

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,

v.

**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.

Iowa Court of Appeals Decision Filed March 17, 2021

**RESISTANCE TO FURTHER REVIEW
BY
DEFENDANT-APPELLEE,
ARCONIC, INC., f/k/a ALCOA, INC.**

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STATEMENT OF THE CASE

Plaintiffs' Application for Further Review centers on the Iowa Court of Appeals' interpretation of Iowa Code Section 686B.7(5), which clearly and unambiguously limits liability of certain defendants in an asbestos action. *See* Iowa Code § 686.7(5). That Section succinctly provides: "A defendant in an asbestos . . . action shall not be liable for exposures from a product or component part made or sold by a third party." Iowa Code § 686.7(5).

The Court of Appeals properly interpreted Iowa Code Section 686B.7(5) and affirmed the District Court's entry of summary judgment in favor of Arconic, Inc., f/k/a Alcoa, Inc. (hereinafter "Arconic") and Iowa-Illinois Taylor Insulation, Inc. (hereinafter "IITI"). (COA Decision, pp. 5-11). The application of Iowa Code Section 686B.7(5) to defeat Plaintiffs' claims against Arconic was proper because Plaintiffs admitted that Arconic did not manufacture or distribute an asbestos-containing product. (Beverage Resistance to Arconic MSJ, p. 3, App. 165). According to Plaintiffs, their "claims against [Arconic] were not based on the allegation that [Arconic] manufactured or distributed asbestos-containing products." (Beverage Resistance to Arconic MSJ, p. 9, App. 171). The Court of Appeals, therefore, affirmed the District Court holding that Iowa Code Section 686B.7(5) immunized Arconic from Plaintiffs' asbestos-claims. (COA Decision, p. 11).

In their Application for Further Review, Plaintiffs do not challenge the application of Iowa Code Section 686B.7(5) to Arconic. (Plaintiffs' Application, pp. 15-38). Instead, Plaintiffs focus their arguments on the Court of Appeals' interpretation Iowa Code Section 686B.7(5) as though the Iowa Rules of Appellate Procedure normally permit further review simply to address claimed error. (Plaintiffs' Application, pp. 15-38). *Cf.* Iowa R. App. P. 6.1103(1)(b). Further review is unwarranted because the Court of Appeals committed no error in interpreting Iowa Code Section 686B.7(5) and Plaintiffs failed to establish any of the factors substantiating further review.

ARGUMENT

I. Further review is unwarranted

“Further review by the [Iowa Supreme Court] is not a matter of right, but of judicial discretion.” Iowa R. App. P. 6.1103(1)(b). “An application for further review will not be granted in normal circumstances.” *Id.*

Plaintiffs' Application for Further Review presents no special circumstances warranting further review. *See id.* Plaintiffs only make a nominal effort to establish why this Court should deviate from the normal circumstances and deny further review. (Plaintiffs' Application, pp. 8-9). At best, and in total, Plaintiffs suggest that further review is proper because the

Court of Appeals decided a matter of public importance as the first appellate court to interpret Iowa Code Section 686B.7(5). (Plaintiffs' Application, pp. 8-9). Read as a whole, however, Plaintiffs' Application for Further Review reveals that the claimed error does not involve issues of first impression but the application of established legal principles to common issues of statutory interpretation. (Plaintiffs' Application, pp. 10-38). Further review is not proper under these circumstances and transfer to the Court of Appeals was the correct mechanism for resolving this appeal in the first instance. *See* Iowa R. App. P. 6.1103(1)(b), *and*, Iowa R. App. P. 6.1101(3)(a).

Most of Plaintiffs' Application is dedicated to rehashing the statutory interpretation arguments raised before and properly rejected by the Iowa Court of Appeals. (Plaintiffs' Application, pp. 15-38). Plaintiffs seek further review simply because the Court of Appeals interpreted the plain and unambiguous language of Iowa Code Section 686B.7(5) in a manner contrary to their preference. (Plaintiffs' Application, pp. 15-38). If further review was granted, it is expected that the Iowa Supreme Court would affirm the Court of Appeals because there was no error in interpreting Iowa Code Section 686B.7(5). Denying further review has the same effect. Further review should be denied.

II. Further review is unwarranted because the Court of Appeals properly interpreted the plain, clear, and unambiguous language of Iowa Code Section 686B.7(5) and correctly affirmed summary judgment in favor of Arconic, Inc.

The Court of Appeals, like the District Court, properly started the interpretation of Iowa Code Section 686B.7(5) by assessing the language of the statute. (COA Decision, p. 5) (“[The Court finds] the Code’s meaning in its words. *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020).”). The Court of Appeals properly: (A) rejected Plaintiffs’ argument that the Statute cannot limit the common-law; (B) rejected Plaintiffs’ argument that the term “defendants” was ambiguous and should be read to mean “defendants who make or sell asbestos products;” (C) rejected Plaintiffs’ argument that the District Court’s interpretation of the Statute was absurd; and (D) rejected Plaintiffs’ argument that the “bare metal defense” should be read into Statute. The Court of Appeals properly held that the Statute was unambiguous, and the term “defendant” had an established legal meaning. In its holdings, the Court of Appeals committed no error.

A. The Court of Appeals properly rejected Plaintiffs’ argument that Iowa Code Section 686B.7(5) cannot limit the common-law.

Plaintiffs begin their Application for Further Review claiming that Iowa's premises liability law is the "starting point for evaluating the meaning and consequences of Section 686.B.7(5)." (Plaintiffs' Application, pp. 15, 16-18). Under established Iowa law, however, the starting point when interpreting a statute is the language of the statute itself. *See Myria Holdings, Inc. v. Iowa Dep't of Revenue*, 892 N.W.2d 343, 348 (Iowa 2017).

Plaintiffs seemingly raise Iowa's premises liability common-law to suggest that Iowa Code Section 686B.7(5) operates in derogation thereof and, somehow, must be construed so as not to offend Iowa's longstanding premises liability law. (Plaintiffs' Application, pp. 16-18). However, when interpreting statutes, the main goal of the Court is to ascertain legislative intent. *Id.* The Court may not consider or weigh the merits of the statute when interpreting a statute and its legislative intent. *See Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004). The Court is prohibited from extending, expanding, or changing "the meaning of a statute under the guise of construction, even if [the Court] believes doing so would mitigate the hardship of a consequence or if [the Court] questions the statute's wisdom." *Myria Holdings, Inc.*, 892 N.W.2d at 348. Thus, even if Iowa Code Section 686B.7(5) operates to eliminate liability for defendants in an asbestos action,

including premises liability claims, the Court may not alter the meaning of the Statute to mitigate such consequences. *See id.*

“The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.” Iowa Code § 4.2. “The provisions and all proceedings under [the Iowa Code] shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.” *Id.* By enacting a statute, it shall be presumed that “[a] just and reasonable result is intended” and the “[p]ublic interest is favored over any private interest.” Iowa Code § 4.4 (3)(5).

Plaintiffs place great weight on existing premises liability law and how Iowa Code Section 686B.7(5) operates to eliminate such liability for asbestos defendants. (Plaintiffs’ Application, pp. 15-18). However, the Statute must be presumed to intend a just and reasonable result favoring the public interest. *See id.* The Court of Appeals rightly found, as Plaintiffs concede, that the Statute is part of a “tort reform law.” (COA Decision, p. 7). The terms of the Statute are “aimed at regulating civil lawsuits arising from asbestos and silica injuries” and it makes good sense that it would cover defendants like Arconic who did not make or sell asbestos products. (COA Decision, p. 7). Iowa Code Section 686B.7(5) should be construed liberally to promote its objects and assist the parties in obtaining justice. *See Iowa*

Code §4.2. This Court should not be persuaded by Plaintiffs' efforts to elevate premises liability case law over Iowa Code Section 686B.7(5) and extend, expand, or change "the meaning of a statute under the guise of construction, even if [the Court] believes doing so would mitigate the hardship of a consequence or if [the Court] questions the statute's wisdom." *See Myria Holdings, Inc.*, 892 N.W.2d at 348. Further review should be denied.

B. The term "defendant" as used in Iowa Code Section 686B.7(5) is not ambiguous and has an established legal meaning that was properly utilized by the Court of Appeals.

Statutory ambiguity arises only "if reasonable persons could disagree as to its meaning" either from the meaning of particular words or "from the general scope and meaning of a statute when all its provisions are examined." *See IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001) (quoting *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 728 (Iowa 1995)). The Court of Appeals rejected Plaintiffs' contention that the term "defendant" was ambiguous and limited by its internal context to "defendant who makes or sells an asbestos product." (COA Decision, pp. 6-8). Instead, the Court of Appeals properly followed the standard three-part process to help decide what "defendant" means for Iowa Code Section 686B.7(5). (COA Decision, pp. 6-8) (citing *De Stefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155, 168 (Iowa 2016) ("Words or phrases that are [1] undefined in the statute or [2]

for which there is no established legal meaning [3] are given their common, ordinary meaning in the context with which they are used.”).

In this regard, the Court of Appeals first found that Legislature did not define the term “defendant” in the Statute. *See id., and, State v. Iowa Dist. Ct.*, 889 N.W.2d 467, 471 (Iowa 2017). (COA Decision, p. 6-7). The Court of Appeals found that Plaintiffs conceded that the Legislature did not define “defendant” in the Statute. (COA Decision, p. 7). The Court of Appeals then looked to determine, in the absence of a legislative definition, if there is an established legal meaning for the term “defendant.” *See De Stefano*, 879 N.W.2d at 168 (COA Decision, pp. 6-7). The Court of Appeals properly held that the term “defendant” has an established legal meaning. (COA Decision, p. 7).

Looking to *Black’s Law Dictionary* for the generally accepted legal meaning for “defendant”, the Court of Appeals found that it means, in pertinent part, “a person sued in a civil proceeding” *Black’s Law Dictionary* (11th ed 2019) (COA Decision, p. 7). This is the right and proper interpretation of the term “defendant.”

When a word is undefined by the statute, the Court assigns the word its common, ordinary meaning, interpreted within the context of the statute and its history. *See Myria Holdings, Inc.*, 892 N.W.2d at 348. The Court is

confined to “the words chosen by the legislature, not what it should or might have said.” *Auen*, 679 N.W.2d at 590. The Court is not permitted to “speculate as to the probable legislative intent apart from the words used in the statute.” *IBP, Inc.*, 633 N.W.2d at 325 (internal punctuation omitted) (quoting *State v. Adams*, 554 N.W.2d 686, 689 (Iowa 1996)). The Court has “long held that the legislature is presumed to know the usual meaning ascribed by the courts to language and to intend that meaning unless the context shows otherwise.” *Nixon v. State*, 704 N.W.2d 643, 652 (Iowa 2005) (quoting *State v. Shafranek*, 576 N.W.2d 115, 118 (Iowa 1998)).

The context does not show otherwise. *See id.* To accept Plaintiffs’ proffered definition of “defendant” the Court would have to improperly speculate as to the probable legislative intent by looking to foreign law regarding the “bare metal defense” while, at the same time, ignoring the clear, plain, and generally accepted legal meaning of the term “defendant.” *Cf. id., and, IBP, Inc.*, 633 N.W.2d at 325. Indeed, if the Legislature intended for the term “defendant” to mean “defendant that makes or sells an asbestos product,” it certainly could have stated as much. The Court of Appeals wisely identified other instances where the Legislature had called out defenses of the common-law “such as contributory negligence, assumption of the risk, the fellow servant rule, comparative fault, laches, estoppel, and contributory

fault.” (COA Decision, p. 10) (internal punctuation altered) (citing, *e.g.*, Iowa Code § 87.21(2), 321.445(4)(b), 596.11, 619.17). “If the Legislature intended to merely codify a common-law bare metal defense, the Legislature could easily have so stated.” (COA Decision, p. 10) (citing *Hansen v. Haugh*, 149 N.W.2d 169, 172 (Iowa 1967)).

The context of the Statute does not show that “defendant” really means “defendant who makes or sells an asbestos product.” *See Nixon*, 704 N.W.2d at 652. As the Court of Appeals noted, Plaintiffs argue that Iowa Code Chapter 686B is a “tort reform law.” (COA Decision, p. 7). “[I]ts words show that it is aimed at regulating civil lawsuits” (COA Decision, p. 7). “In this context, it is only natural for the Legislature to use ‘defendant’ to mean ‘a person sued in a civil proceeding.’” (COA Decision, p. 7) (citing *Black’s Law Dictionary*). The Court of Appeals was correct in this holding.

Furthermore, placement of Iowa Code Section 686B.7(5) within Chapter 686B does not create an ambiguity. (Plaintiffs’ Application, p. 23). As phrased when Plaintiffs raised this argument below, they claim that Iowa Code Section 686B.7(5) is unrelated to larger Statute “Asbestos and Silica Claims Priorities Act.” (Plaintiffs’ Appeal Brief, pp. 36-37). Contrary to the assertions of Plaintiffs, the Statute provides more than just ensuring proof of

physical impairment for claims based on non-malignant asbestos-related diseases as the Plaintiffs claim.

The Statute does establish certain upfront evidence in order to pursue a case with non-malignant disease, but it also relates to all asbestos and silica actions. In this regard, the Asbestos and Silica Claims Priorities Act defines asbestos action by referring to Iowa Code Section 686A.2, where “asbestos action” is defined for the companion statute, the “Asbestos Bankruptcy Trust Claims Transparency Act,” which also relates to all asbestos actions *See* Iowa Code § 686B.2(3), *and*, Iowa Code § 686A.2(1). “Asbestos action” is defined to mean,

a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on, or related to the health effects of exposure to asbestos, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance, and any other derivative claim made by or on behalf of a person exposed to asbestos or a representative, spouse, parent, child, or other relative of that person.

Iowa Code § 686A.2. By defining “asbestos action” in such a way, the Legislature clearly intended for Iowa Code Section 686B.7(5) to apply to all claims in a civil action that arise out of asbestos exposure. *See id.* The limitation on liability is entirely related to the apparent purpose of Chapter 686B because it is defined to apply to an “asbestos action,” which is not

limited to claims based on non-malignant asbestos-related diseases but includes claims such as those made by Plaintiffs. *See id.*

The Court of Appeals was right when it rejected the Plaintiffs' arguments because they would require a search for meaning beyond the express terms of Iowa Code Section 686B.7(5). *Nixon*, 704 N.W.2d at 652, *IBP, Inc.*, 633, N.W.2d at 325, and *Auen*, 679 N.W.2d at 540. The Plaintiffs focus their attack on the Decision of the Court of Appeals for refusing to speculate about the probable legislative intent apart from the words in the Statute. *See IBP, Inc.*, 633 N.W.2d at 325. There is no ambiguity in the plain terms of the Statute and, thus, it would be improper to search for meaning beyond the express terms of the Statute. *See id.*

Because the Court of Appeals properly interpreted Iowa Code Section 686B.7(5) and properly held that Arconic was not liable for the Plaintiffs' asbestos action, this Court should deny further review.

C. The Court of Appeals properly rejected Plaintiffs' absurdity argument.

Plaintiffs argue that it is absurd to interpret Iowa Code Section 686B.7(5) as a tort reform law that limits liability to defendants who do not make or sell asbestos products. (Plaintiffs' Application, pp. 25-30). The Court of Appeals wisely rejected this argument. (COA Decision, pp. 10-11).

The Court of Appeal rightly held that the Statute did not abolish all premises liability claims, but only eliminated liability in an asbestos action to those who make or sell asbestos products and components. (COA Decision, p. 10). The Court of Appeals noted that the absurdity doctrine may “only be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.” (COA Decision, p. 11) (citing *State v. Walden*, 870 N.W.2d 842, 848 (Iowa 2015) (internal punctuation modified)). The Court of Appeals found that the doctrine inapplicable because there was “no inconsistency between a literal construction of Section 686B.7(5) and the purposes and policies of [the Statute].” (COA Decision, p. 11) (citing *id.*) (internal punctuation modified). The clear purpose of Iowa Code Section 686B.7(5) “is to narrow asbestos litigation by protecting defendants against liability for exposure to products that were made or sold by a third party.” (COA Decision, p. 11) (referring to Iowa Code §686B.7(5)). This is the natural and intended consequence of the plain and clear meaning of the statute – refocusing liability on the more culpable targets, such as the asbestos manufacturers. The Court of Appeals found nothing absurd in this result and it is supported by the clear language

of the Statute. (COA Decision, p. 11). The Court is constitutionally prohibited from legislating from the bench. *See id., and, Hansen*, 149 N.W.2d at 172.

Because the Court of Appeals did not err in rejecting Plaintiffs' absurdity doctrine argument, further review is improper.

D. The Court of Appeals properly rejected Plaintiffs' effort to use statutory construction to establish an ambiguity in the term "defendants" by overlaying the "bare metal defense."

Plaintiffs strain to try and establish ambiguity in the Legislature's term "defendant" as used in Iowa Code Section 686B.7(5). (Plaintiffs' Application, pp. 18-24). The Court of Appeals was not persuaded and for the right reasons. (COA Decision, pp. 6-8). The Court of Appeals properly refused to put the cart before the horse and look to foreign law (not adopted in Iowa) to overlay the "bare metal defense" as the construct for establishing an ambiguity in the term "defendant" as used in Iowa Code Section 686B.7(5). (COA Decision, pp. 9-10).

In this regard, Plaintiffs maintain that a better interpretation of the term "defendant" is a "defendant that makes or sells an asbestos product." (Plaintiffs' Application, p. 22). They superficially raise this argument by reading into the Legislature's chosen language restrictions on the term "defendant" that is patently absent. (Plaintiffs' Application, p. 22). More importantly, however, Plaintiffs' efforts to create an ambiguity by the terms

of the Statute only come into play only by assessing the Statute against the “bare metal defense” which exists in law of some other jurisdictions. (Plaintiffs’ Application, pp. 30-37).

According to Plaintiffs, Iowa Code Section 686B.7(5) must be read in context with the “bare metal defense” from some other jurisdictions. In this regard, Plaintiffs invited the Court of Appeals to disregard established mechanisms for statutory interpretation and, in its place, determine whether there an ambiguity arises when viewing the language of Iowa Code Section 686B.7(5) in the context of the foreign “bare metal defense.” They raise the same argument in their Application for Further Review – suggesting that the Legislature must have intended to adopt the “bare metal defense.” (Plaintiffs’ Application, pp. 30-37). The Court of Appeals properly rejected that approach and properly followed established principles of statutory interpretation. (COA Decision, pp. 6-10).

The Court “applies the rules of statutory construction *only* when the terms of the statute are ambiguous.” *IBP, Inc.*, 633 N.W.2d at 325. Because the term “defendant” in Iowa Code Section 686B.7(5), is not ambiguous, it would be improper to apply rules of statutory construction. *See id.* It would be improper, then, to look to foreign law to establish that Iowa Code Section 686B.7(5) was the Legislature’s effort to adopt the “bare metal defense” and

then overly the definition of “defendant in the “bare metal defense” to “defendant” under Iowa Code Section 686B.7(5) to mean “defendant who makes or sells an asbestos product.” In other words, Plaintiffs are wrong to try an establish an ambiguity in the term “defendant” by using principles of statutory construction and looking to foreign law regarding the definition of “defendant” in the “bare metal defense.” *See id.*

Plaintiffs concede that the Legislature may eliminate liability for defendants in an asbestos case if that was its intent. (Plaintiffs’ Application, p. 28). The Legislature’s intent is made clearly by the plain, clear, and unambiguous language of Iowa Code Section 686B.7(5). *See Iowa Code § 686B.7(5)*. Only by creatively manipulating the Legislature’s language can Plaintiffs establish the pretense of ambiguity to overlay their preferred definition of “defendant” from the “bare metal defense.” But, that would be improper because principles of statutory construction cannot be utilized absent an ambiguity in the first instance. The Court of Appeals Decision is not erroneous. Further review would be improper.

CONCLUSION

This Court deny Plaintiffs’ Application for Further Review. This case does not present any threshold issue that would ordinarily be proper for further review and, regardless, the Court of Appeals did not err in

interpreting Iowa Code Section 686B.7(5). Indeed, the Court of Appeals, the District Court, and at least two other District Court cases have interpreted Iowa Code Section 686B.7(5) as a bar to liability for defendants in an asbestos action who are not the seller or manufacturer of asbestos products. *See Clester v. Alcatel-Lucent USA, Inc.*, No. LACV012499 (Clarke Co. November 14, 2019) (granting summary judgment for Ford Motor Company after interpreting Iowa Code Section 686B.7(5), App. 796-803); *Fankhauser v. Borg-Warner Tel., Inc.*, No. LACL150972 (Polk Co. August 14, 2019, App. 778-795).

The Court of Appeals properly interpreted Iowa Code Section 686B.7(5). Further review would be superfluous and denying further review would have the same effect. Further review, it is submitted, should respectfully denied.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa Rules of Appellate Procedure 6.903 (1)(d), 6.903(1)(e)(1), 6.903(1)(g)(1), and 6.1103(4)(a) because this brief has been prepared with Microsoft Word in a proportionally spaced typeface, Georgia, size 14; and contains 3,632 words, which is less than two-fifths (5,600 words) of the length limitations for a brief, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Robert M. Livingston

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on April 16, 2021, the above and foregoing Resistance to Further Review 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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