

IN THE SUPREME COURT OF IOWA

MARLENY RIVAS,)

Plaintiff-Appellant,)

vs.)

S.C. NO. 23-1829

DEREK BROWNELL and)
LINDSEY WESSEL,)

POLK CO CASE NO. LACL148935

Defendants-Appellees.)

**APPEAL FROM THE
IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE**

**REPLY BRIEF FOR APPELLANT AND
REQUEST FOR ORAL ARGUMENT**

Christopher Johnston, AT0012625
LAW GROUP OF IOWA
A Johnston Martineau LLP Company
7900 Hickman Road, Suite 200
Windsor Heights, Iowa 50324
Phone: 515-493-4878
Email: CJohnston@JMLegal.com
ATTORNEY FOR APPELLANT

Table of Contents

Table of Authorities	3
Statement of Issues Presented for Review.....	4
Routing Statement.....	5
Argument	5
1. Standard of review is de novo in this case because it concerns the constitutionality of the Supreme Court’s Supervisory Order.	5
2. Appellant’s arguments present errors properly preserved for appellate review.	6
Conclusion.....	10
Certificate of Service.....	12
Certificate of Compliance with Typeface Requirements and Type- Volume Limitation.....	12

Table of Authorities

Page

Cases

<i>Askvig v. Snap-On Logistics Co.</i> , 967 N.W.2d 558 (Iowa 2021) ...	11
<i>Hendrick v. Hendrick</i> , 976 P.2d 1071 (Okla. Civ. App. 1998)	8
<i>Meier v. Senecaut</i> , 641 N.W.2d 532 (Iowa 2002)	7
<i>Murphy v. Liberty Mut. Ins. Co.</i> , 274 A.3d 412 (Md. 2022).....	7
<i>Roberts v. Roberts</i> , No. 23-1131, ___ N.W.2d ___, 2024 WL 2096350 (Iowa May 10, 2024)	8
<i>State v. Basquin</i> , 970 N.W.2d 643 (Iowa 2022).....	9
<i>State v. Tesch</i> , No. 21-0343, 2022 WL 1100922 (Iowa Ct. App. Apr. 3, 2022).....	7
<i>Thorp v. Casey’s General Stores, Inc.</i> , 446 N.W.2d 457 (Iowa 1989)	10
<i>Weizberg v. City of Des Moines</i> , 923 N.W.2d 200 (Iowa 2018).....	6

Statutes & Rules

Iowa R. App. P. 6.1101(2)(a)	6
------------------------------------	---

Other Authorities

Iowa Sup. Ct. Supervisory Order, In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services (May 22, 2020)	7
---	---

Statement of Issues Presented for Review

1. Standard of review is de novo in this case because it concerns the constitutionality of the Supreme Court's Supervisory Order.
2. Appellant's arguments present errors properly preserved for appellate review.

Routing Statement

All the parties agree that the supreme court should retain this case rather than transfer it to the court of appeals it “presents substantial constitutional questions as to the validity of a ... court ... rule.” Iowa R. App. P. 6.1101(2)(a); (*see* Brownell’s Br. at 4-5; Wessel’s Br. at 4).

Argument

- 1. Standard of review is de novo in this case because it concerns the constitutionality of the Supreme Court’s Supervisory Order.**

All the parties agree that this court’s standard of review is de novo because it concerns the constitutionality of its own Supervisory Order. *See Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018) (citations omitted) (holding that when the summary judgment was based on a constitutional issue, “review is de novo.”); Iowa Sup. Ct. Supervisory Order, In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court

Services (May 22, 2020) [hereinafter “May 22 Order”]¹; (see D0091, Order on Defendants’ Motion for Summary Judgment at 1 & 3, 11/2/23).

2. Appellant’s arguments present errors properly preserved for appellate review.

Brownell argues that because Rivas did not cite two cases to the district court – *State v. Tesch*, No. 21-0343, 2022 WL 1100922, at *3-*4 (Iowa Ct. App. Apr. 3, 2022); *Murphy v. Liberty Mut. Ins. Co.*, 274 A.3d 412, 433-41 (Md. 2022) – Rivas is prohibited from citing them to this court in its appellate review. (Brownell’s Br. at 11 (citing Appellant’s Br. at 25).) The doctrine of error preservation is not so broad or harsh. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

The appellate doctrine of error preservation commands that the error raised on appeal must have been raised in the lower court.

¹
<https://www.iowacourts.gov/collections/499/files/1093/embedDocument/>

Id. Here, that happened. The defendants moved for summary judgment arguing that the May 22 Order was invalid because the Supreme Court violated the legal doctrine of separation of powers when it tolled the statute of limitations applicable to this case. Thus, cases, statutes, and court rules are binding or persuasive authority to interpret the alleged error and reach a conclusion. Brownell’s claim that Rivas and by extension this court can only consider cases cited in the trial court is baseless and not part of the error preservation doctrine. *See, e.g., Roberts v. Roberts*, No. 23-1131, ___ N.W.2d ___, 2024 WL 2096350, at *7 n.4 (Iowa May 10, 2024) (relying upon *Hendrick v. Hendrick*, 976 P.2d 1071 (Okla. Civ. App. 1998), a case neither party nor the district court cited).

Brownell argues that “[w]hether the Supreme Court needed to act to stop the spread of Covid is a matter of conjecture, as there is no evidence one way or the other on this point.” (Brownell’s Br. at 15.) In *Basquin*, the Iowa Supreme Court noted:

On March 17, 2020, Governor Kim Reynolds declared a state of public health disaster emergency in response to

the outbreak of the Novel Coronavirus 2019 (COVID-19). The Governor recognized that the federal government and international organizations had taken similar action. *Thousands of Iowans have died from the virus*. In response to the global COVID-19 pandemic, we issued multiple supervisory orders that “balanc[e] the need to take measures to reduce the spread of the virus with [the Iowa Judicial Branch's] commitment to conduct[] business as necessary.”

State v. Basquin, 970 N.W.2d 643, 653 (Iowa 2022) (citations omitted & emphasis added). The effects of the pandemic were not conjecture but obvious.

Brownell and Wessels misunderstand Rivas’s argument that the supreme court’s May 22 Order is constitutional because the Iowa Legislature abdicated its responsibility to act including but not limited to tolling statutes of limitations. (See Brownell’s Br. at 15; Wessels’s Br. at 10.) The Iowa Supreme Court acted because the Iowa Legislature adjourned and went home instead of addressing the global pandemic affecting every facet our Iowan’s daily lives. The Iowa Supreme Court filled the gap left by the legislature. The authority to fill that gap – tolling statutes of

limitations – by May 22 Order is granted by Iowa Constitution article V, section 4.

Brownell’s and Wessels’s incorrectly argue that the May 22 Order denies them due process. (See Brownell’s Br. at 13; Wessels’s Br. at 9.) They claim that, since the May 22 Order did not permit them to raise the statute of limitations as a basis to dismiss Rivas’s action, they were deprived due process rights. (*Id.*) Their argument turns the concept of due process on its head. They both cite *Thorp v. Casey’s General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989), as support. (*Id.*) *Thorp* supports Rivas.

In *Thorp*, the Iowa Supreme Court considered whether a legislative amendment applied retroactively which would then take away the plaintiff’s right to pursue an accrued cause of action. 446 N.W.2d at 460-64. The court found it was an unconstitutional deprivation of due process rights to do so. *Id.* Here, the May 22 Order only deprives the defendants of the affirmative defense of time-barring Rivas’s action. That affirmative defense that can be

waived. *See Askvig v. Snap-On Logistics Co.*, 967 N.W.2d 558, 562 (Iowa 2021). Further, if the defendants are correct, then Rivas is deprived of an accrued cause of action simply by obeying the May 22 Order, which all parties, attorneys, and courts are required to obey. That would be a due process violation. *See Thorp* at 460-64.

Conclusion

The Iowa Supreme Court, and its inferior courts, hold residual powers to act as justice requires. Based upon the extraordinary circumstances that led to this case now before the court, the Supervisory Orders are not a usurpation of legislative authority. The supreme court acted within its constitutional and statutory authority to extend statutes of limitations. This court should reverse the district court and remand for further proceedings.

Respectfully submitted,

/s/ Christopher Johnston

Christopher Johnston, AT0012625

LAW GROUP OF IOWA

A Johnston Martineau LLP Company

7900 Hickman Road, Suite 200

Windsor Heights, Iowa 50324

Phone: 515-493-4878

Email: CJohnston@JMLegal.com

ATTORNEY FOR APPELLANT

Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 20th day of May 2024, the Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Christopher Johnston
Christopher Johnston

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

this brief has been prepared in a proportionally spaced typeface using Century in 14 point font and contains 952 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

this brief has been prepared in a monospaced typeface using _____ in 14 point font and contains ____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/s/ Christopher Johnston

May 20, 2024