No. 19-1852

IN THE SUPREME COURT OF IOWA

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

vs.

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

Review of Decision of Iowa Court of Appeals
Dated March 17, 2021

APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in interpreting Iowa Code § 686B.7(5) to bar asbestos exposure claims against premises owners and product suppliers when the statute is clearly intended only to protect product manufacturers through the "bare metal" defense.

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STATEMENT SUPPORTING FURTHER REVIEW

This appeal involves the interpretation of Iowa Code § 686B.7(5). That section provides that "[a] defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." The Court of Appeals interpreted Section 686B.7(5) to bar the Beverage family's premises liability claims against Alcoa, Inc., for injuries arising from decedent Charles Beverage's exposure to asbestos on Alcoa's premises, even though the statute makes no reference to premises claims or any intent to abolish such claims. The court also interpreted the statute to eliminate the Beverages' product liability claims against Iowa-Illinois Taylor Insulation, Inc. (IITI), which sold the asbestos insulation to which Charles Beverage was exposed, even though the statute contemplates that sellers of asbestos products will retain liability.

The interpretation of Iowa Code § 686B.7(5) is an issue of first impression. It is a matter of public importance because the Court of Appeals' interpretation eliminates entire causes of action in asbestos cases in contravention of both the language and intent of

the statute. The Court of Appeals erred in dismissing the Beverages' contention that the legislature clearly intended to adopt the "bare metal defense" to limit the liability of asbestos product manufacturers for asbestos replacement parts made by third parties. The district court's interpretation leads to an absurd result of barring all causes of action against premises owners that created dangerous conditions on their property through careless use of asbestos, and asbestos insulation contractors that sold asbestos products. This Court should accept review to correct this error.

STATEMENT OF THE CASE

This lawsuit arises out of Decedent Charles E. Beverage's exposure to asbestos insulation at the Alcoa plant in Bettendorf, Iowa for twenty years, from the 1950s to the 1970s. The plant was owned by Alcoa, and much of the asbestos insulation was installed by IITI. Charles[1] died from malignant mesothelioma, a cancer uniquely caused by asbestos exposure, on October 7, 2015.

[1] Charles Beverage is referred to herein as "Charles" to avoid confusion with his son, Larry Beverage, who is a plaintiff and also a witness.

Wrongful death and survival claims were brought by Charles's children: his son, who was appointed the representative of his estate, and his two daughters.

Alcoa and IITI moved for summary judgment, arguing that the Beverage family's claims were barred by Iowa Code § 686B.7(5). The trial court agreed and granted summary judgment to Alcoa and IITI via order dated October 1, 2019. (App. 776).

The Beverage family appealed the district court's summary judgment order. After full briefing and argument, the Court of Appeals affirmed. A copy of the Court of Appeals' opinion is attached.

STATEMENT OF FACTS

Charles Beverage was diagnosed with malignant mesothelioma in September 2015 and died of mesothelioma on October 7, 2015. (App. 194, 249). Although Charles was not able to give a deposition before he died, testimony from his son, former employee, and others who worked at Alcoa establish his exposure.

Charles worked at Alcoa's Davenport aluminum plant in Bettendorf, Iowa, between the 1950s and mid-1970s. (App. 254,

10:16-24; App. 255, 16:5-12; App. 280, 21:6-9). He was not an employee of Alcoa. (App. 256, 18:2-10). He was a general construction contractor at Alcoa and his own company, Beverage Construction Company, had an office inside the plant. (App. 255, 14:15-17:21; App. 279, 17:1-6; App. 280, 18:4-10, 18:16-19:15). His work took him into all areas of the plant. (App. 279, 17:7-16).

One of his co-workers, Edward Allers, worked with Charles at Alcoa from 1961 to 1971. (App. 278, 10:10-11:15; App. 282, 28:21-24; App. 283-84, 33:21-34:8). He saw Charles working around the installation and removal of insulation on steam lines. (App. 285, 40:14-41:19; App. 291, 65:1-5). Charles was also exposed to other asbestos products like transite board, insulating cement, and insulation blankets. (App. 290, 59:4-60:14; App. 287-88, 46:8-53:7; App. 311, 144:13-145:25).

In Allers' experience, IITI was the only insulation contractor at the plant and they installed insulation throughout the whole plant. (App. 286, 42:1-21; App. 304, 114:23-115:2; App. 312, 149:7-15). IITI installed asbestos insulation at the plant between 1965

and 1972. (App. 303, 110:3-111:22, 113:21-25; App. 305, 119:4-120:17).

Alcoa has acknowledged that it used asbestos insulation and other asbestos materials for processes associated with the manufacture of aluminum in the 1960s. (App. 330, 30:12-19; App. 395-400). Alcoa installed asbestos-containing insulation in the 1960s. (App. 342, 79:11-20; App. 340, 71:17-72:23). Alcoa's standard specification for steam piping required asbestos-containing insulation. (App. 366). Even as late as 2008, 85 percent of thermal insulation that was in the plant still contained asbestos. (App. 346, 95:13-96:7).

Despite the widespread use of asbestos insulation at its Davenport plant in the 1960s and 1970s, Alcoa had no communication protocols to warn contractors about asbestos at the plant. (App. 353, 123:16-21). Allers never saw any warning signs about the hazards of dust at the plant, no requirements to use respirators, no wet-down methods used on the insulation, and no plastic sheeting used to section off insulation work. (App. 290-91, 61:22-63:1).

This despite the fact that Alcoa has known since the 1940s that asbestos exposure causes asbestosis. (App. 333, 43:3-6). Alcoa became aware that asbestos can cause cancer in the 1950s. (App. 333, 43:24-44:20). Alcoa was aware of studies linking asbestos to mesothelioma in the 1960s. (App. 333, 44:22-45:16).

In addition to acting as an insulation contractor, IITI also sold asbestos-containing material to various customers, including Alcoa. (App. 472, 112:3-19; 112:30-113:10; App. 558). It sold asbestos insulation and insulating cement. (App. 432-33, 47:6-49:15; App. 433-34, 52:14-53:4). Documents establish that IITI sold substantial quantities of asbestos-containing insulation to Alcoa in the 1960s and 1970s. (App. 471, 109:9-19; App. 465, 84:1-17).

Iowa has long had employment standards regulating asbestos exposure. Iowa began compensating workers for occupational diseases related to exposure to asbestos in 1936. (App. 490-91, 182:4-186:15). In 1968, Iowa published employment safety rules establishing limits for air-borne concentrations of substances which could cause occupational illnesses. (App. 633-634, 646).

In 1971, the Occupational Safety and Health Administration (OSHA) was created by act of Congress. (App. 210). Its first regulatory activity was an emergency standard for asbestos of twelve fibers per cubic centimeter of air (f/cc). (App. 210). The asbestos standard was progressively lowered over the years to its present value of 0.1 f/cc. (App. 210).

Plaintiffs' medical causation expert concluded that Charles experienced exposures to asbestos beginning no later than 1967 and continuing to about 1976 on the premises of the Alcoa plant in Bettendorf, Iowa. (App. 196). Given Charles's proximity to "construction activities of the type that would cause disruption of asbestos-containing thermal insulation products, it is inevitable that he would have inhaled asbestos dust on many occasions and often at very substantial concentrations." (App. 196). Charles's asbestos exposures cumulatively constituted the direct and sole cause of his malignant pleural mesothelioma, which caused his death. (App. 196).

ARGUMENT

The Court of Appeals erred in interpreting Iowa Code § 686B.7(5) to bar the Beverages' premises liability claims against Alcoa and product liability claims against IITI. Established Iowa law has long provided that premises owners bear liability for injuries caused by an unsafe condition on their property and that product suppliers are liable for selling defective products that cause injury. This established law is the starting point for evaluating the meaning and consequences of Section 686B.7(5).

Next, a review of the language used in Section 686B.7(5) demonstrates that it is ambiguous. Because it is ambiguous, the tools of statutory construction are necessary to illuminate its meaning. The tools of statutory construction most useful to this analysis are a consideration of the language as a whole, evaluation of the absurd consequences of the Court of Appeals' interpretation, and a comparison of Section 686B.7(5) with similar laws governing the bare metal defense. Such analysis demonstrates that Section 686B.7(5) is aimed at establishing the bare metal defense and not

eliminating established causes of action against premises owners and product suppliers in asbestos cases.

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

I. The Beverage family had well-established common law claims against Alcoa and IITI.

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

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

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

Alcoa thus had a duty to exercise reasonable care to maintain its premises in a manner that would be safe for Charles, a lawful (and long term) visitor at Alcoa's Bettendorf plant. The Beverages' evidence showed that, in contravention of this duty, Charles was routinely exposed to asbestos insulation on Alcoa's premises in the 1950s, 1960s, and 1970s, that Alcoa was aware that asbestos was being used on its premises, that Alcoa had known since the 1940s

that asbestos exposure could cause fatal disease, and that Alcoa did not take precautions to warn or protect Charles from asbestos exposure.

Further, with regard to IITI, under Iowa products liability law, a plaintiff may state a claim by showing that their injury was caused by a product that was manufactured *or supplied* by the defendant. *Spaur v. Owens–Corning Fiberglas Corp.,* 510 N.W.2d 854, 858 (Iowa 1994) (quoting *Mulcahy v. Eli Lilly & Co.,* 386 N.W.2d 67, 76 (Iowa 1986)). As noted, IITI supplied and installed asbestos insulation at Alcoa. (App. 472, 112:3-19).

Thus, prior to this case, persons like Charles Beverage who suffered asbestos-related injuries had claims against premises owners and product suppliers who were responsible for their asbestos exposure.

II. Iowa Code § 686B.7(5) is ambiguous.

The purpose of statutory interpretation is to determine the legislature's intent. *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 858 (Iowa 2010). This Court "must not only examine the language of the statute, but also its underlying purpose and

policies, as well as the consequences stemming from different interpretations." *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000); *see also State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) ("In searching for legislative intent, we consider not only the language of the statute, but also its subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of various interpretations.").

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

When interpreting a statute, the Court assesses the statute in its entirety, not just isolated words or phrases. *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231 (Iowa 2010). "To ascertain the meaning of the statutory language, we consider the

context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole." *Griffin Pipe Prod. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003). In interpreting ambiguous statutory language, the Court strives to use "common sense" and to interpret the statute in a "sensible and logical" way. *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 223 (Iowa 2014).

"Ambiguity occurs 'if reasonable minds could differ or be uncertain as to the meaning of the statute.'" *State v. Mathias*, 936 N.W.2d 222, 227 (Iowa 2019) (quoting *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 248 (Iowa 2008)). "Ambiguity may arise in two ways: (1) from the meaning of particular words; or (2) from the general scope and meaning of a statute when all its provisions are examined." *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 728 (Iowa 1995).

Importantly, "disputed statutory language must be read in context." *In Interest of S.M.D.*, 569 N.W.2d 609, 611 (Iowa 1997). This is so during the "initial review for ambiguity," where the Court must "'assess the statute in its entirety, not just isolated words or

phrases.'" *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017) (quoting *State v. Howse*, 875 N.W.2d 684, 691 (Iowa 2016).)

In fact, "great care must be used before declaring a statute unambiguous." *Rhoades v. State*, 880 N.W.2d 431, 446 (Iowa 2016). This Court has recognized "the need to be circumspect regarding narrow claims of plain meaning and [strives] to make sense of our law as a whole." *Id.* "[T]he determination of whether a statute is ambiguous does not necessarily rest on close analysis of a handful of words or a phrase utilized by the legislature, but involves consideration of the language in context." *Id.* In *Rhoades*, the Court discussed prior cases in which seemingly straightforward language such as "all information" or "all liens" was found ambiguous in context. *Id.* (citing *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice,* 867 N.W.2d 58, 79 (Iowa 2015), and *U.S. Bank Nat. Ass'n v. Lamb*, 874 N.W.2d 112, 119 (Iowa 2016)).

Applying these principles, in context the term "defendant" as used in Section 686B.7(5) is ambiguous. "Defendant" is not defined in the statute. While the term "defendant" may ordinarily be straightforward, its meaning within Section 686B.7(5) cannot be

determined in isolation; it must be interpreted in light of the other language used in the statute. Use of the phrase "a product or component part made or sold by a third party" implies that the "defendant" referred to in the beginning of the sentence is a product manufacturer. The phrasing suggests a comparison between "a product or component part made or sold by a third party" and a product or component part made or sold by the defendant.

In other words, a "defendant" is one that makes or sells an asbestos product. This definition of defendant as a product manufacturer is suggested by the modifier to the word "product:" there is no liability if the product was "made or sold by a third party." Such qualification would only be necessary if the statute contemplated that the "defendant" is one who makes asbestos products.

The Court of Appeals, however, refused to look at Section 686B.7(5) as a whole, instead isolating the word "defendant" and claiming that it should be given its ordinary meaning. Slip Op., at 7. Consequently, any entity sued in an asbestos suit qualifies as a "defendant" under the statute. The court did not address the

Beverage family's contention that the term "defendant" has a different meaning in light of the other language used in the sentence, and has no explanation for why the legislature would modify "products" with the descriptor "made or sold by a third party." This approach is not consistent with Iowa law.

Ambiguity also arises from the section's placement within Chapter 686B pertaining to requirements for establishing prima facie proof of impairment from non-malignant asbestos diseases. Section 686B.7 in particular is focused on procedures, not substance. It is titled, "Procedures--limitation." Other than the subsection at issue, it addresses procedural matters such as presumptions, evidence at trial, discovery, and consolidation of cases. The strange addition of an apparently substantive provision at the end of a section on asbestos litigation procedures does not support the Court of Appeals' conclusion that there is a "clear" meaning to Section 686B.7(5). Such meaning certainly is not supported by its location within Chapter 686B.

Because there are multiple reasonable meanings of the statute, and it can logically be read to only apply to product

manufacturers, the Court should use of the tools of statutory construction to ascertain the legislature's intent.

III. The Court of Appeals erred in interpreting Iowa Code § 686B.7(5) to abolish all asbestos exposure claims against premises owners and product suppliers.

A. The Court of Appeals' interpretation leads to an absurd result.

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

"There are well-recognized limits to the extent to which courts will slavishly ascribe literal meanings to the words of a statute." *Schonberger v. Roberts,* 456 N.W.2d 201, 203 (Iowa 1990). If a literal interpretation produces an absurd result, the Court should proceed with caution:

> Such absurdity of result calls for scrutiny of the statute. *Ad absurdum* is a "Stop" sign, in the judicial interpretation of statutes. It is indicative of fallacy somewhere, either in the point of view or in the line of approach. In such case, it becomes the duty of the court

> to seek a different construction, and to presume always that absurdity was not the legislative intent. To this end, it will limit the application of literal terms of the statute, and, if necessary, will even engraft an exception thereon.

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

The Court of Appeals refused to acknowledge the clear consequences of its interpretation. It oddly denied that its interpretation would eliminate all asbestos exposure claims against premises owners and product suppliers, claiming that Section 686B.7(5) "only immunizes defendants against liability for exposure to asbestos or silica products that were 'made or sold by a third party.' It contains no general grant of immunity for 'premises owners' or 'asbestos product suppliers.'" Slip Op., at 10.

The Court of Appeals disingenuously suggests that the elimination of the Beverages' claims against Alcoa and IITI is merely the incidental effect of its interpretation of Section 686B.7(5). It does not, however, explain how an asbestos exposure claim could ever be brought against a premises owner or product supplier under an interpretation that limits liability only to those

who manufacture the asbestos product at issue. The natural consequence of its opinion is that liability cannot be based on a premise owner's duty to take reasonable precautions to keep its premises safe for invitees like Charles Beverage, or based on product liability law that has, until now, imposed liability on those that sell asbestos products.

Contrary to the Court of Appeals' approach, Iowa law provides that "the consequences of a particular construction" is one of the factors to be used in determining legislative intent. Iowa Code § 4.6(5); *Mathias*, 936 N.W.2d at 231. The case of *Carolan v. Hill*, 553 N.W.2d 882 (Iowa 1996) is instructive. There, the Court was interpreting Iowa Code § 147.139, which governs expert testimony on the standard of care in a medical malpractice case. *Id.* at 887. The question was whether only physicians could provide expert testimony or whether nurses and other non-physician medical personnel could testify about the standard of care. *Id.* Among other tools of construction, the Court considered the consequence of an interpretation that only allowed physicians to testify as experts, noting that "[i]f the word 'person' is construed only to include

physicians, it would contradict the statutory and case law regarding the admissibility of expert testimony." *Id.* at 888. Iowa law has long allowed expert testimony based on scientific, technical, or other specialized knowledge and has not required certain credentials before someone can be qualified as an expert. *Id.* The Court therefore rejected a construction of Iowa Code § 147.139 that would have altered Iowa law permitting expert testimony based on experience. *Id.* at 888-89.

Here, the Court of Appeals' construction of Section 686B.7(5) similarly upends longstanding Iowa law with regard to premises liability and product liability. Under the Court of Appeals' construction, Alcoa is merely "a consumer of asbestos insulation provided by a third party, IITI," (App. 774), not a premises owner with a duty to keep its premises safe for invitees like Charles Beverage. Even though Alcoa exposed Charles to asbestos insulation on its premises, contributing to his fatal cancer, it is now exempt from liability because it did not make or sell the asbestos insulation in use on its premises.

Similarly, even though IITI sold and installed the asbestos insulation on Alcoa's premises, and was therefore subject to liability under *Spaur*, now under Section 686B.7(5) IITI escapes liability because it was selling insulation made by Johns Manville and Eagle-Pitcher. (App. 774-75).

The Beverage family recognizes that the legislature could decide to eliminate these causes of action in an asbestos case, *if that was its intent*. They are not claiming that such a result would be absurd if such an intent was clearly stated. But there is nothing in the legislation itself, or in the legislative history, or in the specific language of the statute, that evidences an intent to abolish established tort claims against premises owners and suppliers who expose plaintiffs to asbestos.

This Court has declined to interpret a statute to work a sea change in the law in the absence of any express legislative intent to do so. For example, in *Swanger v. State*, 445 N.W.2d 344 (Iowa 1989), a plaintiff suing under the Iowa Tort Claims Act, Iowa Code chapter 25A, contended that a provision referencing insurance meant that the entire chapter requiring exhaustion of

administrative remedies in suits against the State no longer applied if the State had an applicable insurance policy. *Id.* at 348. This Court disagreed, reasoning first that "if the legislature had intended to allow abrogation of chapter 25A in its entirety as to all insured claims, it would surely have said so explicitly." *Id.* The Court further explained that acceptance of the plaintiffs' statutory construction "would drastically alter the extent of the waiver of State governmental immunity intended and accomplished by the legislature in chapter 25A," and "[y]et the language of section 25A.20 says nothing about governmental immunity, and certainly does not provide a blanket waiver of governmental immunity." *Id.* The Court adopted an alternate interpretation after considering the provision at issue in the context of the statutory scheme as a whole. *Id.* at 349; *see also Graham v. Worthington*, 259 Iowa 845, 855, 146 N.W.2d 626 (1966) ("If the legislature had intended to eliminate the doctrine of governmental immunity, as to all political subdivisions of the state, it could easily have so declared. This it did not do . . .").

The Court of Appeals erred in interpreting Section 686B.7(5) in a manner that eliminates asbestos exposure claims against

premises owners and product suppliers when the legislature never expressed any intention to work such a drastic change in the tort law of this State. Under well-established rules of statutory interpretation, this Court should consider the consequences of the Court of Appeals' interpretation. Because there is nothing in Section 686B.7(5), or the chapter to which it belongs, that gives the slightest indication of an intention to abolish causes of action against premises owners and product suppliers who expose people to asbestos, the Court of Appeals should not have adopted an interpretation that would work such extreme consequences in the absence of clearly stated legislative intent.

B. The clear intent of Section 686B.7(5) is adoption of the "bare metal defense" to claims against asbestos product manufacturers.

The Court of Appeals dismissed the Beverage family's argument that the clear intent of Section 686B.7(5) is to codify the "bare metal defense." It gave little discussion to this argument, simply repeating its conclusion that "defendant" is not limited to manufacturers and noting that the legislature could have used the

words "bare metal defense" if it intended to codify this defense. Slip Op., 9-10.

The Court of Appeals erred in ignoring the discussion of the "bare metal defense" in countless cases across the country in the decade preceding the enactment of Section 686B.7(5). A recognized tool of statutory construction is to consider "[t]he common law or former statutory provisions, including laws upon the same or similar subjects." Iowa Code § 4.6(4). The Court of Appeals should have been guided by case law from other jurisdictions demonstrating that the language used in Section 686B.7(5) is commonly understood to refer to an equipment manufacturer's liability (or lack thereof) for asbestos products made or sold by third parties. *See Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Iowa 1974). While ordinarily this principle is utilized to compare the language of similar statutes, this reasoning applies equally to language used in case law: "in the construction of statutes the logic and reasoning of outside authorities involving similar [laws] are often helpful." *Goergen v. State Tax Comm'n*, 165 N.W.2d 782, 788 (Iowa 1969).

The "bare metal defense" has been one of the most widely litigated issues in asbestos cases over the past 10 to 15 years. The "bare metal defense," rejected in its most extreme form by the United States Supreme Court, is the notion that "manufacturers should not be liable for harms caused by later-added third-party parts." *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 992 (2019). "[T]he 'bare metal defense' stands for the proposition that [an equipment] manufacturer is 'not liable for injuries caused by asbestos products, such as insulation, gaskets, and packing, that were incorporated into their products or used as replacement parts, but which they did not manufacture or distribute.'" *Thurmon v. Georgia Pac., LLC*, 650 F. App'x 752, 756 (11th Cir. 2016) (quoting *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 793 (E.D. Pa. 2012)). "The defense's basic idea is that a manufacturer who delivers a product 'bare metal'—that is without the insulation or other material that must be added for the product's proper operation—is not generally liable for injuries caused by asbestos in later-added materials." *In re: Asbestos Prod. Liab. Litig. (No. VI) (Devries)*, 873 F.3d 232, 234 (3d Cir. 2017), *aff'd, Air & Liquid Sys. Corp. v.*

DeVries, 139 S. Ct. 986 (2019). "A classic scenario would be if an engine manufacturer ships an engine without a gasket, the buyer adds a gasket containing asbestos, and the asbestos causes injury to a worker." *Id.*

Courts that have embraced the bare metal defense have noted that "the policy motivating products-liability law confirms that manufacturers in the chain of distribution can be liable only for harm caused by their own products." *Conner*, 842 F. Supp. 2d at 800. This is because "products-liability theories rely on the principle that a party in the chain of distribution of a harm-causing product should be liable because that party is in the best position to absorb the costs of liability into the cost of production." *Id.* However, "this policy weighs against holding manufacturers liable for harm caused by asbestos products they did not manufacture or distribute because those manufacturers cannot account for the costs of liability created by the third parties' products." *Id.* at 801.

The bare metal defense does not have widespread acceptance, and, as noted, was rejected in *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 994 (2019). The Court "agree[d] with the plaintiffs

that the bare-metal defense ultimately goes too far . . . ." *Id.* Instead, the Court adopted a rule in maritime cases that "a manufacturer does have a duty to warn when its product *requires* incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses." *Id.* at 993-94. Under the Supreme Court's approach, "the manufacturer may be liable even when the manufacturer does not itself incorporate the required part into the product." *Id.* at 994.

The case law discussing the bare metal defense generally uses remarkably similar language to Section 686B.7(5). *See, e.g., Carroll v. ABB, Inc.*, No. 15-CV-373-WMC, 2017 WL 1366113, at *5 (W.D. Wis. Apr. 12, 2017) ("[T]he fundamental principles of the bare metal defense . . . are consistent with product liability law in Wisconsin, since both cases premise liability on a defendant's failure to warn about the risks associated with its own products, not those associated with third-party products . . . ."); *Rabovsky v. Air & Liquid Sys. Corp.*, No. CV 10-3202, 2016 WL 5404451, at *3 (E.D. Pa. Sept. 28, 2016) ("Defendant essentially contends that . . . it owed no legal duty to Decedent to warn of the hazards of asbestos-

containing materials made and sold by third parties Defendant had no control over . . . ."); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769 (N.D. Ill. 2014) ("The 'bare metal defense' . . . posits that a manufacturer has no duty to warn about hazards associated with a product it did not manufacture or distribute."); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1368 (S.D. Fla. 2012) ("[O]ther courts have concluded that a defendant is never liable when the material containing asbestos was supplied by a third party."); *Conner*, 842 F. Supp. 2d at 798 ("[A] defendant manufacturer is not liable for a third party's asbestos products when the defendant is not part of the 'chain of distribution' of the asbestos product.");[2] *Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564, 592, 90 Cal. Rptr. 3d 414, 436 (2009) ("[R]espondents in this appeal are not liable for injury-causing materials supplied by third parties and used in conjunction with respondents' products."); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 500 (Wash. 2008) ("[A]s a

[2] This case was overruled by the United States Supreme Court's decision rejecting the bare metal defense under maritime law in *DeVries*.

matter of law the manufacturers here are not liable under § 402A for failure to warn of the danger of exposure during maintenance of their products to asbestos-containing insulation that was manufactured and supplied by third parties."); *Lee v. Clark Reliance Corp.*, No. B241656, 2013 WL 3677250, at *6 (Cal. Ct. App. July 15, 2013) ("[E]quipment manufacturers could not be held liable for failing to warn about the dangers of asbestos exposure arising from products manufactured and supplied by third parties.").

It is entirely appropriate for this Court to take into account the larger context of nationwide asbestos litigation in which the Iowa legislature enacted Section 686B.7(5). Section 686B.7(5) adopts the bare metal defense to protect manufacturers from liability for asbestos-containing products and component parts manufactured by "third parties." Any doubt about this can be resolved by Googling the phrase "Iowa Bare Metal Defense;" the second hit is an article from Lexis Legal News titled "Iowa Enacts Law Codifying Bare-Metal Defense, Bankruptcy Transparency," dated March 24, 2017

https://www.lexislegalnews.com/articles/15889 (last visited April 6, 2021).

The Beverage family does not challenge the legislature's prerogative in taking this approach. But to deny that this was the legislature's choice is to ignore the legal environment in which Section 686B.7(5) was enacted, and contravenes the rule that courts should consider similar laws on the same subject in assessing the legislature's intent. Iowa Code Ann. § 4.6(4).

Placing Section 686B.7(5) in the context of the broader litigation not only explains why that particular language was chosen, but demonstrates that the intent was not to eliminate all claims for asbestos exposure against premises owners and asbestos product suppliers. It was, instead, to take adopt the bare metal defense invoked by asbestos product manufacturers across the country. The Court of Appeals erred in failing to consider this context in interpreting Section 686B.7(5).

CONCLUSION

Iowa law cautions against the type of "narrow claims of plain meaning" engaged in by the Court of Appeals. *Rhoades*, 880 N.W.2d

at 446. The Court of Appeals failed to consider the statutory language as a whole or recognize its ambiguity, and should have utilized the tools of statutory construction to ascertain legislative intent. Its failures resulted in an erroneous intepretation of Section 686B.7(5). That error should be corrected by this Court.

Dated: April 6, 2021

Respectfully submitted,

/s/ Lisa W. Shirley

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CERTIFICATE OF COSTS

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

/s/ Lisa W. Shirley Dated: April 6, 2021

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4)(a) because:

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/s/ Lisa W. Shirley Dated: April 6, 2021

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The undersigned hereby certifies that on April 6, 2021, the above and foregoing Application for 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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IN THE COURT OF APPEALS OF IOWA

No. 19-1852
Filed March 17, 2021

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

vs.

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

Appeal from the Iowa District Court for Scott County, Patrick A. McElyea, Judge.

Charles Beverage's estate and children appeal dismissal of asbestos injury claims. **AFFIRMED.**

Lisa W. Shirley of Dean Omar Branham Shirley, LLP, Dallas, Texas, and James H. Cook of Dutton, Daniels, Hines, Kalkhoff, Cook & Swanson, PLC, Waterloo, for appellants.

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Robert M. Livingston and William R. Hughes, Jr. of Stuart Tinley Law Firm, LLP, Council Bluffs, and Donna R. Miller of Miller, Zimmerman & Evans, P.L.C., Des Moines, for appellee Arconic, Inc., f/k/a Alcoa, Inc.

Mark Behrens of Shook, Hardy & Bacon L.L.P., Washington, DC, and Matthew McKinney and Thomas Story of Brown, Winick, Graves, Gross & Baskerville, P.L.C., Des Moines, for amici curiae Iowa Association of Business and Industry, Iowa Insurance Institute, NFIB Small Business Legal Center, and Coalition for Litigation Justice, Inc.

Heard by May, P.J., and Greer and Schumacher, JJ.

MAY, Presiding Judge.

Charles Beverage spent many years working inside an aluminum plant. The plant contained asbestos. After Charles's death, his estate and children (Beverage) brought asbestos-related claims against the plant's owner, Alcoa, Inc. (Alcoa), as well as an installer of insulation, Iowa-Illinois Taylor Insulation, Inc. (IITI). The district court concluded Beverage's claims are barred by Iowa Code section 686B.7 (2017). We agree and affirm.

I. Facts and Prior Proceedings

Between the 1950s and mid-1970s, Charles was exposed to asbestos while working as an independent contractor inside an aluminum plant. Alcoa owned the plant. IITI installed much of the plant's asbestos insulation.

In 2015, Charles was diagnosed with malignant mesothelioma. He died that October.

In July 2016, Beverage brought a products liability suit against Alcoa and several other defendants (not including IITI) in Missouri state court. Alcoa filed a motion to dismiss based on lack of personal jurisdiction and improper venue. Beverage voluntarily dismissed their Missouri action.

In September 2017, Beverage commenced this action. Beverage named only two defendants: Alcoa and IITI.

Alcoa and IITI filed motions for summary judgment. They claimed Iowa Code section 686B.7(5) provided them immunity. The district court agreed and granted their motions. This appeal follows.

II. Standard of Review

"Our review is for the correction of legal error." *In re Estate of Franken*, 944 N.W.2d 853, 857 (Iowa 2020). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 858 (quoting Iowa R. Civ. P. 1.981(3)).

Summary judgment plays a special role in immunity cases. As our supreme court explained in *Nelson v. Lindaman*:

> Summary judgment is an important procedure in statutory immunity cases because a key purpose of the immunity is to avoid costly litigation, and that legislative goal is thwarted when claims subject to immunity proceed to trial. *See Plumhoff v. Rickard*, [572 U.S. 765, 772] (2014) ("[T]his [immunity] question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost."); *Hlubek*[*v. Pelecky*], 701 N.W.2d [93,] 98 [(Iowa 2005)] (noting statutory immunity removes the "'fear of being sued'" and affirming summary judgment (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982))). Indeed, in *Hlubek*, we recognized the defendants' observation that "statutory immunity, like common-law immunity, provides more than protection from liability; it provides protection from even having to go to trial in some circumstances." 701 N.W.2d at 96. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

867 N.W.2d 1, 7 (Iowa 2015) (second and third alterations in original).

III. Discussion

In their appellant brief, Beverage argued (1) the district court incorrectly interpreted section 686B.7(5); (2) alternatively, section 686B.7(5) violates their due process rights under the United States and Iowa constitutions; and (3) alternatively, section 686B.7(5) violates equal protection under the United

States and Iowa constitutions. In their reply brief, however, Beverage expressly stated they are "no longer challenging Iowa Code § 686B.7(5) on equal protection grounds." We treat this as a waiver of Beverage's equal protection arguments. So we focus instead on Beverage's statutory and due process theories.

A. Statutory Interpretation

Iowa Code section 686B.7(5) provides: "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." We find the Code's meaning in its words. *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) (noting "in questions of statutory interpretation, '[w]e do not inquire what the legislature meant; we ask only what the statute means'" and "[t]his is necessarily a textual inquiry as only the text of a piece of legislation is enacted into law" (first alteration in original) (citation omitted)); *State v. Childs*, 898 N.W.2d 177, 184 (Iowa 2017) ("Our court 'may not . . . enlarge or otherwise change the terms of a statute as the legislature adopted it.' 'When a proposed interpretation of a statute would require the court to "read something into the law that is not apparent from the words chosen by the legislature," the court will reject it.'" (citations omitted)); *Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962) ("Ours not to reason why, ours but to read, and apply. It is our duty to accept the law as the legislative body enacts it."); *Moss v. Williams*, 133 N.W. 120, 121 (Iowa 1911) ("We must look to the statute as it is written . . . .").

The district court carefully considered the words of section 686B.7(5), the record before it, and the arguments of the parties. Ultimately, the court concluded

that because the asbestos products at issue were "made or sold by a third party,"[1] section 686B.7(5) provided Alcoa and IITI immunity against Beverage's asbestos-related claims.

On appeal, Beverage claims the district court's interpretation was incorrect in three ways. We address each claim in turn.

1. Meaning of "defendant" in section 686B.7(5)

Beverage first argues the district court erred in determining that, in the context of section 686B.7(5), the word "defendant" unambiguously means "any entity sued in an asbestos suit." Rather, in Beverage's view, "a better interpretation is that a 'defendant' is one that makes or sells an asbestos product." Beverage explains:

> This definition of defendant as a product manufacturer is suggested by the modifier to the word "product[":] there is no liability if the product was "made or sold by a third party." Such qualification would only be necessary if the statute contemplated that the "defendant" is one who makes asbestos products.
>
> The statute is making a distinction between a "product or component part made or sold by a third party" and "a product or component part made or sold by" the defendant.

We disagree. A three-part process helps us decide what "defendant" means in this context. *Cf. 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 within which they are used." (citation omitted)). First, we consider whether "the legislature has defined" the term "defendant" in the statute.

[1] The court identified Johns Mansfield and Eagle-Pitcher as sources of the asbestos products.

See State v. Iowa Dist. Ct., 889 N.W.2d 467, 471 (Iowa 2017). If so, the legislature's definition "bind[s] us." *Id.* (citation omitted). Second, if the legislature has not provided a definition, we consider whether there is an "established legal meaning" for the term. *De Stefano*, 879 N.W.2d at 168. Finally, if a term is "undefined in the statute" and lacks an "established legal meaning," then it should be given its "common, ordinary meaning in the context within which [it is] used." *Id.* (citation omitted).

As Beverage notes, it does not appear the legislature defined the term "defendant" either in section 686B.7 or elsewhere in chapter 686B. So we consider whether "defendant" has an "established legal meaning." *See id.* It does. As Black's Law Dictionary explains, "defendant" means "[a] person sued in a civil proceeding or accused in a criminal proceeding." *Defendant*, *Black's Law Dictionary* (11th ed. 2019). This is "the usual meaning ascribed by" courts to the term. *See State v. Shafranek*, 576 N.W.2d 115, 118 (Iowa 1998). So "[t]he legislature is presumed . . . to intend that meaning unless the context shows otherwise." *Id.*

We do not think "context shows otherwise." *See id.* Beverage describes chapter 686B as a "tort reform law." And its words show it is aimed at regulating civil lawsuits arising from asbestos and silica injuries. In this context, it is only natural for the legislature to use "defendant" to mean "[a] person sued in a civil proceeding." *See Defendant*, *Black's Law Dictionary*. This is the "common, ordinary meaning" of the term "in the context" of civil litigation like this. *De Stefano*, 879 N.W.2d at 168 (citation omitted).

So because Alcoa and IITI were both sued in this civil proceeding, it was right for the district court to treat them as "defendants." Conversely, we reject Beverage's suggestion that the district court should have read "defendant" to encompass only a "manufacturer." "Manufacturer" is not a "common, ordinary meaning" of the term "defendant." *See id.* Nor is "manufacturer" a "usual meaning ascribed by" Iowa courts to the term "defendant." *See Shafranek*, 576 N.W.2d at 118. Nor did our legislature specially define "defendant" to mean only "manufacturers" for purposes of chapter 686B generally or section 686B.7(5) particularly. *See Iowa Dist. Ct.*, 889 N.W.2d at 471. And yet our legislature regularly uses the words "defendant" and "manufacturer," sometimes in the same statute. *See, e.g.*, Iowa Code § 322G.11. For example, in section 686B.3, the legislature used both "defendant" and "manufacturer" in the same section. So "[i]f the legislature intended" for the term "defendant" to mean only "manufacturers," the legislature surely would "have so stated." *See Hansen v. Haugh*, 149 N.W.2d 169, 172 (Iowa 1967).

We have also considered Beverage's argument that "defendant" must mean only those "who make[] asbestos products" because only *they* need protection against suits based on products "made or sold by a third party." As this case demonstrates, though, parties who have not manufactured asbestos products still face asbestos litigation. And the words of section 686B.7(5) show the legislature's intention to limit that litigation by immunizing a substantial range of "defendants," not all of whom manufacture anything. We decline to adopt Beverage's contrary view.

2. "Bare metal defense"

Beverage next argues that "while not directly stated in the statute, the meaning and purpose of [s]ection 686B.7(5) is quite clearly the establishment of the 'bare metal defense.'" According to Beverage, the "bare metal defense" is "a common defense raised by manufacturers of equipment that used asbestos parts as wear items that would have to be replaced, often with parts made by 'third parties.'" Beverage further explains "[t]he defense's basic idea is that a manufacturer who delivers a product 'bare metal'—that is without the insulation or other material that must be added for the product's proper operation—is not generally liable for injuries caused by asbestos in later-added materials." *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 873 F.3d 232, 234 (3d Cir. 2017).[2] Or as American Law Reports puts it: "The 'bare metal' defense, an affirmative defense, provides that a manufacturer has no duty to warn about potential dangers from exposure to a part of its product if the manufacturer did not make or distribute the part." Marjorie A. Shields, Annotation, *Application of "Bare Metal" Defense in Asbestos Products Liability Cases*, 9 A.L.R. 7th Art. 2, § 1 (2015).

Because the "bare metal" defense "only applies to product manufacturers," Beverage contends the district court should have interpreted section 686B.7(5) to only protect manufacturers. We disagree for two reasons.

First, as explained above, the words of section 686B.7(5) do not limit its immunity to "manufacturers." So the immunity available under section 686B.7(5)

[2] "A classic scenario would be if an engine manufacturer ships an engine without a gasket, the buyer adds a gasket containing asbestos, and the asbestos causes injury to a worker." *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 873 F.3d at 234.

is not the same as that available under "bare metal" defenses, which only apply to manufacturers. *See id.*

Moreover, while the immunity afforded by section 686B.7(5) may overlap or even encompass the protections available under a "bare metal" defense, we see no reason to think that section 686B.7(5) was a mere codification of that defense.[3] Our legislature is quite capable of calling out "defense[s] of the common law," such as contributory negligence, assumption of risk, the fellow servant rule, comparative fault, laches, estoppel, and contributory fault. *See, 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." *See Hansen*, 149 N.W.2d at 172.

3. Absurdity theory

Beverage also argues that section 686B.7(5) should "only appl[y] to product manufacturers" because, under the district court's interpretation, section 686B.7(5) would eliminate the liability of "premises owners and asbestos product suppliers." In Beverage's view, this interpretation "is absurd in the extreme" and, therefore, cannot be correct.

As a preliminary matter, we think Beverage overstates the impact of section 686B.7(5). It only immunizes defendants against liability for exposure to asbestos or silica products that were "made or sold by a third party." It contains no general grant of immunity for "premises owners" or "asbestos product suppliers."

[3] While this defense is heavily litigated elsewhere, it does not appear Iowa courts have considered it.

That aside, we have considered whether the "absurdity doctrine" could apply to section 686B.7(5). Our supreme court has held that "even in the absence of statutory ambiguity, departure from literal construction [of a statute] 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*, 870 N.W.2d 842, 848 (Iowa 2015) (alteration in original) (citation omitted). Our supreme court has also cautioned, though, that the "doctrine should 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." *Id.* (citation omitted).

We do not believe the doctrine applies here. We see no inconsistency between a "literal construction" of section 686B.7(5) and the "purposes and policies of" section 686B.7(5). *See id.* Its 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." As Alcoa and IITI point out, this will naturally tend to refocus asbestos litigation on more culpable targets, such as asbestos manufacturers. We see nothing absurd about this. And we see no grounds to "displace" the "legislative policy" that our elected leaders adopted through the enactment of section 686B.7(5). *See id.*; *see also Hansen*, 149 N.W.2d at 172 ("It is not the function of courts to legislate and they are constitutionally prohibited from doing so." (citing Iowa Const. art. III, § 1)).

4. Conclusion

Beverage has not shown the district court erred by concluding section 686B.7(5) granted immunity to Alcoa and IITI.

B. Due Process

We turn next to Beverage's due process argument. We review constitutional issues de novo. *Thornton v. Am. Interstate Ins. Co.*, 940 N.W.2d 1, 8 (Iowa 2020). But here our analysis begins and ends with error preservation.

"This court is a statutory court authorized to correct legal error." *State v. Shadlow*, No. 17-2100, 2018 WL 4913805, at *1 (Iowa Ct. App. Oct. 10, 2018) (citing Iowa Code § 602.5103 (2018), which "provid[es] the court of appeals 'constitutes a court for correction of errors at law'"). "If a litigant fails to present an issue to the district court and obtain a ruling on the same, it cannot be said that we are correcting an error at law." *State v. Tidwell*, No. 13-0180, 2013 WL 6405367, at *2 (Iowa Ct. App. Dec. 5, 2013). In those cases, we rightly conclude error has not been preserved and, therefore, "we have nothing to review." *See, e.g.*, *State v. Dawson*, No. 18-0862, 2019 WL 5792566, at *4 (Iowa Ct. App. Nov. 6, 2019). Indeed, "[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). This applies equally to constitutional claims. *See, e.g.*, *Christensen v. Iowa Dep't of Revenue*, 944 N.W.2d 895, 899 n.2 (Iowa 2020) ("Where the lack of a ruling on the constitutional challenge was not brought to the district court's attention, it was not preserved for appeal, and we do not further address it.").

Beverage concedes "the due process clause was not invoked below." Nor did the district court rule on any due process claim. So error was not preserved as to any due process claim. *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (declining to consider unpreserved due process claim).

In their reply brief, though, Beverage invites us consider their unpreserved due process arguments. According to their reply brief, "[t]he Beverage family acknowledges that they did not make a due process argument in the district court. This [c]ourt may consider this argument, however, 'as incident to a determination of other issues properly presented.'" *See Presbytery of Se. Iowa v. Harris*, 226 N.W.2d 232, 234 (Iowa 1975).

For three reasons, we decline Beverage's invitation. First, Beverage waited until their reply brief to argue we could consider unpreserved arguments. But we generally do not consider issues raised for the first time in a reply brief. *Villa Magana v. State*, 908 N.W.2d 255, 260 (Iowa 2018). While there are exceptions, Beverage has not pointed to one. *See id.* ("Yet we have noted exceptions."). Indeed, our rules expressly required Beverage to deal with error preservation issues in their appellate brief. *See* Iowa R. App. P. 6.903(2)(g)(1). So we believe Beverage should have delivered their invitation then. That way, Alcoa and IITI would have had a chance to respond in their briefs.

Second, Beverage has only provided us a passing reference to *Harris*. Beverage has not developed an argument as to why and how we should consider their unpreserved argument "as incident to" another issue. And "[t]he failure to make more than a perfunctory argument constitutes waiver." *State v. Gibbs*, 941 N.W.2d 888, 902 (Iowa 2020) (McDonald, J., specially concurring).

Finally, as noted, the general rule is clear—we do not consider unpreserved constitutional claims. *See Christensen*, 944 N.W.2d at 899 n.2. We see no good reason to take a different path here.

IV. Conclusion

Because Beverage has not shown reversible error, we affirm.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-1852	Beverage v. ALCOA, Inc.

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