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.

ARCONIC, 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 Judge Patrick A. McElyea, presiding.

AMENDED FINAL BRIEF OF DEFENDANT-APPELLEE, IOWA-ILLINOIS TAYLOR INSULATION, INC.

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STATEMENT OF THE ISSUES

The District Court granted summary judgment to Defendants-Appellees Iowa-Illinois Taylor Insulation, Inc. and Arconic, Inc. based on the application of Iowa Code Section 686B7(5). The Statute states, in pertinent part: "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 § 686B.7(5). Only one issue has been properly preserved for review by Plaintiffs (statutory interpretation, IV below); Plaintiffs-Appellants raised two constitutional challenges for the first time to this Court (II and III, below). Preservation of Error is addressed in Section I.

I. Whether Plaintiffs failed to preserve their constitutional challenges by neglecting to raise them before the District Court and have thus, waived them.

Cases

Benavides v. J.C. Penney Life Ins. Co., 539 N.W. 2d 352 (Iowa 1995)

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AFSCME Iowa Council 61 v. State, 928 N.W.2d 21 (Iowa 2019)

Baker v. City of Ottumwa, 560 N.W. 2d 575 (Iowa 1997)

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Master Builders of Iowa, Inc. v. Polk County, 653 N.W.2d 382 (Iowa 2002)

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Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989)

Veasley v. CRST Int'l, Inc.,553 N.W. 2d 896 (Iowa 1996)

Statutes
Iowa Code Section 686B.7(5)

Iowa Code Section 686A.3(1)(a).

Rules
Iowa R. App. P. 6.14(f)(1).

III. Whether the application of Iowa Code Section 686B.7(5) violates the equal protection rights of Plaintiffs-Appellants when such issue was not raised before the District Court and therefore, waived.

Cases

AFSCME Iowa Council 61 v. State, 928 N.W.2d 21(Iowa 2019)

Bierkamp v. Rogers, 293 N.W.2d 577, 578-579 (Iowa 1980)

Burbach v. Radon Analytical Laboratories, Inc., 652 N.W.2d 135 (Iowa 2002)

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Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 202)

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NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W. 2d 30, 45 (Iowa 2012).

Spencer v. Truro Tavern, 728 N.W. 2d 853 (Ct. App. Iowa 2007).

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IV. Whether the District correctly interpreted Iowa Code Section 686B.7(5) to apply to Defendants-Appellees and immunize them from liability pursuant to the Asbestos and Silica Claims Priorities Act of 2017.

Cases

AFSCME Iowa Council 61 v. State, 928 N.W.2d 21, 30-31 (Iowa 2019)

Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W. 2d 291, 295 (Iowa 2015)

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Cox v. Iowa Dep't of Human Servs., 920 N.W. 2d 545, 553 (Iowa 2018)

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Keith v. Community School Dist. of Wilton, 262 N.W.2d 249, 255 (Iowa 1978)

Myria Holdings, Inc. v. Iowa Dep't of Revenue, 892 N.W. 2d 343, 348 (Iowa 2017).

Statutes

Iowa Code Section 686A
Iowa Code Section 686B.7(5)

ROUTING STATEMENT

This appeal should be decided by the Iowa Court of Appeals as the sole issue preserved by Plaintiffs-Appellants (hereinafter "Plaintiffs") is one of statutory interpretation, i.e., challenging the District Court's application of Iowa Code Section 686B.7(5) granting summary judgment in favor of Defendants-Appellees Iowa-Illinois Taylor Insulation, Inc. and Arconic, Inc. (hereinafter "IITI" and "Arconic," respectively). Plaintiffs additionally challenge the validity of that statute based on due process and equal protection arguments for the first time in their appeal to this Court. Plaintiffs failed to raise the issues of due process and equal protection in either their written submissions to, or oral argument before, the District Court. Because Plaintiffs failed to raise either the due process or equal protection arguments, those arguments were unpreserved and are now waived.

Issues of statutory interpretation, application, and issue preservation are properly resolved by applying existing legal principles. As such, IITI requests that this appeal be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(3)(a) and (b).

STATEMENT OF THE CASE

Plaintiffs allege that Decedent Charles E. Beverage was exposed to asbestos-containing products or materials while working as an independent contractor at an Arconic[1] facility in Bettendorf, Iowa from the 1950s to the mid-1970s. (Plaintiffs' Iowa Complaint, p. 1, App. 43-48; October 1, 2019 Order at pp. 1-2, App. 768-777). Plaintiffs initially filed their case, and litigated it for over a year, in Missouri prior to filing in Iowa. (Missouri Petition, App. 8-30). IITI was not named in the Missouri action. *Id.* Plaintiffs allege that Charles Beverage, a self-employed carpenter and contractor, was exposed to insulation installed by IITI, also an independent contractor, at the Arconic plant and that he contracted mesothelioma as a result of that exposure. (October 1, 2019 Order at pp. 2-3, App. 769-770). IITI and Arconic moved for summary judgment on various grounds, including the immunity provisions contained in Iowa Code Section 686B.7(5). The District Court heard oral argument from the Parties and ultimately agreed with IITI and Arconic, granting summary judgment solely on

[1] The facility in Bettendorf was formerly known as Alcoa. The facility and Defendant-Appellee is referred to herein as "Arconic" for purposes of clarity.

the basis of the applicability of Iowa Code Section 686B.7(5). (October 1, 2019 Order at p. 2, 3-9, App. 769, 770-776). Despite never raising a constitutional challenge before the District Court, Plaintiffs appeal the District Court's interpretation on due process and equal protection grounds. (Plaintiffs' Final Proof Brief, pp. 8, 10, 12-14, 20, 42). A more detailed chronology of the case follows.

I. The Missouri Litigation.

Following the death of Charles Beverage on October 7, 2015, Plaintiffs filed a petition in Missouri state court on July 6, 2016. (Missouri Petition, App. 8-30). Plaintiffs were represented by the same counsel in Missouri that would later re-file their case in Iowa and the basis of their claims in the Missouri action are identical to those asserted in Iowa. Plaintiffs named several product manufacturers, suppliers, and premises but failed to include IITI. (Missouri Petition, App. 8-30). The Defendants in the Missouri case, including Arconic, filed motions to dismiss based on personal jurisdiction and other grounds beginning in July 2016. (Arconic Missouri MTD, App. 31-42). Plaintiffs resisted at least one of these motions but ultimately

dismissed the Missouri defendants beginning on January 11, 2017. The remaining defendants in the Missouri case were dismissed a year later after the Plaintiffs had re-filed their case in Iowa. (January 10, 2018 Order Dismissing All Viable Parties, App. 59-60).

II. Iowa Code Section 686.

While Plaintiffs were prosecuting their case in Missouri, Iowa Code Section 686 was signed into law by Governor Terry Branstad on March 23, 2017. Within the parameters of the newly-passed legislation was Section 686B.7(5) which states: "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." Iowa Code Sec. 686B.7(5). Through this subsection, the Iowa Legislature eliminated liability for defendants in lawsuits where a plaintiff seeks to impose legal responsibility on a defendant for an asbestos-containing product that was either made by a third party or sold by a third party. The provisions of Section 686B apply to all asbestos actions filed on or after the effective date of the Statute, which became effective on July 1, 2017.

III. Plaintiffs Re-file in Iowa.

After the enactment of Iowa Code Section 686B, Plaintiffs filed a Petition at Law in the District Court for Scott County on September 27, 2017, naming Arconic (again) and IITI (for the first time) as defendants. (Iowa Petition, App. 43-48). Plaintiffs' claims against IITI included negligence, strict liability, breach of express and implied warranties of merchantability and fitness for intended purposes, and loss of consortium. (Iowa Petition at p. 2, 3-6, App. 44, 45-48). Plaintiffs' Missouri case was still pending – and remained pending against certain defendants – until January, 2018. (January 10, 2018 Order Dismissing All Viable Parties, App. 59-60). Despite being on notice since at least August 2016 that their lawsuit was subject to re-filing in Iowa in the face of personal jurisdiction challenges, Plaintiffs waited over fourteen (14) months to file their Iowa Petition. Further, Plaintiffs had actual or constructive notice that Section 686B was enacted on March 23, 2017 and became effective on July 1, 2017, yet failed to file their Petition in Iowa within the applicable limitations period set forth in the Statute.

IV. Summary Judgment Phase.

Following the close of discovery in the Iowa case, IITI filed its motion for summary judgment based on lack of duty, insufficiency of evidence of proximate cause, and the immunity provisions of Iowa Code Section 686B.7(5). (IITI Memorandum of Law in Support of Summary Judgment, pp. 4-12, App. 65-76; 68-76). Plaintiffs resisted IITI's motion for summary judgment and, as to the immunity argument, conceded that IITI did not make asbestos-containing products. (Plaintiff's Resistance to IITI MSJ, pp. 10-11, App. 154-155). Plaintiffs did not raise any constitutional challenge, on due process or equal protection grounds, in its summary judgment briefing. *Id.* Plaintiffs' sole challenge to the applicability of Section 686B.7(5) was based on IITI's alleged status as a seller of asbestos-containing components at the Arconic facility; the resistance to Section 686B.7(5) was silent as to any constitutional challenges. (Plaintiff's Resistance to IITI MSJ, pp. 10-11, App. 154-155).

The District Court heard oral argument on IITI's and Arconic's summary judgment motions on September 17, 2019 (September 17,

2019 Hearing Transcript, App. 681-746). As to Section 686B.7(5), IITI and Arconic argued for its applicability based on the plain meaning of the Statute and their relative status as non-manufacturers. (Tr. pp. 27-29, 40-43, App. 707-709, 720-723). Plaintiffs' contested the applicability of Section 686 to Arconic and IITI on the grounds that the Statute's intent would not be served by affording immunity protection to Arconic and IITI. (Tr. 29-39, App. 709-719). Plaintiffs suggested that a "plain reading of the statute" allowed for an interpretation that the statute intended to target "companies that have greater asbestos knowledge" and to protect "downstream companies or very small companies from being held liable." Tr. 30, App. 710). Plaintiffs also failed to provide a meaningful definition of "greater asbestos knowledge," "very small companies," or at what threshold liability would be extinguished based on knowledge or size.

IITI argued that Section 686B.7(5) should apply because it is undisputed that IITI never manufactured any asbestos-containing products and, as in this case, acted as a supplier-installer of insulation products to its customers based on their specifications. (Tr. p. 40-41,

App. 720-721). When prompted by the District Court, Plaintiffs' argument was that the Statute didn't provide immunity to IITI because of its "superior knowledge," because IITI wasn't a small company, and an unfounded assertion that "this is a company that's selling the raw asbestos products." (Tr. p. 45, App. 725). The District Court correctly pointed out that IITI was a purchaser of insulation products from a third party and challenged Plaintiffs as to why the immunity provisions of Section 686B.7(5) would not apply to IITI. (Tr. p. 47, App. 727). Plaintiffs responded with argument based on interpretation of the Statute and invoking, again, a sophisticated user/superior knowledge and duty to warn element not found in the Statute. (Tr. p. 47, App. 727).

Plaintiffs did not raise any constitutional challenges to the application of Section 686B.7(5) during the summary judgment phase. At no point in their written submissions to, or at oral argument before, the District Court did the Plaintiffs make any reference to due process or equal protection implications, of the Statute. Plaintiffs failed to raise any constitutional challenge in their briefing and argument as to both

IITI and Arconic (*See* Plaintiffs' Resistance to IITI MSJ, App. 145-162; Plaintiffs' Resistance to Arconic MSJ, App. 163-176; Tr. pp. 29-62; App. 709-742).

The District Court entered summary judgment in favor of IITI via Order on October 1, 2019. (October 1, 2019 Order, App. 768-777). The District Court limited its ruling solely to the immunity provisions of Section 686B.7(5). (Order, p.2, App. 769). The District Court analyzed the language of the Statute, interpreted the plain meaning of its terms, and applied those terms to the facts of this case. The District Court noted that no Iowa appellate court had yet interpreted the Statute but found the opinion of the District Court in *Fankhauser* to be "highly persuasive." (October 1, 2019 Order, p, 4, App. 771; referring to *Fankhauser, et al. v. Borg-Warner Morse Tec, Inc. et al.*, No LACL140972 (Polk County, Aug. 14, 2019), App. 778-795).

Plaintiffs filed their notice of appeal challenging the District Court's grant of summary judgment in favor of IITI and Arconic on October 31, 2019. (Notice of Appeal, App. 804-807). Plaintiffs admit in their briefing that they failed to raise constitutional challenges based

on due process and equal protection before the District Court. (Plaintiffs' Final Proof Brief, pp. 20, 42).

STATEMENT OF THE FACTS

Decedent Charles Beverage was diagnosed with mesothelioma in November 2014. (Plaintiffs' Final Proof Brief, 23; Supplemental Report of Brent C. Staggs, M.D., pp. 2-3, App. 231-240). The Decedent owned Beverage Construction, an independent contractor periodically hired to perform concrete work at the Arconic facility in Bettendorf, Iowa from 1956 to 1976. (Plaintiffs' Petition, App. 8-30; October 1, 2019 Order, p.1, App. 769; Larry Beverage Dep., pp. 14-17, 18, 57, App. 255-256, 265; Edward Allers Dep., pp. 93, 107, 132-34, App. 298, 302, 308-310). Plaintiffs allege that Decedent was exposed to asbestos at the Arconic plant through bystander exposure to insulation contractors employed by IITI. (Plaintiffs' Petition 2-5, App. 44-47; Plaintiffs' Final Proof Brief, pp. 15-16).

On certain occasions during the relevant time period, IITI installed insulation at the Arconic plant and served as a supplier/distributor of insulation products while Decedent worked at

the plant. (10.1.19, Order, p. 2, App. 769). Decedent's son, Larry Beverage, testified his father worked with a lot of insulation while building homes but couldn't recall what he did or didn't do with insulation at the Arconic facility. (Larry Beverage Dep., p. 45, App. 262). Edward Allers worked sporadically for Beverage Construction from some time in the early 1960s until 1971. (Edward Allers Dep., pp 105-106, App. 301-302). According to Mr. Allers, he did not work side by side with Decedent but was an employee supervised by Decedent, who testified that he had no personal knowledge whether any of the materials with which Decedent came into contact contained asbestos. (Edward Allers Dep., pp. 37, 60-61, App. 284, 290). He also conceded he had never seen Decedent personally work with any asbestos-containing materials. (Edward Allers Dep., p. 73, App. 293.) Further, Mr. Allers testified that it was never Decedent's job to work with insulation at Arconic. (Edward Allers Dep., p. 113, App. 303). Mr. Allers could not testify as to a specific area of the Arconic plant where he saw IITI insulators either installing or removing insulation, could not specify any particular time period when this work allegedly took

place, nor could he testify as to the content or specifications of any insulation products he purportedly witnessed at the Arconic plant. (Edward Allers Dep., pp. 118-119, App. 305).

It is undisputed that IITI did not manufacture asbestos containing products and merely purchased asbestos products from third parties at the direction, and to the specifications, of its customers. (October 1, 2019 Order, p. 7, App. 774; Plaintiffs' Resistance to IITI MSJ, pp. 10-11, App. 154-155; Tr. 47, App. 727).

ARGUMENT

This Court should affirm the District Court's granting of summary judgment in favor of IITI and Arconic for the following reasons:

- Plaintiffs failed to raise any constitutional challenge in the District Court proceedings. As such, the arguments based on due process and equal protection are not preserved for appeal and thus, waived;

- Plaintiffs' newly-raised due process challenge, if considered, must fail because Plaintiffs cannot establish a vested, fundamental right to a remedy, there is a rational basis for retroactive application of the Statute, and Plaintiffs had ample notice to exercise their rights.

- Plaintiffs' newly-raised equal protection challenge, if considered, fails because Plaintiffs fail to establish disparate treatment or lack of rational basis for Iowa Code Section 686B.7(5);

- The District Court correctly interpreted Iowa Code Section 686B.7(5) based on the plain language of the Statute and committed no error of law when it granted summary judgment in favor of IITI and Arconic.

I. Plaintiffs Failed to Preserve Constitutional Challenges Based on Equal Protection and Due Process.

It is axiomatic that issues not raised and reviewed by the District Court cannot be introduced for the first time on appeal. *Meier v. Senecaut*, 641 N.W. 2d 532, 537 (Iowa 2002). Error not assigned properly on appeal should not be considered by the appellate court. *See Jensen v. Voshell*, 193 N.W. 2d 86, 89 (Iowa 1971). To properly preserve an issue for appellate review, a party must either raise the issue at the lower court level or, if the "district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier*, 641 N.W. 2d at 537 (citing *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W. 2d 352, 356 (Iowa 1995); *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W. 2d 202, 206 (Iowa 1984)).

This Court has repeatedly refused to consider issues not properly preserved for appeal at the lower court level, even constitutional challenges. *See Taft v. Iowa Dist. Court for Linn Cty.*, 828 N.W .2d 309, 322 (Iowa 2013); *Strand v. Rasmussen*, 648 N.W.2d 95, 100-101 (Iowa 2002). The Rules of Appellate Procedure are explicit and clear regarding the process for presenting issues for review and ensuring that they are properly preserved: Rule 6.903(2)(g)(1) mandates that briefs must include "a statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided." To preserve an issue for appeal, even a constitutional one, a party must raise the issue by written submission or oral argument in the district court;, ensure the issue is considered and ruled upon; advise the appellate court where and how the issue was preserved with appropriate citation to the record Iowa R. App. P. 6.903(2)(g)(1)); *accord Taft*, 828 N.W. 2d at 322; *Meier*, 641 N.W. 2d at 537.

Here, Plaintiffs have failed to preserve their constitutional challenges by neglecting to raise them before the District Court.

Indeed, Plaintiffs concede that their due process and equal protection arguments "were not invoked" below. (Plaintiffs' Final Proof Brief, pp. 20, 42). Plaintiffs' initial Proof Brief was stricken by this Court and the Plaintiffs were admonished for failing to include a statement addressing preservation of error with appropriate references to the record. (March 17, 2020 Order Striking Proof Brief, p. 1). Even in their amended submission, Plaintiffs have failed to adequately establish that they preserved their constitutional arguments for review and in fact, concede that they did not. (Plaintiffs' Final Proof Brief, pp. 20-24, 42-43). Thus, this Court lacks appellate jurisdiction and should refuse to entertain Plaintiffs' arguments. *See* Iowa Const., Art. V § 4, *and* Iowa Code § 603.4102(1-2).

II. The Application of Iowa Code Section 686B.7(5) to Plaintiffs' Claims Does Not Extinguish a Vested Right and Does Not Violate Plaintiffs' Due Process Protections.

A. Standard of Review and Error Preservation.

The District Court granted summary judgment to IITI based on its application of Iowa Code Section 686B.7(5). As such, the District Court's ruling is reviewed for correction of errors at law. *Burbach v.*

Radon Analytical Laboratories, Inc., 652 N.W. 2d 135 (Iowa 2002); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 30-31 (Iowa 2019). Furthermore, Plaintiffs failed to preserve their due process challenge by not raising it before the District Court. Error not assigned properly on appeal should not be considered by the appellate court. *See Jensen v. Voshell*, 193 N.W. 2d 86, 89 (Iowa 1971). Here, Plaintiffs concede that "the due process clause was not invoked" before the District Court but now claim to have preserved this issue because they "retained" a product liability claim against IITI, despite citing to any evidence in the record. (Plaintiffs' Final Proof Brief, 20). Plaintiffs have failed to preserve this issue for appeal and now asserts a challenge to the District Court's findings of fact. Deference should be given to the District Court's findings of fact, which have the force of a special verdict and will be binding on this Court if supported by substantial evidence and justified as a matter of law. *Chariton Feed & Grain, Inc. v. Harden*, 369 N.W.2d 777, 781 (1985), citing to *Keith v. Community School Dist. of Wilton,* 262 N.W.2d 249, 255 (Iowa 1978) and Iowa R. App. P. 14(f)(1).

Assuming, *arguendo*, that Plaintiffs have preserved a due process argument for consideration on appeal, their constitutional challenge would be subject to *de novo* review. *AFSCME Iowa Council 61* at 31. However, statutes subject to *de novo* review enjoy a strong presumption of constitutionality. *Id.* If a statute is capable of being construed in more than one manner, one of which is constitutional, a court must adopt the constitutional interpretation. *Iowa State Education Association v. State*, 928 N.W. 2d 11, 15 (Iowa 2019). Plaintiffs would have to prove, beyond a reasonable doubt, that Section 686B.7(5) was unconstitutional, and "refute every reasonable basis upon which the statue could be found to be unconstitutional." 928 N.W.2d at 30-31; *accord Bierkamp v. Rogers*, 293 N.W.2d 577, 578-579 (Iowa 1980). Plaintiffs concede as much when, in the context of their equal protection argument, they acknowledge that the distinction drawn by Section 686B.7(5) "does not involve a fundamental right" and is thus subject to "rational basis" scrutiny (Plaintiffs' Final Proof Brief, p. 43). As outlined below, Plaintiffs cannot meet this heavy burden.

B. Immunity Provisions do not Violate Due Process Rights, even if Applied to Conduct Pre-dating Enactment.

The due process clauses of both the United States and Iowa Constitutions protect interests in fair notice and repose that may be compromised by retroactive legislation. *Landgraf v. USI Film Products,* 511 U.S. 244, 269. A statute is not impermissibly retroactive merely because it is applied in a case arising from conduct pre-dating the statute's enactment. *Id.* Further, Iowa District Courts have recently reviewed Section 686B.7(5) and applied its immunity provisions retroactively. *See Clester v. Alcatel-Lucent USA, Inc.,* No. LACV012499 (Clarke Co. November 14, 2019), App. 796-803; and *Fankhauser v. Borg-Warner Tel., Inc.,* No. LACL150972 (Polk Co. August 14, 2019); App. 778-795).

The determination of whether due process rights have been infringed is a two-step inquiry requiring the Court first to determine whether a protected liberty or property interest is involved, and then consider what process is due before a deprivation of that interest. *Master Builders of Iowa, Inc. v. Polk County,* 653 N.W.2d

382, 397-98 (Iowa 2002). The requirements of procedural due process are simple and well-established: (1) notice; and (2) a meaningful opportunity to be heard. *Blumenthal Investment Trusts v. City of West Des Moines,* 636 N.W.2d 255, 264 (Iowa 2001).

In *Clark v. Insurance Company State of Pennsylvania*, 927 N.W. 2d 180 (Iowa 2019) this Court examined immunity protections conferred upon insurance carriers conducting workplace inspections. *Id.* The plaintiffs challenged the immunity grant and argued that there was no rational relationship between the immunity statute and the intended purpose. *Id.* at 185. The Court found that the immunity grant did not violate the due process clause of the Iowa Constitution, despite the fact that the putative plaintiffs would not be able to seek a jury trial to determine fault for their injuries. *Clark*, 927 N.W.2d at 190-91. The Court effectively found that the immunity provision did not abolish the right to seek compensation for injuries, it merely imposed a reasonable regulation of that right. *Clark,* 927 N.W.2d at 190-91.

Iowa courts have held that the "right" to sue is a matter of economic – not fundamental – interest. In *Baker v. City of Ottumwa*,

this Court examined whether a municipal grant of immunity deprived a tort plaintiff of equal protection and due process of law. 560 N.W. 2d 575 (Iowa 1997). The plaintiff in *Baker* sought to sue a municipality for injuries he sustained at a local swimming pool when a local patron struck the plaintiff while in an unauthorized area of the pool. The Court correctly reviewed the district court's grant of summary judgment to a municipality for correction of errors of law. *Baker*, 56 N.W. 2d 575, 582. The court in *Baker* determined that the plaintiff's "right" to seek recovery against the city was an economic interest, and that suit could only be maintained to the extent immunity had been expressly waived by the legislature. *Id.* at 584; *accord Suckow v. NEOWA FS, Inc.*, 445 N.W. 2d 776 (Iowa 1989).

C. Plaintiffs Cannot Claim a Deprivation of a Vested Right They Have Already Exercised.

Plaintiffs rely heavily upon the *Thorp*, *Pfiffner*, and *Veasley* cases for the proposition the right to seek recovery for injuries is a fundamental property right and that any legislative impingement upon that right should be deemed an unconstitutional violation of due process. (See *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457

(Iowa 1989); *Pfiffner v. Roth*, 379 N.W.2d 357 (Iowa 1985); and *Veasley v. CRST Int'l, Inc.*,553 N.W.2d 896 (Iowa 1996)). However, these cases are distinguishable from the instant appeal. Initially, as outlined in *Clark, Baker,* and *Suckow* above, the right to sue is not a fundamental right, it is an economic one. In fact, Plaintiffs concede, in the context of their equal protection challenge, that "the distinction made in Section 686B.7(5) does not involve a fundamental right…" (Plaintiffs' Final Proof Brief, p. 43). Further, a vested right requires something more than a mere expectation based on the anticipated continuance of present law. *Schwarzkopf v. Sac County Board of Supervisors,* 341 N.W. 2d 1 (Iowa 1983). Moreover, the plaintiffs in the cases cited by Plaintiffs did not already have lawsuits pending in other jurisdictions they hoped would be more favorable.

Here, assuming the existence of a vested right, Plaintiffs exercised this right upon filing their action in Missouri on July 6, 2016. (*See* Missouri Petition, App. 8-30). Plaintiffs were represented by the same counsel in the Missouri case as they are were before the District Court and are now for the purposes of appeal. Plaintiffs ostensibly had

notice upon filing in Missouri or at some point over the next 12 months before Section 686 became effective on July 1, 2017, that their claims would be subject to re-filing in Iowa. Indeed, Plaintiffs were on notice as early as August 10, 2016, when Arconic filed its initial motion to dismiss based on personal jurisdiction in the Missouri case. (Arconic Missouri MTD, App. 31-42). Plaintiffs were further on notice when they filed their response to Arconic's personal jurisdiction motion on August 12, 2016; when other co-defendants file their respective motions to dismiss from August through December, 2016; and when another co-defendant noticed their personal jurisdiction motion for hearing on January 4, 2017. Despite all these events, Plaintiffs dismissed the remaining parties to the Missouri litigation. (January 10, 2018 Order Dismissing All Viable Parties, App. 59-60).

Despite ample notice, Plaintiffs' dilatory inaction resulted in their re-filing their case in Iowa in September 2017, 2.5 months after the Statute went into effect and six (6) months subsequent to when the Statute was introduced and signed into law. Plaintiffs had ample opportunity to bring suit in Iowa prior to the enactment of Iowa Code

Section 686B.7(5). Plaintiffs had actual notice of personal jurisdiction challenges to their case for almost a full year to statute's effective date. Despite this actual notice, they persisted in maintaining their lawsuit in Missouri against numerous defendants (not including IITI) and even maintained suits in both jurisdictions for a period of almost four (4) months (January 10, 2018 Order Dismissing All Viable Parties, App. 59-60).

D. Iowa Code Section 686B.7(5) Alters a Remedy for Asbestos-Related Injuries; it Does not Deprive Plaintiffs of Due Process Protections.

Section 686B.7(5) and the entirety of the Asbestos and Silica Claims Priorities Act relates to the scope of remedies available to those suffering from asbestos-related injuries. As such, the statue acts as a *de jure* statute of repose for asbestos claims. The Legislature's enactment of this statute bears a rational relationship to a legitimate government purpose, i.e., limiting the remedies available to tort claimants alleging injuries that accrue typically twenty (20) to forty (40) years or more after the time of exposure, as in this case. When considered in conjunction with Iowa Code Section 686A, the Asbestos

Bankruptcy Trust Claims Act, the Legislature's intent to tailor the remedy (not the ability to assert a claim) for asbestos-related disease is perfectly clear.

Pursuant to Section 686A, plaintiffs in asbestos cases are required, within ninety days after filing a lawsuit (or 90 days after July 1, 2017, whichever is later) to provide the court and parties with:

> a sworn statement signed by the plaintiff and the plaintiff's counsel, under penalty of perjury, indicating that an investigation of all asbestos trust claims has been conducted and that all asbestos trust claims that may be made by the plaintiff or any person on the plaintiff's behalf have been filed.

Iowa Code Section 686A.3(1)(a). Here, Plaintiffs filed their required disclosure and disclosed the asbestos manufacturer trusts to which they applied and sought compensation as of that date. They included: AP Green Asbestos Trust; United States Gypsum Asbestos Personal Injury Trust; DII Industries, LLC Asbestos PI Trust; Owens Corning/ Fibreboard Asbestos Personal Injury Trust; Manville Trust; and Eagle Picher Industries Asbestos Trust. (Plaintiffs' Notice of Filed and Anticipated Trust Filings pursuant to Asbestos and Silica Claims Priorities Act filed November 9, 2018, App. 61-62). When one

considers the bankruptcy trust disclosure obligations mandated by Section 686A in conjunction with the immunity provisions in Section 686B.7(3), the Legislature's intent is perfectly clear and satisfies the rational basis test.

This Court must uphold the application of Section 686B.7(5) to Plaintiffs' claims because they had ample notice; their expectation of the continuation of existing law was not reasonable; the right impaired was an economic, not fundamental, right; and the legislation had as its purpose a legitimate governmental aim: to apportion fault properly to manufacturers of asbestos-containing and to impose a *de jure* statute of repose on legacy tort claims. The Statute adjusts the remedy available to Plaintiffs but doesn't impose any further obligation on them. Plaintiffs can still seek compensation for Decedent's death, but they have to pursue that through the bankruptcy system (or, had they been timely, against manufacturers). They can pursue (and have pursued, according to their required disclosures) certain asbestos product manufacturers who are approved payors for the Arconic Riverdale site (Plaintiffs' Notice of Filed and Anticipated Trust Filings

pursuant to Asbestos and Silica Claims Priorities Act filed November 9, 2018, App. 59-60). The Statute has a presumption of constitutionality that Plaintiffs cannot defeat beyond a reasonable doubt as required by *AFSCME Iowa Council 61 v. State*, 928 N.W. 2d 21 (Iowa 2019).

III. The Application of Iowa Code Section 686B.7(5) to Plaintiffs' Claims Does Not Violate Plaintiffs' Equal Protection Rights.

A. Standard of Review and Error Preservation

The District Court granted summary judgment to IITI based on its application of Iowa Code Section 686B.7(5). As such, the District Court's ruling is reviewed for correction of errors at law. *Burbach v. Radon Analytical Laboratories, Inc.,* 652 N.W. 2d 135 (Iowa 2002); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 30-31 (Iowa 2019). Furthermore, Plaintiffs failed to preserve their due process challenge by not raising it before the District Court. Error not assigned properly on appeal should not be considered by the appellate court. *See Jensen v. Voshell*, 193 N.W. 2d 86, 89 (Iowa 1971). Here, Plaintiffs concede that "the equal protection clause was not invoked" before the District

Court but now claim to have preserved this issue because they "retained" a product liability claim against IITI, despite citing to any evidence in the record. (Plaintiffs' Final Proof Brief, 42). Plaintiffs have failed to preserve this issue for appeal and now asserts a challenge to the District Court's findings of fact. Deference should be given to the District Court's findings of fact, which have the force of a special verdict and will be binding on this Court if supported by substantial evidence and justified as a matter of law. *Chariton Feed & Grain, Inc. v. Harden*, 369 N.W.2d 777, 781 (1985), citing to *Keith v. Community School Dist. of Wilton,* 262 N.W.2d 249, 255 (Iowa 1978) and Iowa R. App. P. 14(f)(1).

Assuming, *arguendo*, that Plaintiffs have preserved an equal protection argument for consideration on appeal, their constitutional challenge would be subject to *de novo* review. *AFSCME Iowa Council 61* at 31. However, statutes subject to *de novo* review enjoy a strong presumption of constitutionality. *Id.* If a statute is capable of being construed in more than one manner, one of which is constitutional, a court must adopt the constitutional interpretation. *Iowa State*

Education Association v. State, 928 N.W. 2d 11, 15 (Iowa 2019). Plaintiffs would have to prove, beyond a reasonable doubt, that Section 686B.7(5) was unconstitutional, and "refute every reasonable basis upon which the statue could be found to be unconstitutional." 928 N.W.2d at 30-31; *accord Bierkamp v. Rogers*, 293 N.W.2d 577, 578-579 (Iowa 1980). Plaintiffs concede as much when they acknowledge that their equal protection argument, is subject to "rational basis" scrutiny (Plaintiffs' Final Proof Brief, p. 44). As outlined below, Plaintiffs cannot meet this heavy burden.

B. Plaintiffs Cannot Establish Disparate Treatment.

To sustain their equal protection challenge, Plaintiffs must establish that there is a similarly situated class of plaintiffs who are treated differently under the provisions of Code Section 686B.7(5). The threshold inquiry in any equal protection analysis is to identify whether persons are similarly situated. *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W. 2d 30, 45 (Iowa 2012). "If people are not similarly situated, their dissimilar treatment does not violate equal protection." 815 N.W.2d 30, 45 (Iowa 2012) (internal punctuation

modified). Upon a determination that persons are similarly situated, a court will apply the appropriate level of scrutiny depending on the challenged legislation. *Id.* at 45. Plaintiffs have conceded that their equal protection challenge is properly subject to a "rational basis" analysis, the least rigorous level of scrutiny, because their claim does not involve a fundamental right. (Plaintiffs' Final Proof Brief, p. 44).

Rational basis scrutiny is highly deferential. *Id.* at 42. Under rational basis scrutiny, reviewing courts will presume constitutionality. *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 31 (Iowa 2019). Courts applying a rational basis analysis hesitate to impose upon the legislature's policy-making purview and require only some plausible justification for the challenged legislation. *Id.* at 32. To overcome rational basis scrutiny, a plaintiff must establish that the challenged policy is arbitrary, and further "negate every reasonable basis upon which the classification may be sustained." *Id.*

Here, rational basis analysis dictates that Section 686B.7(5) be upheld and Plaintiffs' equal protection challenge must fail. Plaintiffs have failed to identify – or even suggest – the class of similarly situated

plaintiffs who would be treated differently under the Statute. Plaintiffs suggest that Iowa Code Section 686B.7(5) deprives plaintiffs with asbestos-related injuries of a remedy against "suppliers who sell defective and unreasonably dangerous products" while permitting those with non-asbestos-related injuries to seek redress for their injuries. (Plaintiffs' Final Proof Brief, p. 43). Plaintiffs are at pains to draw the distinction between plaintiffs with asbestos- or silica-related injuries from other plaintiffs, generally; but they fail to recognize that the challenged Statute treats all plaintiffs the same within their class and, as such, they are not similarly situated to plaintiffs in general.

This Court has long upheld the discretion of the Iowa Legislature to create distinct classes of plaintiffs and assign different rights to recovery. *See Grovijohn v. Virjon, Inc.,* 643 N.W.2d 200; *Spencer v. Truro Tavern*, 728 N.W. 2d 853 (Ct. App. Iowa 2002). These cases challenged the notice requirement of Iowa Code Section 123.92, which requires notice to a dramshop defendant within six months of the alleged injury. The *Grovijohn* and *Spencer* plaintiffs could not identify a similar class of plaintiffs treated differently under Section 123.92. In

the alternative, the *Spencer* plaintiffs attempted to show that, despite dramshop plaintiffs being treated similarly, they were treated differently than those not injured by a licensee or permittee. *Spencer,* 728 N.W. 2d at 853. The court in *Grovijohn* noted that dramshop plaintiffs are a class "uniquely created by the legislature and, as such, are different from personal injury claimants generally." 643 N.W.2d at 204. Because the *Grovijohn* and *Spencer* plaintiffs could not identify a similar class of plaintiffs subject to disparate treatment, their equal protection challenges failed.

Like the plaintiffs in *Spencer*, here the Plaintiffs erroneously distinguish plaintiffs who have suffered asbestos- or silica-related injuries from the general pool of tort plaintiffs. (Plaintiffs' Final Proof Brief, p. 43-44). As they did in the context of dramshop plaintiffs, here the Iowa Legislature created a unique class of plaintiffs in asbestos or silica actions, all of whom are equally restrained by the limitations set forth in Iowa Code Section 686B.7(5). Plaintiffs cannot sustain their equal protection argument because they cannot establish disparate treatment for similarly situated plaintiffs under the Statute.

C. Iowa Code Section 686B.7(5) Bears a Rational Relationship to a Legitimate Governmental Interest.

Assuming, *arguendo*, that Plaintiffs could satisfy their burden of showing disparate treatment among similarly situated persons, they would still need to show that the classifications inherent in Section 686B.7(5) have no reasonable relationship to a legitimate governmental interest. *See AFSCME Iowa Council 61*, 928 N.W.2d at 32. Plaintiffs rely on the *Bierkamp* and *Miller* cases to support their challenge to the rational basis behind Section 686B.7(5). As outlined below, those cases are inapposite.

The *Bierkamp* case dealt with the Iowa Guest Statute, which distinguished between guests in automobiles. *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980). The Court in *Bierkamp* determined that, while the statute was entitled to deferential treatment in its legislative aim of fostering hospitality among automobile drivers and prevention of collusive lawsuits, a less deferential view was required when the purposes of the legislation's aims were less apparent. *Id.* at 580. In essence, the passage of time eroded the need for the challenged

legislation, making its public policy goals less clear; thus, the rational basis test could not be satisfied. Similarly, in *Miller v. Boone County Hospital*, the Court took up the issue of whether the notice and limitations provisions of the Municipal Tort Claims Act treated victims of municipal torts differently that then private tort-victim peers. *Miller v. Boone County Hospital*, 394 N.W. 2d 776, 777 (Iowa 1986). As in *Bierkamp,* the Court found that the passage of time had weakened the basis for the once-valid public policy goals advanced by the legislation and a rational basis no longer existed. *Id* at 779-780.

Here, Iowa Code Section 686B.7(5) is relatively new and, even under the analysis of *Bierkamp* and *Miller*, is entitled to deference by the Court conducting a rational basis analysis. *See AFSCME Iowa Counsel 61*, 928 N.W.2d at 32. As noted above, the Legislature's goal of tailoring the remedies available for victims of asbestos-related diseases is an inherently rational one. The legitimate governmental purpose behind the enactment of this statute could not be more clear: protecting Iowa residents from liability for asbestos-related diseases

that accrue typically twenty (20) to forty (40) years or more after the time of exposure, as in this case.

When one considers the bankruptcy trust disclosure obligations mandated by Section 686A in conjunction with the immunity provisions in Section 686B.7(3), the Legislature's intent is perfectly clear and satisfies the rational basis test. The District Court recognized as much at the hearing on IITI's and Arconic's motions for summary judgment: "Well, I mean, the heading is 'priorities,' right? I mean, it seems to insinuate to me that it's saying we have a problem with asbestos products. You need to go after the people who make asbestos products, not the people who bought them." (September 17, 2019 Hearing Tr. 39:8-12, App. 719). As noted, Plaintiffs have waived their equal protection challenge by failing to raise it before the District Court. Even if they had not, they have failed to carry the heavy burden of showing disparate treatment and lack of any rational basis supporting Iowa Code Section 686B.7(5).

IV. The District Court Properly Interpreted and Applied Section 686B.7(5) When It Granted Summary Judgment to IITI.

A. Standard of Review and Error Preservation.

The District Court granted summary judgment to IITI based on its application of Iowa Code Section 686B.7(5). At the summary judgment phase, Plaintiffs argued that IITI should not be immune from suit under the Statute because of their status. Plaintiffs have preserved the issue of statutory interpretation for review by raising the issue in their written submissions and oral argument before the District Court. The District Court's summary judgment ruling is reviewed for correction of errors at law. *Burbach v. Radon Analytical Laboratories, Inc.,* 652 N.W. 2d 135 (Iowa 2002); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 30-31 (Iowa 2019). Because Plaintiffs appeal the District Court's grant of summary judgment and findings of fact, deference should be given to those findings, which have the force of a special verdict and will be binding on this Court if supported by substantial evidence and justified as a matter of law. *Chariton Feed & Grain, Inc. v. Harden*, 369 N.W.2d 777, 781 (1985), citing to *Keith v. Community School Dist. of Wilton,* 262 N.W. 2d 249, 255 (Iowa 1978) and Iowa R. App. P. 14(f)(1).

B. The District Court Correctly Applied the Principles of Statutory Interpretation.

When interpreting statutes, a court's primary objective is to ascertain the legislature's intent. *Branstad v. State ex rel. Nat. Res. Comm'n*, 871 N.W. 2d 291, 295 (Iowa 2015). The starting point is the language of the statute itself. *Myria Holdings, Inc. v. Iowa Dep't of Revenue*, 892 N.W. 2d 343, 348 (Iowa 2017). A reviewing 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. "When the text of a statute is plain and its meaning clear, the court should not search for meaning beyond the express terms of the statute." *Cox v. Iowa Dep't of Human Servs.*, 920 N.W. 2d 545, 553 (Iowa 2018).

When interpreting the language of Iowa Code Section 686B.7(5) at the summary judgment phase, the District Court evaluated the briefing submitted by the parties and correctly interpreted Iowa Code Section 686B.7(5) to conclude that IITI and Arconic were not liable for

Plaintiffs' claims. (October 1, 2019 Order, pp. 1-9; App. 768-777). The District Court painstakingly interpreted each term of the Statute on an almost granular level and took as its guide Iowa Code Chapter 4, which dictates that the court "presume that the state legislature intended "[a] just and reasonable result," as well as "[a] result feasible of execution." *See* Iowa Code § 4.4(3), (4) (2019).

The District Court examined the Statute's plain language as it interpreted the terms "defendant," "asbestos action," and "shall not be liable," and determined that they were "well-defined and unambiguous." (October 1, 2019 Order at p. 6, App. 773). Despite the lack of legislative definition in the statute, the District Court considered the term "product or component part." It noted that products and component parts at issue in this case involve asbestos insulation used at the [Arconic] plant." (October 1, 2019 Order at p. 6, App. 773). Plaintiffs have not contested the District Court's definition of the term "product or component part" before this Court and any argument to that effect is thus waived.

The District Court focused on the terms made," "sold," and third party," noting "[t]he central issue before the Court is whether or not these products and component parts were made or sold by a third party." (October 1, 2019 Order, p. 7, App. 774). The Court correctly noted that there were no allegations or evidence that Arconic ever manufactured or produced an asbestos containing product or component part. *Id.* As to IITI, the District Court found that the record contained evidence that the company sold products containing asbestos. *Id.* However, the Court correctly noted that "[t]he record is also clear that IITI purchased these asbestos products from other sources, specifically, Johns Manville and Eagle-Pitcher." (October 1, 2019 Order at p. 7, App. 774). The District Court, viewing the evidence in the light most favorable to the Plaintiffs, found that "any asbestos products that IITI installed at Alcoa or sold to Alcoa were products or component parts made or sold by third parties such as Johns Manville and Eagle-Pitcher." (*Id.* at pp. 7-8, App. 774-775).

Plaintiffs claim on appeal that application of Iowa Code Section 686B.7(5) to immunize IITI and Arconic from liability would lead to an

absurd result. (Plaintiffs' Final Proof Brief, 34). They further attempt to imbue the Statute with a different legislative intent than is present in its plain language, attempting to assert (for the first time on appeal) that the Section 686B.7(5) is intended to codify the "bare metal defense." (Plaintiffs' Final Proof Brief, 35-39). In their presentation at oral argument, Plaintiffs' went so far as to suggest that the Statute was meant only to protect "Mom and Pop Shop[s]" building valves. (September 17, 2019 Hearing Transcript, p. 30, App. 710). However much Plaintiffs may question Section 686B.7(5)'s wisdom or its consequences, this Court is prohibited from extending, expanding, or changing the meaning of the Statute under the guise of construction in face of its plain, unambiguous language. *Myria Holdings, Inc.*, 892 N.W. 2d at 348.

Two other Iowa District Courts have interpreted and applied Section 686B.7(5) in the same manner as the District Court in the instant case. *See Clester v. Alcatel-Lucent USA, Inc.,* No. LACV012499 (Clarke Co. November 14, 2019); App. 796-803) and *Fankhauser v. Borg-Warner Tel., Inc.,* No. LACL150972 (Polk Co. August 14, 2019,

App. 778-795). Both District Courts applied established principles of statutory interpretation and, in the case of *Fankhauser*, also granted summary judgment to a defendant alleged to have been a 'seller' of asbestos containing material. *Id.*

As noted above, and contrary to Plaintiffs' assertions, viewing Section 686B.7(5) together with the provision of the larger Asbestos and Silica Claims Priorities legislation, the legitimate governmental interest is clear: to focus liability for asbestos-related injuries on the manufacturers of asbestos-containing products. Together with the bankruptcy trust provisions contained within Section 686A, the Legislature created a scheme for allowing a route to recovery for plaintiffs suffering from asbestos-related injuries while balancing the need to protect Iowa residents and businesses from liability for claims which typically take twenty to forty years to accrue. The District Court's order granting summary judgment to IITI should be affirmed.

CONCLUSION

This Court should affirm the District Court's Order granting summary judgment in favor of IITI. No genuine issue of material fact

exists and, as such, IITI is entitled to affirmance of the judgment as a matter of law pursuant to Iowa Code Section 686B.7(5). Plaintiffs' constitutional challenges were not preserved and are, therefore, waived. Were the Court to consider the constitutional challenges raised in Plaintiffs' appeal, these should be denied because they fail as a matter of law.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested pursuant to Rule 6.903(2)(i) to aid the Court in resolution of this appeal.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS

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/ Kevin P. Horan

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 7, 2020, the above and foregoing Final Brief was electronically re-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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