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.

Iowa Court of Appeals Decision Filed March 17, 2021

RESISTANCE TO FURTHER REVIEW OF DEFENDANT-APPELLEE, IOWA-ILLINOIS TAYLOR INSULATION, INC.

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STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's grant of summary judgment to Defendants-Appellees Iowa-Illinois Taylor Insulation, Inc. and Arconic, Inc. based on the application of Iowa Code Section 686B.7(5) (*See* Iowa Court of Appeals Decision filed March 17, 2021). 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). The Court of Appeals correctly interpreted Section 686B.7(5) to immunize Iowa-Illinois Taylor Insulation, Inc. ("IITI"), an installer and distributor of insulation products to Arconic, Inc. ("Arconic") during the relevant time period at issue. The Court of Appeals also properly dispensed with Plaintiffs' unpreserved constitutional challenges based on due process and equal protection, which were raised for the first time in their appellate papers.

Plaintiffs now claim that the Court of Appeals erred in interpreting Section 686B.7(5) because the terms contained in the statute are ambiguous and would lead to an absurd result if applied to

IITI and Arconic. Further, Plaintiffs claim the Court of Appeals erred by failing to accept Plaintiffs' (also unpreserved) contention that Section 686 was merely an attempt to codify a "bare metal" defense into Iowa law. The Court of Appeals committed no error and correctly interpreted Section 686B.7(5) by relying on the plain, clear, and unambiguous language of the statute itself. The Court of Appeals also properly refrained from displacing legislative policy on the basis of speculation as to the legislature's true (but undefined) intent. Further review should be denied as the Plaintiffs have failed to show any factors which would warrant additional scrutiny by this Court.

ARGUMENT

I. Plaintiffs Have Failed to Establish Any Basis for Further Review

Under normal circumstances, an application for further review will not be granted. Indeed, "[f]urther review by review by the supreme court is not a matter of right, but of judicial discretion." Iowa R. App. P. 6.1103(1)(b). Rule 6.1103 outlines four (4) main grounds for consideration that may warrant further review by this Court: 1. conflicting appellate court decisions; 2. a substantial question of

constitutional law erroneously decided by the appellate court; 3. an important question of changing legal principles are at issue; or 4. an issue of broad public importance that should ultimately be decided by this Court. *See Id.* Plaintiffs have failed to identify any conflicting decisions by lower courts (indeed, the analysis has been uniformly in favor of upholding the challenged statute). Further, Plaintiffs appear now to have completely abandoned their unpreserved challenges on constitutional grounds.

While Plaintiffs suggest that the interpretation of Section 686B.7(5) implicates an issue of broad public importance that should be decided by this Court as a matter of first impression, further inspection reveals that Plaintiffs' sole issue with the decision of the Court of Appeals rests with its reading of the plain and unambiguous language of the statute (Plaintiffs' Application, pp. 8-9; 15-24). The Court of Appeals, despite the lack of ambiguity present in the statute, applied the principles of statutory construction and upheld the validity of the statute in this case (COA Decision, pp. 5-8). It should be noted that Plaintiffs failed to raise the issue of "bare metal defense"

codification, at either the summary judgment pleading or argument phase before the District Court. Indeed, one can find no mention of the "bare metal defense" in Plaintiffs' summary judgment briefing or hearing transcript. This failure alone should preclude further review.

Despite Plaintiffs' failure to challenge, or even mention, the "bare metal defense" before the District Court, the Court of Appeals nonetheless evaluated Section 686B.7(5) in the context of the "bare metal defense" and gave it its plain effect, much to the chagrin of Plaintiffs (COA Decision, pp. 9-10). Now, Plaintiffs' Application simply re-packages their previously unsuccessful argument in the hope of securing a different result before this Court. Issues of statutory interpretation, application, and issue preservation are properly resolved by applying existing legal principles and were correctly resolved by the Court of Appeals. As such, Plaintiffs have not satisfied the requirement of Rule 6.1103(1)(b)(1) and further review should be denied.

II. The Court of Appeals Correctly Interpreted Section 686B.7(5)

When interpreting statutes, 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).

a. The Plain Language of the Statute is Unambiguous

The Court of Appeals, like the District Court before, interpreted Section 686B.7(5) on an almost granular level. Plaintiffs suggested that the District Court had "adopt[ed] an overly broad and unsupported definition of "defendant." (Appellants' Amended Brief, p. 13; Amended Reply Brief, p. 12). Indeed, Plaintiffs' arguments in their briefing hinge on imbuing the language of the statue with an

unsupported and narrow meaning of the term "defendant." Despite any indication in the statute itself, Plaintiffs attempted to suggest that "a 'defendant' is one that makes or sells an asbestos product'" (COA Decision, p. 6). Indulging the Plaintiffs' attempt to redefine the meaning of the term "defendant," the Court of Appeals engaged in the three-step analysis outlined in *De Stefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155, 168 (Iowa 2016). The Court first determined whether the legislature had defined the term "defendant" (it had not). Next, the Court considered whether there was an "established legal meaning" for the term. Per the Court of Appeals, "it does." (COA Decision, p. 7). The Court of Appeals went so far as to cite to *Black's Law Dictionary* to define the term "defendant" (COA Decision, p. 7).

The Court of Appeals dispensed with Plaintiffs' argument, noting that the legislature is presumed to intend the "usual meaning ascribed by" courts to the term "unless the context shows otherwise." (COA Decision, p. 7); *State v. Shafranek*, 576 N.W. 2d 115, 118 (Iowa 1998). Here, the context did not show otherwise. The Court of appeals noted that "manufacturer" is not a common meaning of the term

"defendant," as Plaintiffs' proffered interpretation would suggest; and that the legislature commonly uses both terms, "sometimes in the same statute." (COA Decision, p. 8). Again relying on the plain language of the statute in the face of a lack of ambiguity, the Court of Appeals stated " if the legislature intended for the term 'defendant' to mean only 'manufacturers, the legislature surely would 'have so stated.'" (COA Decision, p. 8)(citing *Hansen v Haugh*, 149 N.W. 2d 169, 172 (Iowa 1967).

b. Plaintiffs' "Absurdity Doctrine" Argument is Without Merit

The threshold for applying the "absurdity doctrine" is a difficult one to satisfy. "Departure from the literal construction is justified when such construction ... would produce an absurd and unjust result and the literal construction is clearly inconsistent with the purposes and policies of the act." *State v. Walden*, 87 N.W. 2d 842, 848 (Iowa 2015). The presumption is 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 literal construction of a challenged statute is the default analysis, and departure from that default "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." *Id.*

Plaintiffs have misstated (and overstated) the implications of applying Section 686B.7(5) to immunize IITI and Arconic, suggesting that the statute completely eliminates claims against premises owners or product suppliers (Plaintiffs' Application, pp. 25-30). Plaintiffs rely heavily on *Carolan v. Hill*, 553 N.W.2d 882 (Iowa 1996) to support their contention that one must consider the consequences of a particular construction in determining its legislative intent. This Court should note that the *Carolan* case interpreted whether the term "person" was ambiguous in determining whether expert testimony regarding standard of care limited to physicians under Iowa Code Section 147.139. Contrary to Plaintiffs' assertion (which incorrectly relies on *dicta*), the *Carolan* court did not find the term "person" to be ambiguous and went on to say that statutory construction would not aid the analysis because limiting expert testimony to physicians rather than qualified persons contradicted the statutory and case law

precedent encouraging liberal admissibility of expert opinions. *Carolan* at 888.

The *Carolan* decision supports IITI's and Arconic's position (and the Court of Appeals' opinion) that terms like "person" and "defendant" are not ambiguous and should be given their accepted meaning. *Carolan* is also properly read to suggest that engaging in statutory construction runs counter to well-established case law and statutory authority where the term "defendant" is not limited to product manufacturers, as urged by Plaintiffs. Especially in cases like this, where the plain, literal meaning of Section 686's terms is clear and unambiguous. Plaintiffs' suggestion that the Court of Appeals (in addition to the two District Courts who have analyzed this statute) somehow misinterpreted or cannot accurately define the term "defendant" in Section 686 may be, in and of itself, "absurd."

Moreover, the Court of Appeals correctly concluded that the consequences of applying Section 686B.7(5) to immunize IITI and Arconic from liability are consistent with the purposes and policies of the legislation: "It's plain purpose – as shown by its plain words – 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). 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. 767; Plaintiffs' Resistance to IITI MSJ, pp. 10-11, App. 147-148; Tr. 47, App. 720).

The Court of Appeals' analysis is consistent with the District Court's, which determined the legislature may have intended to shift the focus of asbestos cases to "the actual producers of products containing asbestos rather than the entities who purchase it." (App. p. 775). 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. 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." (App. 719).

It is perfectly rational that this statute would shield contractor/distributor defendants like IITI who did manufacture asbestos products from liability. The Court of Appeals correctly sees nothing absurd about this intended result, noting Section 686 is "aimed at regulating civil lawsuits arising from asbestos and silica injuries," and then rightly shying away from the temptation to "displace" the "legislative policy" adopted by Iowa's elected leaders. (COA Decision, pp. 7, 11).

c. Plaintiffs' Bare Metal Argument is Unpreserved and Unpersuasive

Plaintiffs attempt to infuse Section 686 with a different legislative intent than is present in its plain language, asserting (for the first time on appeal) that the Section 686B.7(5) is intended to codify the "bare metal defense." (Plaintiffs' Amended Proof Brief, 36; Plaintiffs' Application, pp. 18-24). Plaintiffs failed to raise the issue of "bare metal defense" codification at the summary judgment phase before the District Court. Indeed, one can find no mention of the "bare

metal" defense in Plaintiffs' summary judgment briefing or in the oral argument hearing transcript.

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)). Plaintiffs' late-stage "bare metal defense" argument is unpreserved: "[t]he failure to make more than a perfunctory argument constitutes waiver." *State v. Gibbs*, 941 N.W. 2d 888, 902 (Iowa 2020).

Despite Plaintiffs' failure to preserve their "bare metal defense" argument, the Court of Appeals dutifully indulged it. In their opinion, the Court of Appeals noted that the plain language of Section 686B.7(5) does not limit immunity to only "manufacturers," as Plaintiffs suggest it should, in conformity with other statutes from other jurisdictions. (COA Decision, p. 10). The Court properly employed sound principles of statutory interpretation, relying on the language of the statute itself. Further, the Court found no indication that the legislature intended merely to codify the "bare metal defense" and rejected Plaintiffs' invitation to look to foreign law in order to manufacture legislative intent in the absence of any ambiguity. As stated by the Court, "[i]f 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)).

Plaintiffs urged the Court of Appeals to look to other jurisdictions in an attempt to find a "lookalike" statute and bootstrap a legislative intent that more closely fits with their desired outcome. The Court of Appeals rejected this invitation, as it would require a conjuring of

meaning and intent well beyond the plain language of Section 686B.7(5) and in contravention of established precedent. *Nixon v. State*, 704 N.W.2d 643, 652 (Iowa 2005); *IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001); *Auen v. Alcoholic Beverages* Div., 679 N.W.2d 586, 590 (Iowa 2004). However much Plaintiffs may question Section 686B.7(5)'s intent 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.

d. The Court of Appeals' Analysis is Consistent with that of the Lower Courts

The Court of Appeals correctly interpreted Section 686B.7(5). In addition to the Court of Appeals and the District Court below, 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. 789-796) and *Fankhauser v. Borg-Warner Tel., Inc.,* No. LACL150972 (Polk Co. August 14, 2019, App. 771-788). 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 Court of Appeals' decision affirming the District Court's grant of summary judgment to IITI should be affirmed, and Plaintiffs' Application for Further Review should be denied.

CONCLUSION

This Court should deny Plaintiffs' Application for Further Review. Plaintiffs have failed to show any factors which would warrant additional scrutiny by this Court. The Court of Appeals correctly interpreted Iowa Code Section 686B.7(5) by analyzing its clear, plain, and unambiguous language. Its interpretation is consistent with the painstaking analysis undertaken by two District Courts and their application of Section 686 as a bar to liability for non-manufacturers or sellers of asbestos products in asbestos actions. The Court of Appeals did not err in its interpretation and further review would be duplicative and improper. As such, Plaintiffs' Application should respectfully be denied.

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), 6.903(1)(e)(1), 6.903(1)(g)(1), and 6.1103(4)(a) because:

[X] this brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains 2,802 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/ Kevin P. Horan

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 16, 2021, 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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