IN THE SUPREME COURT OF FLORIDA

AMERICAN OPTICAL CORP., et al.

Appellants/Cross-Petitioners,

v.

WALTER R. SPIEWAK, et al.,

Appellees/Cross-Respondents.
_____/

Case No. SC08-1616, SC-08-1640

L.T. Case Nos: 4D07-405, 4D07-407

Consolidated with

AMERICAN OPTICAL CORP., et al.,

Appellants/Petitioners,

v.

DANIEL N. WILLIAMS, et al.,

Appellees/Respondents.
_____/

Case Nos. SC08-161 & SC08-1639

L.T. Case Nos. 4D07-143, 4D07-144, 4D07-145, 4D07-146, 4D07-147, 4D07-148, 4D07-149, 4D07-150, 4D07-151, 4D07-153, 4D07-154

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION ON BEHALF OF APPELLEES/RESPONDENTS

BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
(561) 721-0465 (fax)
pmb@FLAppellateLaw.com
Attorneys for Florida Justice Association

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STATEMENT OF INTEREST

The Florida Justice Association ("FJA") is a large voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The FJA has been involved as amicus curiae in hundreds of cases in the Florida appellate courts and this Court.

The lawyer members of the Association care deeply about the integrity of the legal system and, towards this end, have established an amicus curiae committee. This case is important to the FJA because it involves the retroactive elimination of pre-existing causes of action in violation of the Plaintiffs' due process rights. The FJA believes that its input may be of assistance to the Court in resolving the issues raised in this case, and that this Court's decision will have a tremendous impact on its members and their clients. See, e.g., Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522 (Fla. 4th DCA 1999) (briefs from *amicus curiae* are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues). Accord Rathkamp v. Dept. of Community Affairs, 730 So.2d 866 (Fla. 3d DCA 1999) (endorsing and adopting the opinion in Ryan v. Commodity

Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997), regarding the role of *amicus curiae*).

SUMMARY OF ARGUMENT

The Fourth District correctly held that the Asbestos and Silica Compensation Fairness Act, section 774.201 *et seq.*, Florida Statutes (2005) could not be retroactively applied to Plaintiffs' causes of action because to do so would be violative of the Florida Constitution. See Williams v. American Optical Corp., 985 So.2d 23, 32 (Fla. 4th DCA 2008). Application of the Act to the Plaintiffs' claims would have abolished their pre-existing causes of actions, leaving them without a remedy for their injuries.

Retroactive laws are universally disfavored as unfair and unjust. The Florida Constitution contains provisions that limit the Legislature's ability to enact such laws, including the due process clause, which protects interests in property, and the access to courts clause, which protects the citizens' right to seek a remedy for wrongs perpetrated against them. The retroactive application of the Act to the Plaintiffs' pre-existing causes of actions would have been a violation of the Florida Constitution and the "fundamental notions of justice" that it embodies.

ARGUMENT

RETROACTIVE APPLICATION OF LAWS IS VIOLATIVE OF THE FLORIDA CONSTITUTION.

The Fourth District correctly held that the Asbestos and Silica Compensation Fairness Act, section 774.201 *et seq.*, Florida Statutes (2005) ("the Act") could not be retroactively applied to Plaintiffs' causes of action because to do so would be violative of the Florida Constitution. See Williams v. American Optical Corp., 985 So.2d 23, 32 (Fla. 4th DCA 2008). This decision is supported by Florida law and general principles regarding the inherent unfairness of retroactivity and should be affirmed by this Court.

Retroactivity is generally disfavored in the law, Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 469-470, 102 L.Ed.2d 493 (1988), in accordance with "fundamental notions of justice" that have been recognized throughout history, Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 855, 110 S.Ct. 1570, 1586-1587, 108 L.Ed.2d 842 (1990) (SCALIA, J., concurring). See also, e.g., Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y.1811) ("It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect"); H. Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character

of past transactions carried on upon the faith of the then existing law"); Norman J. Singer, Statutes and Statutory Construction § 41:2, at 375 (6th ed. 2009) ("A fundamental principle of jurisprudence holds that retroactive application of new laws is usually unfair.")

"Throughout history, courts and legal commentators have looked with disapproval and extreme caution at the retroactive application of laws." Raphael v. Shecter, --- So.3d ---, 2009 WL 3018157, *1-2, (Fla. 4th DCA 2009). As Justice Story observed, the Supreme Court has long disfavored retroactive statutes because "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." Eastern Enterprises v. Apfel, 524 U.S. 498, 533, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (*quoting* 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)). Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." General Motors Corp. v. Romein, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). Thus, due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation." Landgraf v. USI Film Prod., 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1999).

Discussing historical abhorrence to retroactive application of laws, Justice Scalia pointed out:

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, see 2 P. Vinogradoff, Outlines of Historical Jurisprudence 139-140 (1922), by the Romans, see Justinian Code, Book 1, Title 14, § 7, by English common law, see 3 H. Bracton, De Legibus et Consuetudinibus Angliae 531 (T. Twiss trans. 1880); Smead, 20 Minn.L.Rev., at 776-778, and by the Code Napoleon, 1 Code Napoleon, Prelim. Title, Art. I, cl. 2 (B. Barrett trans. 1811). It has long been a solid foundation of American law.

Bonjorno, 494 U.S. at 855 (SCALIA, J., concurring). In fact, the United States Constitution "expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* and Takings Clauses."[1] Apfel, 524 U.S. at 533-34.

Individual states, too, have recognized the fundamental unfairness of retroactive laws. For example, a provision of the New Hampshire Constitution provides: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const., Pt. 1, Art. 23; see also Colo. Const., Art. II, § 11 ("No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or

[1] The *Ex Post Facto* Clause is directed at the retroactivity of penal legislation, while the Takings Clause provides a similar safeguard against retrospective legislation

immunities, shall be passed by the general assembly."; Ohio Const., Art. II, § 28; Ga. Const. art. I, § 1, ¶X.

Although Florida does not expressly prohibit the enactment of all retroactive laws, it does limit the Legislature's ability to enact such laws. Provisions of the Florida Constitution such as the due process clause, the access to courts clause, and the ex post facto clause limit the Legislature's ability to enact retroactive legislation.

The due process clause of the Florida Constitution prohibits the state from depriving a person of property without due process of the law. Art. 1, § 9, Fla. Const. Accordingly, this Court has refused to apply a statute retroactively if the statute impairs or eliminates property rights because to do so would be violative of due process guarantees. See State Farm. Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55 (Fla. 1995); Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989); Rupp v. Bryant, 417 So.2d 658 (Fla.1982); Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4 (Fla. 1975); see also Cox. v. Community Services Dep't, 543 So.2d 297 (Fla. 5th DCA 1989). Here, the Plaintiffs' causes of action are a species of property subject to the protections of the due process clause, see City of Panama City v. Head, 797 So.2d 1265 (Fla. 1st DCA 2001) (quoting Zipperer v. City of Ft. Myers, 41 F.3d 619, 623 (11th Cir.1995)); thus, the Act should not be applied retroactively to abolish their

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concerning property rights. See Apfel, 524 U.S. at 533-34.

claims.

The access to courts provision of the Florida Constitution serves as an additional limitation on the Legislature's power to enact retroactive laws. *See* Art. I, § 21, Fla. Const.2 This provision "guarantees the continuation of common law causes of action and those causes of action may be altered only if there is a reasonable substitution which protects the persons protected by the common law remedy." Johnson v. R.H. Donnelly Co., 402 So.2d 518 (Fla. 1981) (citing Kluger v. White and Manchester Ins. Indemnity Co., 281 So.2d 1 (Fla. 1973). This is based upon the principle that a remedy shall be provided for every injury. See Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 244 (Fla. 1977); Lasky v. State Farm Insurance Co., 296 So.2d 9, 14 (Fla.1974); Kluger, 281 So.2d at 4.

In DaimlerChrysler Corp. v. Hurst, 949 So.2d 279 (Fla. 3d DCA 2007), the Third District determined that retroactive application of the Act did not violate due process because the Act does not impair or eliminate a plaintiff's cause of action for asbestos-related injuries. In coming to this conclusion, the court cited this Court's decision in Clausell v. Hobart Corp., 515 So.2d 1275 (Fla. 1987).

In Clausell, the plaintiff filed a products liability claim against defendant, but it was barred by the statute of repose contained in section 95.031(2), Florida Statutes

2 Art. I, § 21, provides: "The courts shall be open to every person for redress of any

(1983). However, the Legislature had amended that statute to eliminate the statute of repose, and one of the issues was whether that amendment operated retrospectively to revive the plaintiff's cause of action. Additionally, that statute of repose had been declared unconstitutional in Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980), but that decision had been overruled in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). This Court determined that the plaintiff's cause of action was barred and that the application of Pullum did not deprive the plaintiff of a vested right retroactively.

For the reasons explained in detail by Judge Campbell in City of Winter Haven v. Allen, 541 So.2d 128 (Fla. 2d DCA 1989), Clausell is of limited utility in analyzing the issue of what choses in action are subject to constitutional protection when attempts are made to retroactively eliminate or diminish them. Moreover, in subsequent cases involving accrued tort causes of action, this Court has relied on the analysis it applied in cases such as State, Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981) and Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), and not on the analysis applied in Clausell. See Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55 (Fla. 1995). In fact, Clausell has never been relied upon, nor even cited, by this Court in a

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injury, and justice shall be administered without sale, denial or delay."

discussion regarding accrual of a tort action, despite the fact that this Court has addressed issues regarding vested rights in accrued tort claims in cases such as Kaisner and Laforet.

Another reason that the decision in Clausell should not be relied upon is its reliance on federal law in determining whether a pre-existing cause of action can be retroactively eliminated. See Clausell, 515 So.2d at 1276 (citing Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D.Fla.1986); Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45 (N.D.Fla. 1986)). As mentioned above, the access to courts provision of the Florida Constitution severely restricts the Legislature's ability to eliminate a common law cause of action; the Federal Constitution does not contain a similar provision. Accordingly, an individual's expectancy of the continuation of a common law remedy is greater under Florida law than under Federal jurisprudence. In Florida, a pre-existing chose in action based on a tort claim is not merely an expectation of the continuation of the existing law; it is a property right entitled to the protections afforded by the Constitution.

Here, the Plaintiffs filed actions against Defendant for damages resulting from asbestosis before the Act was enacted by the Legislature. At that time, they had viable causes of action which afforded them a substantive remedy under the law. Retroactive application of the Act to their cases served to abolish these pre-existing causes of

action. Defendant's contention that only a judgment can turn the Plaintiffs' causes of actions into rights afforded the protection of the due process and access to court provisions of the Florida Constitution is erroneous and flies in the face of general principles of fairness and of "fundamental notions of justice."

In light of the inherent unfairness of retroactive legislation, the protections of the Florida Constitution must be flexible enough to prohibit the application of the Act to pre-existing causes of action. A narrow application of the protections proscribed by the Constitution here, where the Plaintiffs had legitimate expectations of prosecuting their pre-existing causes of actions to seek remedies for their injuries, would be unjust.

CONCLUSION

For these reasons, the Fourth District Court correctly determined that the Asbestos and Silica Compensation Fairness Act, section 774.201 *et seq.*, Florida Statutes (2005) cannot be applied retroactively to eliminate the Plaintiffs' pre-existing causes of action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was served on all counsel on the attached Service List, by mail, on October 15, 2009.

BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
(561) 721-0465 (fax)
pmb@FLAppellateLaw.com
Attorneys for Florida Justice Associateion

By:_____
PHILIP M. BURLINGTON
Florida Bar No. 285862

By:_____
NICHOLE J. SEGAL
Florida Bar No. 41232

SERVICE LIST

AMERICAN OPTICAL CORP., et al. v. SPIEWAK, et al.,
Case Nos. SC08-1616 and SC08-1640

AMERICAN OPTICAL CORP., et al. v. WILLIAMS, et al.,
Case No. SC08-161 and SC08-1639

Joel S. Perwin, Esq.
Joel S. Perwin, P.A.
Alfred I. DuPont Bldg., Ste. 1422
169 E. Flagler Street
Miami, FL 33131
Tel: (305) 779-6090
Fax: (305) 779-6095
Attorneys for Respondents

James L. Ferraro, Esq.
David A. Jagolinzer, Esq.
Case A. Dam, Esq.
The Ferraro Law Firm, P.A.
4000 Ponce de Leon Blvd., #700
Miami, FL 33146
Tel: (305) 375-0111
Attorneys for Respondents

Gary L. Sasso, Esq.
Matthew J. Conigliaro, Esq.
Christine R. Davis, Esq.
Carlton Fields, P.A.
P.O. Box 3239
Tampa, FL 33601
Tel: (813) 223-7000
Fax: (813) 229-4133

Stuart L. Cohen, Esq.
Bennett Aiello Cohen & Fried
The Ingraham Bldg., Ste. 808
25 S.E. Second Ave.
Miami, FL 33131
Tel: (305) 358-9011
Fax: (305) 358-9012

John H. Pelzer, Esq.
Robin F. Hazel, Esq.
Ruden McClosky
P.O. Box 1900
Ft. Lauderdale, FL 33302
Tel: (954) 764-6660
Attorneys for Petitioners

Evelyn M. Fletcher, Esq.
Hawkins & Parnell, LLP
4000 SunTrust Plaza
303 Peachtree St., N.E.
Atlanta, GA 30308
Tel: (404) 614-7571
Fax: (404) 614-7500

Susan J. Cole, Esq.
Brenda Godfrey, Esq.
Bice Cole Law Firm
999 Ponce de Leon Blvd., Ste. 710
Coral Gables, FL 33134
Tel: (305) 444-1225
Fax: (305) 446-1598

M. Stephen Smith, Esq.
Rumberger Kirk & Caldwell
Brickell Bayview Centre, Ste. 3000
80 SW 8th Street
Miami, FL 33130
Tel: (305) 358-5577
Fax: (305) 371-7580

CERTIFICATE OF COMPLIANCE

Amicus Curiae, Florida Justice Association, hereby certifies that the type size and style of the Amicus Curiae Brief is Times New Roman 14pt.

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NICHOLE J. SEGAL
Florida Bar No. 41232