxicated. *Id.* The amendment had the effect of precluding the plaintiff's claim against a store that sold beer to a drunk driver that killed her son because she could not allege that the store had also

"served" the beer. *Id.* The amendment applied to all cases filed on or after July 1, 1986, which was after the fatal accident in 1985 but before the plaintiff filed her claim in 1987. *Id.* at 459-60.

First, this Court held that the plaintiff's cause of action against the alcohol seller accrued, and became a vested right, at the time of the injury. *Id.* at 460. Moreover, the dramshop law could not be applied retroactively because it deprived the plaintiff of a vested cause of action. The Court explained that "[t]he effect of the 1986 amendment to the Dramshop Act requiring that the seller of intoxicants also serve them is to preclude plaintiff's cause of action against a convenience store that only sells beer." 446 N.W.2d at 462. This was a substantive change in the law because it resulted in "a substantial reduction in the total remedies available to plaintiff against sellers of beer and liquor to intoxicated persons and as such deprived her of her vested cause of action without due process of law." *Id.* The statute impermissibly provided for retrospective application by applying to existing causes of action not filed by July 1, 1986, thereby eliminating the plaintiff's claim that was filed after that date. *Id.* Because the "plaintiff had a vested property right in her cause of action against" the convenience store,

such "retroactive application of the 1986 amendment destroyed that right in violation of due process under both the federal and state constitutions." *Id.* at 463. The new law could not be applied to her vested cause of action. *Id.*

The same result was reached in *Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896 (Iowa 1996). *Veasley* involved a trucking accident and a suit against the owner of the truck. *Id.* at 897. The defendant urged the retroactive application of a 1995 amendment to Iowa Code § 321.493 providing that the "owner" of a vehicle means the person to whom it is leased, not the person who holds the title. *Id.* at 900-01. Retroactive application would have completely eliminated the claim against the trucking company. *Id.* at 901. Because the plaintiff's injuries occurred prior to the amendment, the Veasleys' cause of action against the trucking company was fully matured and vested. *Id.* at 901. This Court therefore held that "the 1995 amendment may not be retroactively applied so as to affect the Veasleys' rights in the present case." *Id.*

Under the holdings of *Pfiffner*, *Thorp*, and *Veasley*, Section 686B.7(5) may not be applied to eliminate the Beverages' cause of action against Alcoa and IITI that had fully vested in 2015 well before the

passage of the statute in 2017. Section 686B.7(5) undoubtedly works a substantive change in the law by prohibiting suit against certain categories of companies—premises owners and suppliers—that had previously been liable for asbestos-related injuries. Like the statute in *Thorp*, Section 686B.7(5) unconstitutionally provides for retroactive application in that it applies to asbestos actions filed on or after July 1, 2017, regardless of when the cause of action accrued. 446 N.W.2d at 462. Application of this statute to deprive the Beverages of their vested causes of action against Alcoa and IITI deprives them of property in violation of their right to due process of law. *Id.* at 463. This is an unconstitutional taking that cannot be permitted by this Court.

II. The district court's interpretation of Iowa Code § 686B.7(5) to constitute a complete bar on all premises liability and product supplier claims for asbestos exposure is not supported by the language or intent of the statute.

The question of whether Iowa Code § 686B.7(5) should be interpreted to bar Plaintiffs' claims against Alcoa and IITI was preserved at the hearing on the motions for summary judgment. (Hearing Tr. at 27-46). The trial court interpreted the statute to preclude Plaintiffs' claims. (Dist. Ct. Order at 3-9).

The interpretation of a statute is a matter of law for this court. *Insituform Techs., Inc. v. Employment Appeal Bd.*, 728 N.W.2d 781, 800 (Iowa 2007). This Court reviews questions of statutory interpretation for correction of errors at law. *In re Det. of Johnson*, 805 N.W.2d 750, 753 (Iowa 2011); *Primm v. Iowa Dep't of Transp., Motor Vehicle Div.*, 561 N.W.2d 80, 81 (Iowa 1997).

The district court interpreted Section 686B.7(5) to abolish all premises liability claims for property owners who cause injury by the dangerous condition of asbestos on their premises, even though the statute makes no reference to premises claims or any intent to abolish such claims. The court also interpreted the statute to abolish all product liability claims against those who sold, but did not manufacture, asbestos products even though the statute clearly contemplates that sellers of asbestos products will retain liability. In both instances, the district court's interpretation is contrary to both the language and intent of the statute.

A. Principles of statutory interpretation.

The purpose of statutory interpretation is to determine the legislature's intent. *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 858 (Iowa 2010). This Court "must not only examine the language of the statute, but also its underlying purpose and policies, as well as the consequences stemming from different interpretations." *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000); *see also State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) ("In searching for legislative intent, we consider not only the language of the statute, but also its subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of various interpretations.").

If the language is clear and unambiguous, the Court applies a plain and rational meaning in light of the subject matter of the statute. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 379–80 (Iowa 2000). "However, if reasonable minds could disagree over the meaning of a word or phrase of a statute, the statute is ambiguous and we resort to the rules of statutory construction." *Id.*

When interpreting a statute, the Court assesses the statute in its entirety, not just isolated words or phrases. *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231 (Iowa 2010). "To ascertain the meaning of the statutory language, we consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole." *Griffin Pipe Prod. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003). In interpreting ambiguous statutory language, the Court strives to use "common sense" and to interpret the statute in a "sensible and logical" way. *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 223 (Iowa 2014).

The language of a statute should not be construed in a manner that will produce an absurd or impractical result. *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 534 (Iowa 2017); *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999). The Court "presume[s] the legislature intends a reasonable result when it enacts a statute." *Carpenter*, 616 N.W.2d at 542.

"There are well-recognized limits to the extent to which courts will slavishly ascribe literal meanings to the words of a statute." *Schonberger v. Roberts,* 456 N.W.2d 201, 203 (Iowa 1990). If a literal

interpretation produces an absurd result, the Court should proceed with caution:

> Such absurdity of result calls for scrutiny of the statute. *Ad absurdum* is a "Stop" sign, in the judicial interpretation of statutes. It is indicative of fallacy somewhere, either in the point of view or in the line of approach. In such case, it becomes the duty of the court to seek a different construction, and to presume always that absurdity was not the legislative intent. To this end, it will limit the application of literal terms of the statute, and, if necessary, will even engraft an exception thereon.

Id. at 203 (quoting *Trainer v. Kossuth County,* 199 Iowa 55, 59, 201 N.W. 66, 67 (1924)).

B. The district court's interpretation is contrary to the language and intent of the statute.

Application of these statutory interpretation principles demonstrates that the trial court's interpretation was strained, disregards the legislature's intent, and produces an absurd result.

1. The district court failed to consider the statute as a whole.

Iowa Code § 686B.7(5) provides that "[a] defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." The district court's approach was to define each term used in Section 686B.7(5) in isolation, conclude that they were all plain and unambiguous terms, and end the

analysis there. (Dist Ct. Order at 4-8). This approach was oversimplified and failed to consider the terms in relationship to each other or the statute as a whole.

First, and most importantly, the term "defendant" is ambiguous. It is not defined in the statute. But the district court concluded, with no analysis, that this term is unambiguous and that Alcoa and IITI "fit squarely within the definition of 'defendant' for purposes of this code section." (Dist. Ct. Order at 5). In other words, the court determined that any entity sued in an asbestos suit qualifies as a "defendant" under the statute.

The definition of "defendant" cannot be determined in isolation; it must be interpreted in light of the other language used. In context, a better interpretation is that a "defendant" is one that makes or sells an asbestos product. This definition of defendant as a product manufacturer is suggested by the modifier to the word "product:" there is no liability if the product was "made or sold by a third party." Such qualification would only be necessary if the statute contemplated that the "defendant" is one who makes asbestos products.

The statute is making a distinction between a "product or component part made or sold by a third party" and "a product or component part made or sold by" the defendant. This distinction is found in the plain language as well as the wider context in which the statute was enacted, as set forth below.

2. Section 686B.7(5) is intended to adopt the "bare metal defense" for asbestos product manufacturers.

There is no legislative history to consult. Section 686B.7(5) is part of a larger tort reform law aimed at asbestos and silica claims. Acts 2017 (87 G.A.) ch. 11 S.F. 376. The law is described as "[a]n Act relating to disclosure of asbestos bankruptcy trust claims in civil asbestos actions, asbestos and silica claims prioritization, and successor corporation asbestos-related liability, and including applicability provisions." Section 686B.7(5) is part of the chapter titled "Asbestos and Silica Claims Priorities Act," Iowa Code § 686B.1, *et seq.*, which requires asbestos claimants with non-malignant diseases (*i.e.*, asbestosis) to file a medical report with their complaint in order to demonstrate "prima facie evidence that the exposed person has a physical impairment for which asbestos exposure was a substantial contributing factor." Iowa

Code § 686B.4. The other provisions of Chapter 686B consist of definitions and procedures related to establishing prima facie evidence of impairment, save the provision at issue, Section 686B.7(5), which appears at the end of the section titled "Procedures--limitation."

Section 686B.7(5) is entirely unrelated to the apparent purpose of Chapter 686B: ensuring proof of physical impairment for claims based on non-malignant asbestos-related diseases.[4]

Instead, while not directly stated in the statute, the meaning and purpose of Section 686B.7(5) is quite clearly the establishment of the "bare metal defense," a common defense raised by manufacturers of equipment that used asbestos parts as wear items that would have to be replaced, often with parts made by "third parties."

The "bare metal defense," rejected in its most extreme form by the United States Supreme Court last year, is the notion that "manufacturers should not be liable for harms caused by later-added third-party parts." *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 992 (2019). "[T]he 'bare metal defense' stands for the proposition that [an equipment] manufacturer is 'not liable for injuries caused by

[4] Charles had a malignant asbestos-related cancer, mesothelioma.

asbestos products, such as insulation, gaskets, and packing, that were incorporated into their products or used as replacement parts, but which they did not manufacture or distribute.'" *Thurmon v. Georgia Pac., LLC*, 650 F. App'x 752, 756 (11th Cir. 2016) (quoting *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 793 (E.D. Pa. 2012)). "The defense's basic idea is that a manufacturer who delivers a product 'bare metal'—that is without the insulation or other material that must be added for the product's proper operation—is not generally liable for injuries caused by asbestos in later-added materials." *In re: Asbestos Prod. Liab. Litig. (No. VI) (Devries)*, 873 F.3d 232, 234 (3d Cir. 2017), *aff'd, Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019). "A classic scenario would be if an engine manufacturer ships an engine without a gasket, the buyer adds a gasket containing asbestos, and the asbestos causes injury to a worker." *Id.*

Courts that have embraced the bare metal defense have noted that "the policy motivating products-liability law confirms that manufacturers in the chain of distribution can be liable only for harm caused by their own products." *Conner*, 842 F. Supp. 2d at 800. This is because "products-liability theories rely on the principle that a party in

the chain of distribution of a harm-causing product should be liable because that party is in the best position to absorb the costs of liability into the cost of production." *Id.* However, "this policy weighs against holding manufacturers liable for harm caused by asbestos products they did not manufacture or distribute because those manufacturers cannot account for the costs of liability created by the third parties' products." *Id.* at 801.

The bare metal defense does not have widespread acceptance, and, as noted, was rejected in *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 994 (2019). The Court "agree[d] with the plaintiffs that the bare-metal defense ultimately goes too far . . . ." *Id.* Instead, the Court adopted a rule in maritime cases that "a manufacturer does have a duty to warn when its product *requires* incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses." *Id.* at 993-94. Under the Supreme Court's approach, "the manufacturer may be liable even when the manufacturer does not itself incorporate the required part into the product." *Id.* at 994.

When viewed in the context that the bare metal defense has been a controversial issue in asbestos litigation for several years, it is clear that Section 686B.7(5) is an attempt by the Iowa legislature to adopt this as a statutory defense in asbestos cases. That is the only way to make sense of its odd negative construction and reference to "a product or component part made or sold by a third party."

3. The Court should reject the district court's interpretation as leading to an absurd result.

The apparent ambiguity of Section 686B.7(5) is cleared up by understanding that it is meant to adopt the bare metal defense. Such a defense necessarily only applies to product manufacturers. The district court's alternative interpretation, that the statute abolishes all asbestos claims against premises owners and asbestos product suppliers, is absurd in the extreme.

The statute itself says nothing about premises claims or claims against product manufacturers. It defies common sense that the legislature would eliminate well-established common law causes of action without indicating that it was, in fact, doing so. And the idea that the legislature would want to protect premises owners who exposed

people to asbestos on their property, a carcinogen that causes fatal disease, has no support in the tort law of this state or the general purpose of Chapter 686B. Premises owners were historically on the forefront of knowledge about the dangers of asbestos exposure, and were in a key position to protect workers, warn workers, and prevent exposures from the invisible danger of asbestos. In 1971, when the Occupational Safety and Health Administration (OSHA) passed its first asbestos regulations, it imposed requirements on employers to limit exposure levels and take other precautions to protect workers and their families. (Holstein Report at 21).

Moreover, under the district court's interpretation a premises owner could, *today*, utilize asbestos materials on their property in violation of OSHA regulations, exposing workers and visitors on the property with complete impunity. This would be a shocking policy decision and one that it is impossible to believe would be undertaken without substantial debate and a clearly stated intention.

It is also contrary to common sense to interpret Section 686B.7(5) to protect asbestos insulation contractors who were selling and installing asbestos products to the detriment of their own workers as

well as those persons, like Charles, who were on the premises where those products were installed and used. If the legislature had intended to limit liability to sellers in the chain of distribution, it presumably would have stated that. Simply inferring that the legislature meant to effect a sea change in the liability of product sellers, when there is no explicit language to that effect, contravenes the norms of statutory construction outlined above.

This Court should reject the district court's interpretation of Section 686B.7(5) as abolishing entire categories of defendants for those injured by asbestos exposure. This is an absurd result not supported by the language of the statute or the obvious intent of the statute to simply limit the liability of asbestos product manufacturers via the bare metal defense.

III. Iowa Code § 686B.7(5) violates the equal protection provisions of the United States and Iowa constitutions by singling out the class of persons injured by asbestos exposure to deprive them of a remedy against premises owners and product suppliers.

While the equal protection clause was not invoked below, the Beverages argued in the trial court that under the trial court's interpretation of Section 686B.7(5) premises owners such as Alcoa could

expose persons to asbestos with impunity. (Hearing Tr. at 32). The trial court nevertheless ruled that Section 686B.7(5) bars premises liability claims arising from asbestos exposure. (Dist. Ct. Order at 7-9).

A constitutional challenge to a district court's order is reviewed *de novo*. *Ames Rental Prop. Ass'n*, 736 N.W.2d at 258; *In re Estate of Adams*, 599 N.W.2d at 709.

If Section 686B.7(5) can properly be construed to bar all claims for asbestos-related injuries against premises owners and product suppliers, then it violates the Beverages' right to equal protection under the law. The law singles out Iowa residents who have developed asbestos-related injuries and deprives them, and them alone, of a remedy against premises owners who have a dangerous condition on their property. This same class of injured persons is also deprived of a remedy against suppliers who sell defective and unreasonably dangerous products. No other types of injuries are encompassed within the law; any person with non-asbestos-related injuries retains a remedy against premises owners and product suppliers. The only persons *not protected* from a landowner's dangerous condition or a product supplier's defective product are those suffering from fatal asbestos-

related diseases, including cancer. This distinction has no rational basis in the law and is cruel in the extreme.

The U.S. and Iowa constitutions both provide for equal protection under the law. *See* U.S. Const. amend XIV ("[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws"); Iowa Const. art. I, § 6 (prohibiting laws "grant[ing] to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens"). This Court has interpreted both constitutional provisions similarly. *Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776, 778 (Iowa 1986); *Beeler v. Van Cannon*, 376 N.W.2d 628, 629 (Iowa 1985).

The Beverages acknowledge that the distinction made in Section 686B.7(5) does not involve a fundamental right or an inherently suspect classification, and thus is reviewed under the least rigorous equal protection scrutiny. *Fed. Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988). Under the "rational basis test," this Court seeks to determine whether legislative classifications bear a rational relationship to a legitimate state interest. *Id.* (citing *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 881 (1985)). While there is a

presumption of legislative constitutionality, "a citizen's guarantee of equal protection is violated if desirable legislative goals are achieved by the state through wholly arbitrary classifications or otherwise invidious discrimination." *Id.* (quoting *Chicago Title Ins. Co. v. Huff,* 256 N.W.2d 17, 28 (Iowa 1977)).

In applying the rational basis test to an equal protection challenge, the Court first examines the legitimacy of the end to be achieved and then scrutinizes the means used to achieve that end. *Fed. Land Bank of Omaha*, 426 N.W.2d at 156. In examining the claimed interests of a statute, the focus is on whether they are realistically conceivable. *Miller*, 394 N.W.2d at 779.

As noted, there is no legislative history to draw from. The trial court made no effort to ascertain the intent of Section 686B.7(5). The chapter that Section 686B.7(5) appears in is entirely aimed at limiting asbestos and silica claims to those plaintiffs with physical impairment from their disease. While the state's interest in making physical impairment an element of an asbestos or silica claim may be legitimate, it has nothing to do with abolishing claims against premises owners and product suppliers for asbestos-related diseases.

In evaluating the aims of the statute, this Court is "obliged to consider 'matters of common knowledge and common report and the history of the times.'" *Fed. Land Bank of Omaha*, 426 N.W.2d at 157 (quoting *Miller*, 394 N.W.2d at 779). Taken in the broader context of asbestos litigation trends, it is apparent that the aim of Section 686B.7(5) is to adopt the bare metal defense in Iowa for equipment manufacturers, limiting their liability to asbestos materials that they made or sold and not extending such liability to injury caused by asbestos materials later added to the equipment to keep it functioning as intended.

Plaintiffs/Appellants believe this to be an overly restrictive view of product liability, as found by the Supreme Court in *DeVries*. But regardless of one's view of the merits of the bare metal defense, Section 686B.7(5) is not a legitimate way to effectuate that defense. It sweeps entirely too broadly, extending beyond the mere protection of product manufacturers for replacement asbestos parts they did not make or sell. As interpreted by the district court, it instead abolishes all asbestos exposure claims against premises owners who create dangerous conditions on their property by utilizing asbestos materials in a careless

manner, and all product suppliers who sell and install asbestos products. This latter category is in the chain of distribution, making 686B.7(5) internally contradictory.

Any possible legislative goal of Section 686B.7(5) in limiting the liability of asbestos product manufacturers is not rationally served by a provision that singles out those suffering from asbestos-related diseases and deprives them of a remedy against premises owners and asbestos suppliers and insulation contractors. Persons injured by any other dangerous condition of property are not affected; only persons injured by asbestos are barred from seeking redress from the premises owner who allowed this dangerous condition. Similarly, only persons injured by an asbestos product are barred from suing the supplier of the product; persons injured by other products still have this cause of action.

This Court has stricken down statutes that make class distinctions on similarly irrational bases, particularly when they deprive injured persons of a remedy. In *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), the court invalidated Iowa's guest statute that prohibited vehicular passengers from bringing negligence claims

against the driver of the car in which they were injured; claims could only be based on recklessness. An injured passenger brought suit, "challeng[ing] the rational basis of distinguishing between paying and nonpaying guests in automobiles as well as that of establishing a different standard of care for guests in the automobile context as opposed to other guests." *Id.* at 580. This Court agreed that the classification did not advance the proffered rationale of encouraging hospitality. *Id.* at 583. Because the classification bore "no rational relationship to any conceivable legitimate state purpose," it violated the equal protection provision of Article I, section 6, of the Iowa Constitution. *Id.* at 585.

The Court similarly struck down a statute governing tort claims against local governments that required claimants to commence action within six months after injury or cause written notice to be presented to local government within 60 days after injury. *Miller*, 394 N.W.2d at 780. The statute was challenged on the basis that it singled out persons with claims against local governments as a special class and imposed an accelerated statute of limitations not required of plaintiffs with claims against private tortfeasors. *Id.* at 779. Applying the rational basis test,

the Court determined that "[f]ailure to commence an action within six months unless a notice is given within 60 days arbitrarily bars victims of governmental torts while victims of private torts suffer no such bar. We conclude such arbitrary treatment violates the equal protection guarantees of our federal and state constitutions." *Id.* at 780. Although the statute had been justified on various rationales, this Court did not agree that the rule furthered a legitimate governmental interest and instead found it to "be a trap for the unwary." *Id.*

The reasoning of *Bierkamp* and *Miller* supports a finding that the classification made by Section 686B.7(5) does not have a rational basis. Classifying those with asbestos-related injuries as having no remedy against premises owners and product suppliers, and allowing those with other kinds of injuries to bring such claims, serves no legitimate governmental purpose. On the contrary, it arbitrarily selects Iowa residents with the most grievous injuries imaginable—painful, fatal cancers—and deprives them and their families of justice against the premises owners and product suppliers who injured them. And it perversely encourages premises owners to disregard the health and safety of visitors to their property for dangers that are invisible and

that they alone are in a position to protect visitors from. It similarly lets asbestos product suppliers off the hook for selling known dangerous products. These are not rational or legitimate interests, but are instead antithetical to tort law that is supposed to offer Iowans protection from harm and redress for their injuries.

This Court should find that Section 686B.7(5) lacks a rational basis, violates the equal protection guarantees of the U.S. and Iowa constitutions, and is invalid.

CONCLUSION

For the foregoing reasons, the Beverage family urges this Court to find that their claims against Alcoa and IITI are not barred by Section 686B.7(5), reverse the trial court, and remand for further proceedings.

Dated: March 24, 2020

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.903(2)(i), oral argument is requested to assist the Court in resolution of this appeal.

CERTIFICATE OF COSTS

Because this Proof Brief has been filed and served through EDMS, the actual cost of printing or duplicating this brief is $0 per document, and the total cost for the three required copies of the brief is $0.

/s/Lisa W. Shirley Dated: March 24, 2020

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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:

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/s/Lisa W. Shirley Dated: March 24, 2020

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on March 24, 2020, the above and foregoing Amended Proof Brief of Plaintiffs/Appellants was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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