IN THE SUPREME COURT OF FLORIDA

AMERICAN OPTICAL CORP., et al.,

Appellants/Petitioners, Case Nos. SC08-1616 & SC08-1640

v.

WALTER R. SPIEWAK and BETTY J. SPIEWAK, et al., L.T. Case Nos. 4D07-405, 4D07-407

Appellees/Respondents.
_____/ Consolidated With

AMERICAN OPTICAL CORP., et al.,

Appellants/Petitioners, Case Nos. SC08-1617 & SC08-1639

v.

DANIEL N. WILLIAMS, et al. L.T. Case Nos. 4D07-143, 4D07-144 4D07-145, 4D07-146, 4D07-147, 4D07-148, 4D07-149, 4D07-150, 4D07-151, 4D07-153, and 4D07-154

Appellees/Respondents.
_____/

APPELLANTS/PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

ARGUMENT

Plaintiffs' Answer Brief fails to address what Defendants actually argued in the Initial Brief. Plaintiffs mischaracterize Defendants' arguments as contending that injured persons (1) do not have a remedy under Florida common law for asbestosis and (2) may obtain a recovery only if they show they have cancer. Ans. Br., at 36; *see also id.* at 18 n.10, 19, 29. Defendants made no such arguments. Defendants' Initial Brief showed instead that (1) under Florida common law, claimants alleging asbestos exposure may not obtain a remedy unless they show they actually have asbestosis or some other disease that impairs their health, and (2) they cannot demonstrate such injury merely by proving exposure together with the kind of benign physiological responses that are incidental to all exposures but only rarely result in an actual disease.

The ASCFA codifies and effectuates the impairment standard and bases all procedural requirements upon it. Specifically, as Defendants explained in their Initial Brief, the ASCFA reasonably requires a *prima facie* showing early in the case that the plaintiff *does in fact* have a disease caused by asbestos exposure, resulting in impairment, and the list of such compensable diseases *includes* asbestosis, not just cancer. Thus, the ASCFA establishes procedures that effectuate, but do not abridge, claims seeking redress for actual, compensable injuries due to asbestos exposure. Precisely because the ASCFA is procedural and

remedial, and does not abridge vested rights, the Florida Legislature appropriately determined that the ASCFA should apply to pending cases.

The Initial Brief further demonstrated that the Florida Legislature adopted the Act to redress a crisis of great public importance stemming from premature claims filed by persons unable to demonstrate any health impairment and whose suits divert judicial and financial resources from claimants with actual injuries. The ASCFA addresses this problem by requiring *prima facie* proof that a claim is ripe for adjudication and by deferring, not abolishing, premature claims.

In the cases at bar, Plaintiffs *assert* they have asbestosis, but instead of relying on a diagnosis by a qualified physician (as the Act requires), they rely on x-ray readings that Plaintiffs' own expert acknowledged do *not* constitute a medical diagnosis. SR5:966-98; Supp.R1:44081-82. In this "as-applied" challenge to the ASCFA's constitutionality, Plaintiffs have failed to adduce proof that they have any vested rights impaired by the ASCFA. Applying the ASCFA to Plaintiffs is not unconstitutional, and the decision below should be reversed.

I. THE ACT DOES NOT VIOLATE DUE PROCESS.

A. The Act Is A Remedial Law That Establishes Reasonable Procedures For Managing Asbestos Claims To Ensure Fairness to All Claimants.

Defendants' Initial Brief demonstrated, as a threshold matter, that the Act's requirements under section 774.204(2)(d)-(f) are procedural. Requiring plaintiffs

to make *prima facie* showings that they have suffered the requisite injury caused by asbestos exposure before permitting them to proceed to trial is a procedural step no different from similar requirements imposed when plaintiffs bring claims for medical malpractice. *E.g.*, *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005) (rejecting due process challenge to medical malpractice act's requirement that plaintiff present affidavit supporting claim at inception of case); *see also DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279, 287 (Fla. 3d DCA 2007) (holding section 774.204(3) merely affects the means and methods a plaintiff must follow when filing or maintaining an asbestos cause of action, is procedural in nature, and may be applied retroactively).

In responding, Plaintiffs claim that each of them has "some form of bilateral interstitial lung disease (asbestosis) or pleural disease." Ans. Br., at 5. Plaintiffs cite nothing to support that proposition and cannot do so. In fact, the trial court dismissed Plaintiffs' claims without prejudice precisely because Plaintiffs failed to present evidence that, among other things, they suffered such conditions.

Plaintiffs improperly challenge the Act's *prima facie* evidentiary requirements, complaining that the "radiological evidence of asbestosis" authorized by section 774.204(2)(e) permits quality 1 chest x-rays under the ILO classification system but not quality 2 or 3 x-rays. Ans. Br., at 8. However, this Court has repeatedly upheld legislative efforts to regulate forms of admissible

evidence. *Yisrael v. State*, 993 So. 2d 952, 955 n.5 (Fla. 2008); *Glendening v. State*, 536 So. 2d 212 (Fla. 1988).

Furthermore, even though Plaintiffs bring an as-applied challenge to section 774.204(2)(d)-(f), at no point have Plaintiffs ever shown that the Act's x-ray requirements are the reason they could not satisfy the Act's *prima facie* showing requirements. In fact, as demonstrated in Defendants' Initial Brief, Plaintiffs and others like them have numerous alternative opportunities under the ASCFA to demonstrate entitlement to move forward with their claims. Plaintiffs have not attempted to utilize those provisions. Nor have Plaintiffs addressed them in their Answer Brief. Rather, Plaintiffs point to other provisions that Plaintiffs have never argued affect their claims or support their *as-applied* challenge.

For instance, Plaintiffs contend that section 774.203(3) imposes "new" requirements for smokers who bring claims for various forms of cancer. Ans. Br. at 12. Plaintiffs are incorrect, but more importantly these Plaintiffs do not claim to have cancer and their constitutional challenge is not directed at section 774.203(3). Similarly, Plaintiffs incorrectly declare that "a deceased asbestos victim by definition has no possible cause of action." Ans. Br., at 27-28; *see also* Ans. Br., at 28 n.16, 36. The Act is replete with special considerations for proofs regarding decedents, and the Act in no way eliminates their claims. *E.g.*, §§ 774.203(23), 774.204(2)(a), (3)(e), (5)(c)3., (7)(a), (8)(b). Plaintiffs never show otherwise.

Plaintiffs also attack the Act's requirement that certain opinions be provided by a "qualified physician" who (except, as Plaintiffs note, in the case of a deceased claimant) must be a treating physician. Plaintiffs complain the treating physician requirement is improper because "[a]sbestosis is not treatable." Ans. Br., at 11 & n.6. Plaintiffs cannot seriously suggest that persons actually suffering from respiratory disease may not and do not consult with treating physicians.

Plaintiffs also argue that the "qualified physician" requirement "creates an insurmountable barrier" because qualified physicians must be B-readers, and, according to Plaintiffs, there are only 436 qualified B-readers in the country and only eight in Florida. *Id.* at 11-12. Assuming *arguendo* that those figures are correct, Plaintiffs' premise is flawed. The Act does not require "qualified physicians" to be B-readers. B-readers are persons trained and certified by the National Institute for Occupational Safety and Health as proficient in reading x-rays for evidence of lung disease caused by certain dusts. *See* § 774.203(11); 42 C.F.R. § 37.51(b). The Act requires x-rays to be read by B-readers when those x-rays are used to substantiate claims, but contrary to Plaintiffs' contentions, nothing in the Act requires the "qualified physician" who treats a claimant to be a B-reader.

Finally, in demonstrating that the Act's *prima facie* showing requirements are procedural, Defendants relied in their Initial Brief on the Supreme Court of Ohio's recent decision in *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio

2008). *Ackison* considered a nearly identical retroactivity challenge to a similar Ohio law and held that the statute's requirements were remedial and procedural and could be applied retroactively. *Id.* at 1121-26. Plaintiffs completely ignore *Ackison*, which should guide this Court's decision. The Court should hold the Act is procedural and remedial and may be applied retroactively to Plaintiffs' claims.

B. The Act Does Not Abridge Vested Rights.

1. A Florida Common Law Cause Of Action For Asbestos-Related Disease Does Not Accrue Without Impairment.

Defendants' Initial Brief next demonstrated that, contrary to the Fourth District's decision under review, the Act did not modify the essential elements of Plaintiffs' claims because, under Florida's common law, Plaintiffs must prove impairment to show a compensable injury based on asbestos exposure. Benign physiological changes in the lungs based on mere exposure are insufficient. Defendants established that numerous Florida cases support this conclusion, including this Court's decision in *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985), Justice Barkett's concurrence in *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988), Justice Lewis's concurrence in *Willis v. Gami Golden Glades LLC*, 967 So. 2d 846 (Fla. 2007), and the Third District's decision in *Eagle-Picher Industries Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985).

Plaintiffs initially focus on *Eagle-Picher*, which they say helps show that the

Act abolished their supposedly accrued causes of action. Plaintiffs ignore the Third District's holding that exposure does not automatically produce the injury needed to bring suit. 481 So. 2d at 527-29. Plaintiffs also ignore the court's extensive policy discussion regarding why a contrary result would allow millions of uninjured persons exposed to asbestos to flood the courts with claims. *Id.* Plaintiffs instead point to *Eagle-Picher*'s holding that an emotional distress claim based upon proof of asbestosis (including damages for fear of cancer experienced by persons who have asbestosis) exists distinct from a claim for cancer. Plaintiffs argue that when a person "suffers pleural disease, causing pleural thickening, or asbestosis, causing scarring, and resulting in worsening breathing difficulty and fatigue, his claim for emotional distress may be based on these consequences, even without cancer." Ans. Br., at 16. Plaintiffs contend *Eagle-Picher* permitted such a claim without proof of impairment, *id.*, and Plaintiffs repeatedly characterize the Act as prohibiting claims for asbestosis absent cancer. *Id.* at 18 n.10, 19, 29, 36.

Plaintiffs' arguments fail on multiple levels. First, the Act plainly does not bar claims for asbestosis without cancer. It instead provides distinct *prima facie* showing requirements depending on whether a plaintiff claims asbestosis, diffuse pleural thickening, or various types of cancer. § 774.204(2)-(6). Defendants have never suggested otherwise.

Furthermore, Plaintiffs describe their supposed asbestosis or pleural

thickening as involving "worsening breathing difficulty and fatigue," and they argue these conditions "have physical effects, and cause significant physical impairment, including increasingly-debilitating shortness of breath and fatigue." Ans. Br., at 15-16. Plaintiffs assert they can base an emotional distress claim on "these consequences" of asbestos exposure. *Id.* at 16. But these are mere assertions by Plaintiffs' counsel. Plaintiffs never produced *prima facie* evidence of such conditions. Claimants who can and do make the requisite *prima facie* showing of such conditions may satisfy the Act's requirements.

Plaintiffs also argue that *Copeland* supports their claim because their purported injuries "manifested themselves physically in the form of asbestosis, causing scarring, or pleural thickening, thus satisfying the impact rule." *Id.* at 21. Again, Plaintiffs' own declarations of asbestos-related disease are insufficient.

Further, Plaintiffs confuse the kind of contact that satisfies the impact rule (here, inhalation of asbestos fibers) with the wholly different concept of manifestation of asbestos-related disease. As Justice Lewis pointed out in his concurrence in *Willis*, the two are distinct in the toxic tort context. *See* 967 So. 2d at 861 n.8 (Lewis, J., concurring) (explaining "physical injury" in addition to "impact" was required in cases involving "a special type of tort," namely, "cases involving exposure to toxic substances"). The Fourth District also confused these concepts and erroneously relied on impact rule standards in holding impairment is

not required to bring a common law claim for asbestos-related disease. *Williams v. American Optical Co.*, 985 So. 2d 23, 29-30 (Fla. 4th DCA 2008).

Finally, Plaintiffs ignore Justice Barkett's concurrence in *Meehan* in which she explained that even though asbestos inhalation leads to fibrous development (scarring) in the lungs, this establishes only the *potential* for a subsequent injury that is not yet compensable. 523 So. 2d at 150-51 (Barkett, J. concurring). Justice Barkett recognized that actual impairment was required, emphasizing that asbestosis is said to be present only "[w]hen the encapsulation process *diminishes pulmonary function and makes breathing difficult* . . . ." *Id.* at 150 n.2 (emphasis added). The Fourth District erred in holding that impairment is not required to bring a claim for asbestos-related disease.

2. Courts In Other Jurisdictions Agree That A Cause Of Action For Asbestos-Related Disease Does Not Accrue Without Impairment.

Defendants' Initial Brief next demonstrated that numerous jurisdictions hold the common law requires impairment to demonstrate injury based on asbestos-related disease. Plaintiffs all but ignore those decisions. Citing none of them, Plaintiffs declare in a footnote that Defendants' authorities "have nothing to do with retroactivity" and are "irrelevant to the nature of Florida's pre-existing common-law causes of action." Ans. Br., at 22 n.13. Also, referring to claims without proof of impairment, Plaintiffs boldly state that Defendants "ignore the

other 40-plus states that allow such claims." *Id.*

Plaintiffs are fundamentally incorrect in each respect. Plaintiffs have challenged the Act's impairment requirement as unconstitutional by arguing it adds an element not required by the common law. Ans. Br., at 6, 26. Determining whether the common law requires impairment to prove injury from asbestos-related disease is essential to resolving Plaintiffs' challenge, and Defendants' out-of-state authorities confirm that numerous states require proof of impairment to obtain a remedy for such diseases.

Further, Plaintiffs' reference to "the other 40-plus states" that supposedly "allow" recovery without impairment is entirely unsupported. Plaintiffs do not cite a single case, and the only decisions Defendants have located squarely holding that the common law does not require impairment for asbestos-related claims are the Fourth District's *Williams* decision below (which cited no case on point) and Ohio intermediate appellate court decisions that were overruled by the Ohio Supreme Court in *Ackison*. The rest of the jurisprudence requires impairment. To be clear, if the Court were to agree with Plaintiffs that impairment is not required to demonstrate asbestos-related disease, Florida would be the only state to adopt such a position, contrary to the law of numerous other jurisdictions. The Court should decline to do so.

3. Plaintiffs Are Incorrect That Impairment Is Not Required.

Defendants' Initial Brief next demonstrated Plaintiffs' misplaced reliance on anecdotal evidence from cases Plaintiffs claim involved evidence as weak as the evidence in this case. Plaintiffs respond by stating that *W.R. Grace & Co. v. Pyke*, 661 So. 2d 1301 (Fla. 3d DCA 1995), involved a plaintiff with only "mild" asbestosis, without any form of cancer and that such is "exactly the pre-existing basis of liability that the Statute took away." Ans. Br., at 18 n.10. Plaintiffs claim the plaintiff in *Pyke* had only a 1/0 B-read for asbestosis (and an A3 reading for pleural thickening), which Plaintiffs claim to be insufficient under the Act. *Id.*

Plaintiffs are again incorrect. They continue to claim the Act "took away" claims for asbestosis not progressing to cancer, but as Defendants showed above, Plaintiffs misread the Act, which allows such claims on quality proofs. Plaintiffs also ignore that the Act would permit the plaintiff in *Pyke* to proceed with a 1/0 B-read if he could produce other evidence to satisfy the Act's *prima facie* showing requirements. Neither the courts below nor this Court have any record evidence of what else was proved in *Pyke*; nor was any of this vetted on appeal in *Pyke*.

4. Plaintiffs Have Not Made *Prima Facie* Showings Of Impairment.

Defendants further demonstrated that Plaintiffs failed to demonstrate impairment through a qualified physician's diagnosis. Plaintiffs do not dispute this

point. Nor do they dispute that, based on the evidence in the record, the 1/1 B-reads of Plaintiffs Pittman and Martin and the 1/0 B-reads of the remaining Plaintiffs would satisfy the Act's *prima facie* showing requirements if accompanied by other evidence. Plaintiffs do not deny that they failed to meet the Act's requirements. In fact, Plaintiffs never showed that they *could not* meet the Act's requirements if they made efforts to do so. They simply gave up. Their as-applied challenges therefore must fail.

C. Even if the Act Could Be Deemed to Affect Vested Rights, It Is a Valid Exercise of the Legislature's Police Power.

Defendants finally showed that even if this Court rejects the overwhelming weight of authority and holds the common law does not require impairment to demonstrate injury from asbestos exposure, and even if Plaintiffs showed they had accrued causes of action for asbestos-related disease that have been abridged, then the due process analysis is not over. The Act may nonetheless be upheld if it is based on a valid exercise of the Legislature's police power. *Department of Agriculture & Consumer Services v. Bonanno*, 568 So. 2d 24, 30 (Fla. 1990) ("[W]hether or not the plaintiffs' rights are vested in this case is essentially irrelevant because that alone is not dispositive."). Defendants' Initial Brief relied on the three-part balancing test set forth in *Bonanno* and *Department of Transportation v. Knowles*, 402 So. 2d 1155, 1158 (Fla. 1981), to prove this point and show that the Act should in all events be upheld.

Plaintiffs argue that they need not have vested rights to protect them from retroactive legislation. Plaintiffs claim retroactive application of a statute "is impermissible not only when it affects vested rights, but also when it imposes new penalties, or establishes a new disability." Ans. Br., at 29. Imposing new penalties or disabilities occurs when legislation impermissibly gives a party a cause of action or a defense, or the state criminalizes conduct, based on events that have already occurred. Such circumstances do not exist here. The Legislature has not imposed a criminal or civil disability on Plaintiffs *for their past conduct*. Plaintiffs have not suffered any detrimental reliance on rules that have changed.

Plaintiffs cite numerous cases in text, and more in footnotes, supposedly demonstrating that a statute cannot retroactively abolish a cause of action. Plaintiffs repeatedly misstate the holdings of these cases. For example, Plaintiffs claim *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d 557 (Fla. 1975), held application of a statute to be "impermissible" where it required 90 days' notice of termination of a franchise agreement. *Yamaha Parts*, however, involved the Florida Constitution's contracts provision, not due process. The Court in *McKibben v. Mallory*, 293 So. 2d 48 (Fla. 1974), did not invalidate a statute but rather concluded that the Legislature did not intend the statute at issue to be retroactive. In *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995), and *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985), the Court

refused to apply statutes retroactively that penalized defendants for conduct that had already occurred, but that is not at issue here.

Plaintiffs further argue it is unclear whether the three-part balancing test of *Bonnano* and *Knowles* is still good law because this Court stated in *Metropolitan Dade County v. Chase Federal Housing Corp*., 737 So. 2d 494, 500 (Fla. 1999), that the Court had not recently "used" that analysis when discussing retroactivity. That the Court has not recently "used" an analysis does not mean it is no longer good law. The Court has held it does not overrule itself *sub silentio*, *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002), and neither *Knowles* nor *Bonanno* has been overruled. In addition, *Metropolitan Dade County* decided the retroactivity challenge in that case based on a lack of evidence the Legislature intended the statute to be retroactive. Any discussion regarding the balancing test of *Knowles* and *Bonanno* was therefore *dicta*.

Plaintiffs contend that the balancing test of *Knowles* and *Bonanno* should apply only in situations where a retroactive law retroactively abrogates the value of a claim. That is not what those cases held. They held that the balancing test applies to determine "whether to sustain the retroactive application of a statute . . . ." 568 So. 2d at 30; 402 So. 2d at 1158. Moreover, the ASCFA does not abrogate any already accrued claim—it regulates *when* claims may be asserted.

It remains only to note that Plaintiffs contend that the Act's supporting

findings—contained in the preamble's "whereas" clauses—are not findings on which the Legislature or this Court may rely. Ans. Br., at 36. Ignoring the numerous cases Defendants cited in which this Court relied on such clauses to establish legislative findings, Plaintiffs cite *North Florida Women's Health & Counseling Services v. State*, 866 So. 2d 612, 627-30 (Fla. 2003), to argue such clauses are invalid without evidentiary support. Plaintiffs overlook that *North Florida* involved a full trial in which the plaintiffs prevailed by presenting evidence that disproved the legislative findings at issue in that case. Here, by contrast, Plaintiffs never even attempted to disprove the Legislature's findings.

II. THE ACT DOES NOT VIOLATE ACCESS TO COURTS.

Plaintiffs raised an access to courts challenge in the circuit and district courts, but their Answer Brief in this Court mentions it only in footnotes. *See* Ans. Br. at 29 n.17, 40 n.24. Defendants do not read the Answer Brief as raising an access to courts issue for this Court to rule upon. To the extent any such issue exists, Defendants rely upon their argument on this point in their Initial Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2009, a copy of the foregoing was served by U.S. Mail on the following persons:

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CERTIFICATE OF COMPLIANCE

I further certify that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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