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. SC08-1617 & 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

ANSWER BRIEF OF RESPONDENTS

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I.
INTRODUCTION AND SUMMARY OF ARGUMENT

> Section 774.204(3) [Fla. Stat.] does not impair or eliminate the plaintiff's right to sue for asbestos-related injuries. Rather section 774.204(3) sets forth the procedures a plaintiff must follow to file or maintain an asbestos cause of action when the alleged injured person is/was a smoker with lung cancer.
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> Accordingly, we grant the petition for writ of certiorari, quash the order under review, and remand for entry of an order granting [the defendant's] motion to dismiss.

DaimlerChrysler Corp. Hurst, 949 So. 2d 279, 287-88 (Fla. 3d DCA), *review denied*, 962 So. 2d 337 (Fla. 2007).

In a single breath, the Third District Court in *Hurst* held that the relevant provisions of the Asbestos and Silica Compensation Fairness Act, §774.201 *et seq.*, Fla. Stat. (2005)[1] are merely procedural, and then directed the retroactive *dismissal* of the Plaintiffs' claims. The Appellants ("Defendants") urge the same outcome here. As the Plaintiffs will establish, whether a statute is ostensibly substantive or procedural, there can be no more substantive application than its retroactive abolition of a pre-existing cause of action, and this Court repeatedly has held that a statute altering or abolishing a pre-existing right (not necessarily a vested right) is

[1]Chapter 2005-274, §10, Laws of Florida, codified at Chapter 774, Part II,

unconstitutional.

Although the Statute at issue here is largely substantive--altering the elements of the pre-existing cause of action, in the process abolishing claims that had been viable--the same analysis applies to a statute that is ostensibly procedural in its prospective application, but no less substantive in its retroactive application. A statute of limitations in the abstract may be procedural, but the Legislature cannot retroactively displace a pre-existing claim by altering the applicable statute of limitations. To the contrary, "to shorten a period of limitation, the Legislature must by statute allow a reasonable time to file actions already accrued." *Homemakers, Inc. v. Gonzales*, 400 So. 2d 965, 967 (Fla. 1981). Numerous decisions, in a variety of areas, disallow the retroactive application of statutes that have a substantive effect, even if they were designated procedural or remedial.

Like *Homemakers*, many of these decisions concern claims that had not yet been filed, and of course no judgment had been entered. They debunk the Defendants' contention that only vested rights, as they define them--as judgments, not claims--can preclude the retroactive abolition of a pre-existing right of action. To the contrary, this Court has said repeatedly that a retroactive statute is impermissible not only "in those cases wherein vested rights are adversely affected

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Fla. Stat. (2007).

or destroyed," but also "when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions previously had or expiated." *McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949). *See State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). Apart from any question of vested rights, in numerous contexts noted below, the retroactive application of this Statute would impose "a new obligation or duty," and "an additional disability." And in any event, as we will establish, a cause of action in Florida--not only a judgment--*is* a vested right, and retroactive application of the Statute is impermissible for that reason as well.

Apart from their insistence that retroactivity can be precluded only by a pre-existing judgment, the Defendants also argue that even before the Statute was amended, the Plaintiffs had no cause of action. But several decisions, including decisions of this Court, recognized such an action before the Statute abolished it. The Defendants erroneously rely upon cases addressing only the *damages* that were available to those plaintiffs, like the Plaintiffs here, who suffer from asbestosis or pleural disease, but not from cancer. These cases hold that while damages for the fear of cancer were allowable, damages for the risk of cancer were not (although the plaintiffs in such cases could bring a second lawsuit if they should contract cancer). At the same time, these cases expressly validated the plaintiffs' pending claims for asbestosis alone. They hold that such claims survive

the impact rule because of the physical effects of asbestosis--scarring--or of pleural thickening, even without any permanent impairment of the kind now required by the Statute. *See Eagle-Picher Industries Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985), *review denied*, 492 So. 2d 1331 (Fla. 1986) (*discussed infra*). As we note below, decisions of this Court have endorsed that holding. As Justice Barkett put it in *Celotex Corp. v. Meehan*, 523 So. 2d 141, 150 (Fla. 1988) (cited by Defendants) (Barkett, J., concurring and dissenting), "claims for asbestosis and cancer arising from the same exposure to asbestos are separate and distinct so that they need not be joined in a single action". *See also Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985) (also cited by Defendants) ("the action accrues when the accumulated effects of the substance"--not necessarily a permanent disease--"manifest themselves in a way which supplies some evidence of the causal relationship to the manufactured product"). In this case, the "effects of the substance" are the physical manifestations of asbestosis in scarring, or of pleural thickening, and their increasingly-debilitating effects, including breathing difficulty and fatigue, even without an asbestos-related disease and impairment, as defined by the Statute.

Thus the Plaintiffs had a viable cause of action before the Statute was enacted. The Statute added numerous and significant substantive and procedural

requirements that combined to abolish their pre-existing claims, as the Third District Court directed in *Hurst*. Whether or not those claims constituted vested rights, the Statute's retroactive impact--the most substantive impact possible--was invalid. Therefore, the District Court's decision in the instant case should be approved.

II.
STATEMENT OF THE CASE AND FACTS

The Defendants' statement of the procedural history of these cases is generally accurate. As the Defendants acknowledge (Brief at 33-36), and successfully argued below, the Statute required dismissal of the Plaintiffs' pending lawsuits, because they cannot satisfy its requirements. For this reason, it is not necessary to detail the physical condition of each Plaintiff. They are described in the District Court Brief of Appellants in *Spiewak* at 1-3, and in *Williams* at 1-2. Their medical records are in Defendants' Appendix in this Court, Vol. II, Tabs 15-27. All have some form of bilateral interstitial lung disease (asbestosis) or pleural disease. As the District Court put it: "Before the Act was adopted, all of the plaintiffs in these cases had filed actions for damages based on various degrees of asbestosis--that is, interstitial lung disease resulting from asbestos exposure or pleural thickening. . . . Under the Act, however, a claimant bringing an action for damages from exposure to asbestos must now, as an indispensable element, plead

and prove an existing malignancy or actual physical impairment for which asbestos exposure was a substantial contributing factor." *Williams v. American Optical Corp.*, 985 So. 2d 23, 26 (Fla. 4th DCA 2008), *citing* §774.204(1), Fla. Stat. (2007).[2]

As the Defendants have acknowledged throughout, all of the Plaintiffs are unable to satisfy the new requirements of the Statute. These requirement include the following:

Section 774.202(1) records the statutory purpose to "[g]ive priority to true victims of asbestos and silica, claimants who can demonstrate actual physical impairment caused by exposure to asbestos or silica . . . ." Accordingly, §774.204(1) provides that physical impairment is now an essential element of an asbestos or silica claim; and §774.204(2) precludes the pre-existing civil action "alleging a non-malignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor." Sub-section (2) then provides that such a *prima facie* showing "must include all of the following requirements. . . ." They include:

Section 774.204(2)(e) requires diagnosis of "asbestosis or diffuse pleural

[2]As we note next, the Statute also contains numerous additional substantive

thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening." Section 774.203(4) defines asbestosis to mean "bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers". These provisions abolish the pre-existing claims of those suffering from diaphragmatic pleural plaques (a scarring of the outer lining of the lung), circumscribed pleural thickening, and pleural calcifications, as opposed to pleural thickening.

Section 774.203(24) defines "radiological evidence of asbestosis" (the requirement of §774.204(2)(e), *supra*) as "a quality 1 chest X ray under the ILO System of classification . . . showing small, irregular opacities (s, t, u) graded by a certified B-reader as at least 1/1 on the ILO scale."[3] This definition excludes

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and procedural requirements that the Plaintiffs cannot satisfy.

[3]"ILO" is the International Labor Organization. The ILO is responsible for drafting guidelines and standardizing classification methods for chest radiographs of persons with dust-related lung diseases. *See* Geneva International Labor Organization, *Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses*, 2000 Ed., 2002 (App. 1 to Spiewak Brief in District Court, p. vi). The ILO established a 12-category scale for measuring the degree of scarring ("profusion") in a person's lungs (*id*. at 4). For example, a B-read classification of 0 indicates that small opacities or scarring is either absent or less profuse than category 1 (*id.* at 35). Category 1 denotes increasing profusion of fiber related to scarring (*id*.).

A B-read, issued by a certified B-reader, identifies the degree of scarring found in or on a person's lung. A B-reader is a physician who studies the National Institute for Occupational Safety and Health's ("NIOSH") courseware, and passes NIOSH's test, ensuring competency to classify radiographs for pneumoconiosis

alternative pre-existing methods of proving asbestosis. It narrows the definition of asbestosis utilized by the American Thoracic Society (*see Williams* R. 2063, Ex. 3). In addition, in requiring a quality 1 chest X ray, or quality 1 or 2 for deceased asbestos victims, the Statute also permanently abolishes pre-existing claims. Prior to its enactment, under the ILO classification system, Quality 1, 2 and 3 films could form the basis for both injury and death claims--1 (good), 2 (acceptable, with no technical radiograph defect) or 3 (defective for some purposes) (*see* Brief of Appellants in *Williams*, App. 20). Now only a rating of 1 will sustain a living injury claim--1 or 2 a death claim (if such a reading was even obtained while the victim was alive) . If, for various reasons--obesity, positioning, some other malady, a minor flaw in the X ray--the X ray cannot record the optimum reading of 1, the pre-existing viable claim is lost.[4]

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and other dust-related diseases using the ILO system. *See* Spiewak Brief in District Court, App. 4; 42 C.F.R. §37.51(b) (definition of B-reader). The B-reader program was initiated by NIOSH in 1974 to identify physicians qualified to serve in national pneumoconiosis programs for coal miners and other victims of dust-related diseases. *Id.* The Occupational Safety and Health Administration ("OSHA") asbestos standards require chest radiographs of those exposed to asbestos to be interpreted and classified by a B-reader, radiologist, or physician with expertise in pneumoconioses. *Id.* Presently there are 436 certified B-readers in the United States, eight of whom reside in Florida. *See* Spiewak Brief in District Court, App. 5.

[4]Section 774.204(2)(g) does provide an alternative formula for satisfying the requirements of sub-section (2) (e). However, the alternative itself imposes

Section 774.203(25) defines "radiological evidence of diffuse pleural thickening" (the alternative requirement of §774.204(e)) as "a quality 1 chest X ray under the ILO System of classification . . . showing bilateral pleural thickening of at least B2 on the ILO scale and blunting of at least one costophrenic angle."[5] This too narrows the pre-existing definition--for example, that of the American Thoracic Society, *see Williams* R. 2063, Ex. 3--to only one measurement.

Section 774.204(2)(d) requires, in addition to the foregoing, a "determination by a qualified physician" (defined as the treating physician, *see infra*), based on a "medical examination and pulmonary function testing, that the exposed person has a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated pursuant to the AMA Guides to the Evaluation of Permanent Impairment." This further details the new requirement of permanent impairment, and quantifies that requirement.

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standards not theretofore required. They include satisfaction of 774.204(2)(d)--permanent respiratory impairment (discussed below), and (2)(f)(1)--impaired lung capacity (also discussed below).

[5]The ILO establishes a scale for measuring the degree of pleural scarring or thickening caused by asbestos exposure. (*See* App. 2, Spiewak Brief in District Court, at 36). The pleura is a thin layer of cells that line the lungs, and among other things allows the lungs to expand and contract against the rib cage. A B-read classification of circumscribed pleural thickening of A1 would indicate that the visceral pleura has thickened (scarring) approximately 3 to 5 millimeters in width, and that the asbestos-caused thickening is present on 1/4 of the length of projected chest wall. *Id*. at 36.

Section 774.204(2)(f) imposes the additional requirement of a "determination by a qualified physician" (treating physician) that "asbestosis or diffuse pleural thickening, rather than chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person" has total lung capacity below a specified level; forced vital capacity below a specified level; or a chest x-ray satisfying specified requirements.

Section 774.206(2) abolishes a pre-existing element of damages, even if the plaintiff meets all the other new requirements. As we note *infra*, for a patient who did not suffer some form of cancer, the pre-existing common-law claim permitted damages for the plaintiff's fear of contracting cancer, but not for the risk of contracting cancer. The new Statute provides that "[d]amages may not be obtained for *fear or risk* of cancer in a civil action asserting an asbestos or silica claim." §774.206(2) (emphasis added).

Thus the Statute newly requires physical impairment, evidenced either by asbestosis, defined in a new and exclusive way; or by diffuse pleural thickening, defined in a new and exclusive way; and proof of a permanent respiratory impairment, defined in a new and exclusive way; and proof that asbestosis or diffuse pleural thickening, as thus defined, rather than chronic obstructive

pulmonary disease, is a substantial contributing factor to the newly-required physical impairment, based on one of three new specified measures; and it eliminates one element of damages. It is conceded that all Plaintiffs were unable to satisfy one or more of these new requirements.

The Statute also contains provisions that are ostensibly procedural, but have substantive impact in their retroactive application. Section 774.203(23) defines "qualified physician"--a phrase attached to mandatory provisions throughout the Statute--as *only* the doctor who was "actually treating or has treated the exposed person, or has or had a doctor-patient relationship with that person."[6] Unless the plaintiff secures the treating physician as his expert--a requirement that did not theretofore exist--there is no claim. This is extremely significant, not only because the treating physician may not be available, but because most patients' treating physicians are not "qualified," as the Statute requires. Asbestosis is not treatable. Scarring of lungs does not regress. At some point, it kills. As noted, *supra* note 3, B-readers can be qualified physicians, but there are only 436 qualified B-readers in all of the United States–8 in Florida. As a practical matter, to comply with this Statute, asbestos victims must know that they have or may have cause of action;

[6]Under sub-section 1 of §23(a) and (b), if the patient is deceased, the treating physician can examine the exposed person's records in lieu of physical examination, but under sub-section 2, it must be the decedent's treating physician who does so.

then hire a qualified physician (one of 436) to treat them; and then secure his testimony. The Statute thus creates as insurmountable barrier to these actions, especially in its retroactive application.

Section 774.203(29) defines a "smoker" as someone who had used tobacco products on a consistent and frequent basis within the last 15 years. Section 774.204(3) provides that smokers, as thus defined, may not file civil actions alleging an asbestos claim based on cancer of the lung, larynx, pharynx, or esophagus absent a *prima facie* showing "that exposure to asbestos was a substantial contributing factor to the condition"; that ten years had elapsed between the date of first exposure and the date of diagnosis; "[r]adiological or pathological evidence of asbestosis or diffuse pleural thickening or a qualified physician's diagnosis of asbestosis based on a chest X-ray graded by a certified B-reader as to at least 1/0 on the ILO scale, and high-resolution computed tomography supporting the diagnosis of asbestosis to a reasonable degree of medical certainty"; and evidence of the plaintiff's "substantial occupational exposure to asbestos." These are all new requirements.[7]

[7]Here too, if the exposed person is deceased, the information can be obtained from a person knowledgeable, but the Statute still requires the report of a "qualified physician" (defined *only* as the treating physician) stating that the impairment was not "probably the result of causes other than asbestos exposure revealed by the exposed person's employment and medical history." s.

Section 774.205(2) requires that "[f]or any asbestos or silica claim pending on the effective date of this act, the plaintiff must file [a] report and supporting test results" "meeting the requirements of s. 774.204(2), (3), (5) or (6)," "at least 30 days before setting a date for trial."

III.
ISSUE ON APPEAL

WHETHER THE ASBESTOS AND SILICA COMPENSATION FAIRNESS ACT IS UNCONSTITUTIONAL IN ITS RETROACTIVE APPLICATION.

IV.
STANDARD OF REVIEW

The Court's consideration of the constitutionality of a statute is *de novo*. *See Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008); *Florida Department of Children & Families v. F.L.*, 880 So. 2d 602, 607 (Fla. 2004).

V.
SUMMARY OF ARGUMENT

We have summarized the Argument in the Introduction.

VI.
ARGUMENT

774.204(3)(f), Fla. Stat.

THE ASBESTOS AND SILICA COMPENSATION FAIRNESS ACT IS UNCONSTITUTIONAL IN ITS RETROACTIVE APPLICATION.

The Defendants do not deny that the Statute is retroactive in its application. They sought and obtained the dismissal of pending claims. The U.S. Supreme Court said in *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994), *quoted in Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999), that a statute is retroactive which "attaches new consequences to events completed before its enactment." *Accord*, *Dade County v. Ferro*, 384 So. 2d 1283, 1285 (Fla. 1980); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961). In this case the operative event was the accrual of the Plaintiffs' causes of action.[8] Thus a statute is retroactive in its application to a pre-existing cause of action, whether the action has been filed or not. In the instant case, the Plaintiffs' claims have all been filed.

As this Court recognized in *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999), every retroactive statute

[8]*See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977); *Raphael v. Shecter*, 34 Fla. Law Weekly D1936 (Fla. 4th DCA Sept. 23, 2009); *Russell Corp. v. Jacobs*, 782 So. 2d 404, 405 (Fla. 1st DCA), *review denied*, 791 So. 2d 1098 (Fla. 2001).

"implicate[s] due process concerns."[9] The Defendants have raised a number of disparate points in support of two arguments for upholding retroactive application of the Statute. We will group these points under those two arguments.

A. The Plaintiffs Had a Pre-existing Cause of Action. The Defendants argue (Brief at 21-33) that none of the Plaintiffs had a common-law claim before the Statute was enacted, because any such claim required proof of "impairment" (Brief at 21), which the Defendants define as nothing less than either mesothelioma (lung cancer) or some other form of cancer. The District Court held otherwise, acknowledging the Plaintiffs' position that "before the statute was enacted Florida law recognized a cause of action for damages arising from the disease of asbestosis without any permanent impairment or the presence of cancer," and holding that "[o]ur research confirms their assertion." *Williams v. American Optical*, 985 So. 2d at 28. The District Court was correct.

Whether or not asbestosis or pleural thickening have led to cancer, they

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[9] *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-33 (1998); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass'n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008); *Raphael v. Shecter*, 34 Fla. Law Weekly D1936. *See generally* H. Broom, *Legal Maxims* 24 (8th ed. 1911); 2 N.J. Singer, *Statutes and Statutory Construction* §41:2, at 375 (6th ed. 2001); Annotation, Retroactive Effect of Statute Which Imposes, Removes, or Changes a Monetary Limitation of Recovery for Personal Injury or Death, 98 A.L.R. 2d 1105 (1964); Hochman, *The Supreme Court and the Constitutionality of Retroactive Application*, 73 Harv. L. Rev. 692 (1960).

nevertheless have physical effects, and cause significant physical impairment, including increasingly-debilitating shortness of breath and fatigue (*see* R. 2606, Ex. 9). These symptoms only get worse--never better. Given such serious physical consequences, before the Statute was enacted, Florida's courts recognized a cause of action to redress them.

As the Defendants note (Brief at 24-27), the District Court cited *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985), *review denied*, 492 So. 2d 1331 (Fla. 1986), which held that a plaintiff with "asbestosis, but not cancer," *id*. at 519--like most of the Plaintiffs here (two had pleural disease, which also supported an action)--had a viable claim notwithstanding the absence of any "impairment." The court in *Eagle-Picher* held that the physical manifestations of asbestosis alone satisfy Florida's impact rule *(see Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974)), because "[t]he essence of impact . . . is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body." *Eagle-Picher*, 481 So. 2d at 527. The court held that asbestosis supports a claim for emotional distress because it constitutes "a chronic, painful and concrete reminder that [the plaintiff] was *injuriously exposed* to a substantial amount of asbestos." *Id.* at 529 (second emphasis added). When the plaintiff 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.

On the issue of damages, however, the court in *Eagle-Picher* disallowed part of the prayer. It did agree with the plaintiff that "in a case such as this where the plaintiff already had manifested the physical disease of asbestosis," he may introduce "evidence that the plaintiff had an enhanced risk of contracting cancer," in order to prove "present mental distress caused by his fear of getting cancer in the future . . . ." *Id*. at 529. (As noted, this element of damages was taken away by the Statute, §774.206(2)). However, the court also held that the plaintiff in such a case cannot recover additional damages based on the "enhanced risk of contracting cancer in the future," *id*. at 519. Instead, "the plaintiff may bring a second action for damages if and when he actually contracts cancer." *Id.* at 520. Thus, *Eagle-Picher* expressly recognized the right to sue for asbestosis alone, with no resulting cancer, although the claim cannot entail damages for the risk of cancer. *Accord*, *Landry v. Florida Power & Light Corp.*, 799 F. Supp. 94 (S.D. Fla. 1992) (Fla. law) (first action still viable for emotional distress), *aff'd*, 998 F.2d 1021 (11th Cir. 1993); *Wildenburg v. Eagle-Picher Industries, Inc.*, 645 F. Supp. 29, 30-31 (S.D. Fla. 1986) (Fla. law) (same); *W.R. Grace & Co.-Conn. v. Pyke*, 661 So. 2d 1301 (Fla. 3d DCA 1995) (allowing damages for pain and suffering, but reversing the

award for lost future earning capacity, of a plaintiff whose "asbestos-related disease was essentially mild and in the early stages"). *See also Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (action available under FELA).[10]

This Court approved *Eagle-Picher's* holding on the impact rule in *Zell v. Meek*, 665 So. 2d 1048, 1050 n.1 (Fla. 1999). The Court noted its holding that "the inhalation of asbestos fibers, which over time causes serious lung damage, constituted an impact," and found this "formulation . . . consistent with our own holdings." The Court again cited this holding of *Eagle-Picher* in reaffirming *Zell*

[10]The Defendants say that the statement in *W.R. Grace* that the plaintiff had "mild" asbestosis "may be consistent with the Act's requirement that plaintiffs demonstrate at a minimum a *prima facie* showing that they have the lowest level of impairment discernable by medical professionals" (Defendants' Brief at 32-33). The exact opposite is true. A "mild" asbestosis, without any form of cancer, is exactly the pre-existing basis of liability that the Statute took away. In fact, we know that Earl Pyke did not have cancer, because his medical records are in the Record in *Spiewak* (*see Spiewak* District Court Brief, App. 20, 21, 22). These records also show that Mr. Pike could not satisfy the new statutory standard, because his Pulmonary Function Test (PFT) was below the cut-off, with only a 1/0 asbestosis rating, and his pleural thickening was A3 and not B2. This is similar to Mr. Spiewak's medicals, and the Defendants got his claims dismissed.

The Defendants also take comfort in the holding of *W.R. Grace* that the plaintiffs had failed to prove their claim of lost income. But the court affirmed the damages for pain and suffering. Thus, *W.R. Grace does* hold "that a plaintiff can bring suit for asbestosis without impairment" (Defendants' Brief at 33). It affirms an award for pain and suffering for "mild" asbestosis of a patient who did not have cancer.

v. Meek in *Willis v. Gami Golden Glades LLC*, 967 So. 2d 846, 85 (Fla. 2007).[11]

In discussing *Eagle-Picher*, the Defendants repeatedly mischaracterize its holding--which was that a claim based on cancer was must await the development of cancer, but the pending claim based on asbestosis may proceed--as a broader holding that a plaintiff cannot maintain *any action* in the absence of a permanent disease.[12] At least four times, the Defendants erroneously attribute to *Eagle-Picher* the holding that *no* cause of action can be brought in the absence of a permanent disease like cancer, when in fact it held the opposite--that the scarring of asbestosis alone, or pleural thickening, which the Plaintiffs here suffer, will support a cause of action, although a second action may be available if the plaintiff develops cancer.

The Defendants also dismiss this Court's decisions in *Zell* and *Willis*. They

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[11]Comparable decisions on the impact rule include *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234 (Fla. 2001) (contaminated food); *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360, 364 (Fla. 1995) (invasive procedure of "caustic" or toxic medication, although touching by doctor or taking blood is not enough); *Clark v. Choctawhatchee Electric Co-op., Inc.*, 107 So. 2d 609 (Fla. 1958) (electric shock).

[12]*See, e.g.,* Defendants' Brief at 24 (*Eagle-Picher* "expressly held that actual physical injury from asbestos, not merely asbestos inhalation was required to maintain *an action*" (emphasis added); 25 (*Eagle-Picher* held that "the plaintiff could only *bring suit* for such damages later 'if and when he actually contracts cancer'") (emphasis added); 25 (*Eagle-Picher* held that a plaintiff "could not obtain damages for emotional distress until the plaintiffs *also* manifested actual physical injury") (emphasis in original); 27 ("[p]roperly understood, *Eagle-Picher* represents a sensible *limitation* on the assertion of *asbestos-related claims*") (first

note the Court's recognition in *Zell* that the plaintiff there had suffered a "physical impairment," 665 So. 2d at 1049, but ignore the Court's suggestion that such an impairment is not necessary to support the action, in its quotation of *Eagle-Picher's* statement that the impact rule is satisfied, and the cause of action is permitted, based on the "outside force or substance . . . no matter that the effects are not immediately deleterious . . . ." *Eagle-Picher*, 481 So. 2d at 527, *quoted in Zell*, 665 So. at 1050 n.1. As noted, the Court again endorsed that statement in *Willis*, 967 So. 2d at 850--an endorsement not diluted by either concurring or dissenting contentions that a greater impact should be required (*see* Defendants' Brief at 27-28). Thus, this Court has twice endorsed the real holding of *Eagle-Picher*. That means that the Plaintiffs here did have a viable cause of action before enactment of the Statute.

The Defendants also find authority to the contrary in a decision of this Court concerning the statute of limitations in an asbestos case, and a concurring opinion on the choice-of-law considerations implicated in such a case. In *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538-39 (Fla. 1985), which rejected a market-share theory of liability, and found an issue of fact on the commencement of the statute of limitations, the Court noted only that the plaintiff was unable to work because of

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emphasis in original).

shortness of breath. *Id*. at 538-39. There is no indication that the plaintiff suffered cancer, and the Court did not suggest that any such impairment is a necessary condition of an asbestosis claim. In fact it held that for purposes of the statute of limitations, "the action accrues when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of the causal relationship to the manufactured product." *Id*. at 538. The Statute is triggered not, as the Defendants contend, by a permanent impairment, but only when the effects of exposure "manifest themselves . . . ." Here, for all Plaintiffs, those effects manifested themselves physically in the form of asbestosis, causing scarring, or pleural thickening, thus satisfying the impact rule.

In *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988), cited by the Defendants, the Court applied Florida's borrowing statute, §95.10, Fla. Stat., in holding that because the asbestos claim was time-barred in New York, where the decedent had lived, it could not be sustained in Florida. Justice Barkett dissented in part, on the ground that the cause of action had not arisen in New York by virtue of the decedent's exposure to asbestos there, but rather at the time the "injury" (not permanent injury) "was first inflicted. . . ." *Id*. at 149. The opinion cited *City of Miami v. Brooks*, 70 So. 2d 306, 307 (Fla. 1954), holding that the statute does not run "until an occupational disease has manifested itself . . . ." It thus was the physical manifestation--not necessarily a permanent injury--that assertedly should

have triggered the statute of limitations. Thus, the opinion recognizes that "claims for asbestosis and cancer arising from the same exposure to asbestos are separate and distinct so that they may not be joined in a single action." *Id.* at 150. It says that asbestosis is a "recognized disease." *Id.* at 149. These statements reinforce the viability of claims based on asbestosis.[13]

On the basis of the foregoing, the Defendants are incorrect in asserting that these Plaintiffs, all of whom suffer asbestosis and/or pleural thickening (as measured by prior common-law standards), did not have a cause of action before enactment of the Statute. Although their damages might have been limited in the absence of cancer, they did have cognizable claims.

B. Retroactive Application of the Statute is Unconstitutional.

1. Retroactive Application of the Statute Is Not Defensible on the Ground That It Is Remedial or Procedural. The Defendants argue (Brief at

[13]The Defendants say (Brief at 30-32) that common-law asbestos claims in a few other states require a showing of impairment, and that the courts of other states have upheld statutes requiring such a showing. Of course they ignore the other 40-plus states that allow such claims. Moreover, these decisions have nothing to do with retroactivity, which is the issue before this Court. *Compare DaimlerChrysler Corp. v. Ferrante*, 637 S.E. 2d 659 (Ga. 2006) (invalidating retroactive application of asbestos statute). *See infra* pp. 32-33. Whether common-law actions in other states require a showing of permanent impairment is irrelevant to the nature of Florida's pre-existing common-law cause of action. And decisions in other states upholding the facial constitutionality of statutes are irrelevant to the question of retroactivity.

15-21) that all provisions of the Statute are procedural or remedial, as opposed to substantive, and cite the general rule that "[r]emedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation . . . ." *Village of El Portal v. City of Miami Shores,* 362 So. 2d 275, 278 (Fla. 1978). The Defendants then cite decisions allowing retroactive application of statutes requiring a medical affidavit, altering the requirements of contribution, changing the burden of proof, changing *per se* rules, and changing provisions of the Evidence Code (Brief at 18-19). They assimilate these decisions to the dramatic substantive and procedural amendments that required dismissal of the Plaintiffs' actions here. The Defendants make two arguments.

First, the Defendants contend (Brief at 19-20) that provisions of the Statute requiring proof of permanent health impairment; prescribing the measure of such proof; and specifying the measure of causation (only three of its many provisions) do nothing more than prescribe the elements of a *prima facie* showing, which is "plainly a procedural matter" that is "critical to the Act's remedial purpose of preventing scarce resources from being consumed by persons who believe they have been exposed to asbestos but who suffer no actual impairment to their health." The Third District Court said the same thing in *Hurst*--that the Statute only "sets forth the procedures a plaintiff must follow to file or maintain an

asbestos cause of action [and] the plaintiff's burden of proof . . . ." 949 So. 2d at 287. (Then it ordered dismissal of the plaintiffs' actions). We respectfully disagree. The Statute contains numerous substantive provisions, and it also has an obvious substantive impact in the retroactive application of its ostensibly-procedural requirements.

Typically, the controlling constitutional dividing line in appraising retroactive legislation is between procedural and substantive laws. A "substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), *quoted in Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994).[14] However, under Florida law, even a statute that is ostensibly procedural or remedial may be constitutionally impermissible in its retroactive application, if it alters or eliminates a pre-existing substantive right. In *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999), this Court quoted *Landgraf v. USI Film Products*, 511 U.S. 244,

[14] *Accord*, *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005); Metropolitan *Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999); *State of Florida, Department of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981); *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975); *Tel Service Co. v. General Capital Corp.*, 227 So. 2d 667, 671 (Fla. 1969).; *Raphael v. Shecter*, Case No. 4D08-432, Slip. Op. at 5 (Fla. 4th DCA Sept. 23, 2009).

269-70 (1994), which said that whether a statute is ostensibly procedural or not, the court still "must ask whether the new provision attaches new legal consequences to events completed before its enactment." The Court said in *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994): "[W]e have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of 'remedial' legislation that should be presumptively applied in pending cases." Even "an act designed to serve a remedial purpose will not be applied retroactively, when it is clear that doing so 'would attach new legal consequences to events completed before its enactment.'" *McMillian v. State of Florida, Department of Revenue ex rel. Searles*, 746 So. 2d 1234, 1237 (Fla. 1st DCA 1999), *quoting Arrow Air*. *Accord*, *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

Thus, as noted, although a statute of limitations may be prospectively procedural, the Court held in *Homemakers, Inc. v. Gonzales*, 400 So. 2d 965, 967 (Fla. 1981) that it cannot retroactively abolish an accrued cause of action. And in *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d 557 (Fla. 1975), although the statute in question was abstractly procedural--it required 90 days' notice of termination of a franchise agreement--its retroactive application to a pre-existing case would abolish the claim, and thus was impermissible.

In *McKibben v. Mallory*, 293 So. 2d 48, 50-51 (Fla. 1974), a statute

"changing the manner or method of distributing the damages recoverable" was held to be substantive in its retroactive application. In *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 61-62 (Fla. 1995), an amendment to the uninsured-motorist statute "significantly alter[ing] the language used to determine damages" was substantive in its retroactive application. In *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985), a statute creating a right to attorney's fees was substantive in its retroactive application. The retroactive application of these Statutes could not be saved by labeling them procedural or remedial.

In the instant case, numerous provisions of this Statute are inherently substantive, because they "prescribe[] duties and rights . . . ." *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975). These provisions are described *supra* pp. 6-10. They explicitly give a new priority to plaintiffs who are physically impaired, and provide that such impairment is essential to their claims. §§ 774.202(1), 774.204(1)(2). They therefore create a new substantive element of this cause of action. They create new standards by which to establish that cause of action--either asbestosis, as newly defined, or diffuse pleural thickening, as newly defined-- eliminating other definitions of asbestosis, and eliminating pleural plaques, as a basis for the claim. §774.204(2). These are new substantive

elements of the cause of action. They create new standards of proof to satisfy these elements. §774.203(24)(25). They abolish a pre-existing element of damages. §774.206(2). They significantly narrow pre-existing bases for asserting the claim.

Moreover, the substantive effect of these provisions could not be any greater. They required dismissal of the Plaintiffs' actions. Even the provisions that are ostensibly procedural in nature--for example, requiring testimony from the plaintiff's treating physician--will preclude some causes of action in their retroactive application. *See supra* p. 9. They did so in *Hurst*, as the Third District Court held.[15] By any standard, the majority of statutory provisions here are substantive, and they all infringe on substantive rights in their retroactive application.

Second (Brief at 16-18, 39, 44), the Defendants argue that all provisions of the Statute are procedural, because the Statute says in §774.202(2) that it "[f]ully preserve[s] the rights of claimants who were exposed to asbestos or silica to pursue compensation if they become impaired in the future as a result of the exposure . . .

[15]The District Court in the instant case sought to distinguish *Hurst* on this ground--that *Hurst* considered procedural provisions of the Statute, while the instant case concerns its substantive provisions. *See* 985 So. 2d at 31. Respectfully, that is a distinction, but not a difference. However characterized, the statutory provisions upheld in *Hurst* deprived the plaintiffs of a viable pre-existing cause of action.

." This argument persuaded the trial court in this case that the Statute "may delay a plaintiff's right to bring a claim," "but it does not abrogate the right to bring a claim . . ." (App. 373). Likewise, the Third District Court held in *Hurst* that the Statute "does not impair or eliminate the plaintiff's right to sue for asbestos-related injuries," but "merely shifts the timing of when the plaintiff must present evidence that exposure to asbestos substantially contributed to the alleged injury." 949 So. 2d at 287. Respectfully, this conclusion is incorrect.

To begin with, of course, a deceased asbestos victim by definition has no possible cause of action. Such a decedent had a pre-existing cause of action whether he had cancer or not. That cause of action is lost entirely, and there will be no other. The victim is deceased.[16]

And for living victims of asbestosis, before this Statute was enacted, they *already* had the right to bring a future action if they should develop cancer. As the court held in *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d at 520-22, under the prior common-law regime, a plaintiff could bring *both* claims--the first based on asbestosis or pleural thickening alone, *and also* claims based on the subsequent development of mesothelioma (lung cancer) or other forms of cancer. Bringing the

[16]Even if the deceased victim did have cancer, he may not have had the required x-ray film quality 1 rating, or met any of the other new requirements. The claim is lost.

first claim did not preclude the second--"the plaintiff may bring a second action if and when he actually contracts cancer." *Id*. at 520. Therefore, the new Statute did not simply change the order of priority in which pre-existing rights could be asserted; it completely *abolished* a pre-existing cause of action, remanding the Plaintiffs to a *different* cause of action (subject to onerous new substantive and procedural requirements) that was *already available* if the Plaintiffs should contract cancer. The Statute gave them nothing they did not already have.[17]

Moreover, even if the Statute had given them a new remedy, these Plaintiffs may never develop mesothelioma or another form of cancer, and thus would be deprived by the Statute of any remedy. The theoretical availability of a cause of action that may never arise hardly renders the abolition of an existing cause of action merely procedural. It does not render less substantive the retroactive abolition of their existing claim. Both in its substantive and its procedural application to existing claims, the Statute's effect is substantive--not remedial or procedural.

2. Even Apart from Vested Rights, the Retroactive Application of the Statute Is Unconstitutional. This Court has said that the retroactive application

[17]In this light, Under Florida's access-to-courts protection (Art. 1, §21, Florida Constitution), the Statute would not provide a constitutionally-sufficient quid pro quo, because it provides no compensating benefit to plaintiffs that they did not already possess. *See infra*.

of a statute is impermissible not only when it affects vested rights, but also when it imposes new penalties,[18] or establishes a new disability.[19] Therefore, even accepting the Defendants' definition of vested rights--that only a judgment qualifies--this Statute is invalid in its retroactive imposition of new penalties and disabilities. Some examples of rulings short of a judgment--and thus short of the Defendants' definition of a vested right--include the following:

In *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995), the statute changed the damages recoverable in a bad-faith action. The Legislature said that it was intended to reaffirm the existing legislative intent, and applied it to all causes of action accruing after the effective date of the prior statute. This Court held that "[j]ust because the Legislature labels something as being remedial . . . does not make it so," and disallowed its retroactive application.

In *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989), the plaintiff had filed his lawsuit, but had not obtained a verdict. The new statute limited damages

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[18]*State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); *Hotelera Naco, Inc. v. Chinea*, 708 So. 2d 961 (Fla. 3d DCA 1998); *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla. 2d DCA 2004), *review denied*, 895 So. 2d 406 (Fla. 2005); *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687 (Fla. 5th DCA 2002).

[19]*Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 498 (Fla. 2008); *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 503 (Fla. 1999); *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275,

recoverable against the sovereign by removing a provision that waived sovereign immunity up to the limits of insurance coverage. It provided that this limitation would apply to all causes of action then pending or subsequently filed, but not to cases in which a verdict had been returned or a judgment entered. This Court held that the statute could not be applied retroactively.[20]

Numerous decisions involving attorneys' fees reach the same conclusion. In *L. Ross, Inc. v. R.W. Roberts Construction Co., Inc.*, 481 So. 2d 484 (Fla. 1986), the existing statute limited fees to a certain percent of the judgment recovered; an amendment repealed the limit. This Court agreed with "Judge Cowart's well-

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277 (Fla. 1978); *McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949).

[20]*See also Ruhl v. Perry*, 390 So. 2d 353 (Fla. 1980); *Allegheny Casualty Co. v. Roche Surety, Inc.*, 885 So. 2d 1016 (Fla. 5th DCA 2004); *Polk County BOCC v. Special Disability Trust Fund*, 791 So. 2d 581 (Fla. 1st DCA 2001); *McMillian v. State of Florida, Department of Revenue ex rel Searles*, 746 So. 2d 1234 (Fla. 1st DCA 1999) (amendment limiting right to past parental support); *Hotelera Naco, Inc. v. Chinea*, 708 So. 2d 961 (Fla. 3d DCA 1998) (amendment of ordinance allowing recovery only of quantifiable damages, adding potential recovery for mental anguish and loss of dignity, and attorneys' fees, was "substantive in nature," and could not apply to a pending claim); *South Broward Topeekeegeeyugnee Park District v. Martin*, 564 So. 2d 1265 (Fla. 4th DCA 1990), *review denied*, 576 So. 2d 291 (Fla. 1991); *Cox v. Community Services Department*, 543 So. 2d 297 (Fla. 5th DCA), *review denied*, 551 So. 2d 460 (Fla. 1989); *City of Winter Haven v. Allen*, 541 So. 2d 128 (Fla. 2d DCA), *review denied*, 548 So. 2d 662 (Fla. 1989); *City of North Bay Village v. Braelow*, 469 So. 2d 869 (Fla. 3d DCA 1985), *rev'd on other grounds*, 498 So. 2d 417 (Fla. 1986); *Kirkland by and Through Kirkland v. State Department of Health and Rehabilitative Services*, 424 So. 2d 925 (Fla. 1st DCA 1983); *Galbreath v. Shortle*, 416 So. 2d 37 (Fla. 4th DCA 1982); *Griffin v. City of Quincy*, 410 So. 2d 170 (Fla. 1st DCA 1982), *review denied*, 434 So. 2d 887 (Fla. 1983); *In re Jelley's Estate*, 360 So. 2d 1313 (Fla. 2d DCA), *cert. denied*

reasoned opinion" in the district court, *id.* at 485, which said that "substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues." *See also Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) (statute authorizing award of attorneys' fees to prevailing party in malpractice action cannot be applied to cause of action which accrued before effective date of statute); *Antunez v. Whitfield*, 980 So. 2d 1175 (Fla. 4th DCA 2008) (change in right to attorneys' fees); *Patria Publications, Inc. v. Armesto*, 593 So. 2d 574 (Fla. 3d DCA 1992) (new right to attorneys' fees in a civil theft action); *L. Ross, Inc. v. R. W. Roberts Construction Co., Inc.* 466 So. 2d 1096 (Fla. 5th DCA 1985), *approved*, 481 So. 2d 484 (Fla. 1986).[21]

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sub nom Hitt v. Stevens, 366 So. 2d 881 (Fla. 1978).

[21]In *State of Florida, Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), this Court applied the foregoing analysis to a judgment that was on appeal. At the time the plaintiff was injured, he could recover up to $50,000 from the State, and also sue the employee. The new statute granted employees immunity from liability. This Court held that it could not be applied retroactively, which would take "something of value" from the plaintiff, quoting a non-Florida decision holding that the legislature cannot "'retroactively affect common law rights of redress which have already accrued.'" *Id.* at 1158 & n.7, *quoting Pinnick v. Cleary*, 271 N.E. 2d 592 (Mass. 1971). *See also Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982). In *Galbreath v. Shortle*, 416 So. 2d 37 (Fla. 4th DCA 1982), consistent with the many cases cited above, the court held that *Knowles*' reasoning was not limited to a suit already filed or verdict already obtained: "It is true this particular law suit has not yet been filed on the effective date of the amendment and that does represent a factual distinction from the above cited *Knowles* case. However, we are of the opinion that the date of the accident controls." *Accord, Kirkland By and Through Kirkland v. State of Florida Department of Health and*

A number of other states have invalidated retroactive legislation short of a final judgment. The Supreme Court of Georgia invalidated the retroactive application of asbestos legislation in *DaimlerChrysler Corp. v. Ferrante*, 637 So. 2d 659 (Ga. 2006). Other decisions on retroactivity include the following:

> "Statutes and amendments imposing, removing or changing a monetary limitation on recovery for personal injuries or death are generally held to be prospective only." *Thomas v. Cumberland Operating Co.*, 569 P.2d 974, 976 (Okla. 1977). *Accord, Majors v. Good*, 832 P.2d 420 (Okla. 1992).
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> "By the overwhelming weight of authority statutes which impose, remove or change a monetary limitation of recovery for personal injury or death and statutes which change the manner and method of distribution of recovery or settlement for wrongful death are prospectively applied." *Wittel v. Baker*, 272 A.2d 57, 62 (Md. Ct. App. 1971).
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> "[T]he great weight of authority holds that an increase, decrease or repeal of the statutory maximum recoverable in wrongful death actions is not retroactive." *Kleibrink v. Missouri-Kansas-Texas Railroad Co.*, 581 P.2d 372, 378 (Kan. 1978).
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> "Courts of other jurisdictions which have been faced with this question have uniformly held that the new statute, whether it changes or abolishes the dollar limit in wrongful death recoveries, should not be applied retrospectively." *State ex rel. St. Louis-San Francisco*

Rehabilitative Services, 424 So. 2d 925, 927 (Fla. 1st DCA 1984). (We cite *Knowles* here on the issue of whether only vested rights can forestall retroactivity. We will consider *Knowles* in a moment on the question of whether a balancing test is appropriate or satisfied.)

> *Railway Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974).
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> "Every court which has considered the issue raised by plaintiff has found that a subsequent change as to the amount or the elements of damage in the wrongful-death statute to be substantive rather than procedural or remedial, and thus any such change must be applied prospectively." *Dempsey v. State*, 451 A.2d 273, 273 (R.I. 1982).

See also Greenville v. Maine Mutual Fire Insurance Co., 788 A.2d 165 (Maine 2001); *Schultz v. Natwick*, 653 N.W.2d 266 (Wisc. 2002); *Nieman v. American National Property and Casualty Co.*, 613 N.W.2d 160 (Wisc. 2000).

The cited Florida decisions do not apply a balancing test that considers the strength of the public interest the statute serves; the extent to which the right it affects is abrogated; and the nature of that right (*see* Brief of Appellants at 37-43). Such a test is addressed in *Department of Agriculture and Consumer Services v. Bonanno*, 568 So. 2d 24, 30 (1990) and *State of Florida, Department of Transportation v. Knowles*, 402 So. 2d 1155, 1158 (Fla. 1981). However, nine years after *Bonanno*, this Court said in *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 500 (Fla. 1999) that "the *Knowles* analysis has not been used recently by this Court when discussing retroactivity." *See Lakeland Regional Medical Center v. Florida Agency for Health Care Administration*, 917 So. 2d 1024 (Fla. 1st DCA), *review denied*, 932 So. 2d 193

(Fla. 2006). Therefore, it is unclear whether a balancing test is a recognized approach to retroactivity.

Moreover, the balancing test was only utilized in a narrow context, which explains how it co-existed with the many decisions discussed above. *Bonanno* and *Knowles* address statutes that retroactively abrogated the value of the plaintiff's claim--not the claim itself. *Bonanno* concerned the amount of compensation for the destruction of the plaintiffs' citrus plants. *Knowles* characterized the retroactive immunization of government employees as a reduction of the total damages available to a plaintiff ($70,000 down to $50,000), holding that "[u]nder due process considerations, a retroactive *abrogation of value* has generally been deemed impermissible . . . [but] courts have used a weighing process to balance the consideration permitting or prohibiting an *abrogation of value* . . . . 402 So. 2d at 1158 (emphasis added). The instant cases do not involve a retroactive abrogation of value.[22]

Finally, even if a balancing test applied, the instant Statute cannot survive it. In *Bonanno*, in which the statute only "streamlin[ed] the process for settlement of compensation claims," and thus "merely provides a different procedure to obtain

[22]Many of the other cases cited by the Defendants in this section were decided under the takings clause, and not the due process clause, and address the requirement of just compensation for the taking. They are not directly relevant to the analysis here.

recovery," this Court distinguished *Knowles* on the ground that "Knowles' right to full tort recovery was completely abrogated by legislative enactment granting public employees absolute immunity." 568 So. 2d at 30. In the instant case, the Plaintiffs' right of action was also "completely abrogated." Moreover, although the Defendants have described the overall objectives of this Statute, they have said little about any public interest served by its retroactive application. Even its prospective objectives are suspect, given that the enabling legislation made no findings to support the Statute. *See Williams* R. 3065-3293; *Spiewak* R. 2606-2840 & Ex. 5. In *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612, 627-30 (Fla. 2003), this Court held that hollow "whereas" clauses without evidentiary support, or merely "pro forma" testimony, *id*. at 630, are meaningless. Here there were no factual findings. Finally, as in *Knowles*, the right affected here is completely abrogated, and the nature of that right is a viable cause of action, and the constitutional right of access to Florida courts.

As we noted earlier, the Defendants (and respectfully, the court in *Hurst*) are wrong in contending that the Statute abolishes nothing, but merely postpones the Plaintiffs' assertion of their right, if and when they should develop some form of cancer. It provided no remedy at all for deceased asbestos victims. And as we said, victims of asbestos *always* had the right to sue if they developed cancer. The

Act gave them nothing they did not already have. But it did take away--permanently and unconditionally--a cause of action that they also had, for asbestosis short of cancer. Whatever test applies to the propriety of retroactive legislation, this Statute fails.

3. Vested Rights. The prohibition against retroactive legislation also applies to vested rights.[23] The Defendants insist that only a judgment can constitute a vested right. But this Court has held that an accrued cause of action is a vested right under Florida law. *See Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4, 8 (Fla. 1975) ("[I]t has been held that a vested cause of action, or 'chose in action' is personal property entitled to protection from arbitrary laws"). "[O]nce a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right." *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1219 (Fla. 2d DCA 2004), *review denied*, 895 So. 2d 406 (Fla. 2005).[24] An accrued cause of

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[23]*See Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 490 (Fla. 2008); *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989); *Raphael v. Shecter*, 34 Fla. L. Weekly D1936 (Fla. 4th DCA Sept. 23, 2009); *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA), *review denied*, 962 So. 2d 337 (Fla. 2007); *Hotelera Naco, Inc. v. Chinea*, 708 So. 2d 961 (Fla. 3d DCA 1998); *R.A.M. of South Florida v. WCI Communities*, 869 So. 2d 1210 (Fla. 2d DCA 2004), *review denied*, 895 So. 2d 406 (Fla. 2005); *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687 (Fla. 5th DCA 2002).

[24]*See Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989) (right to sue for greater

action is also a property right under Federal law,[25] The same is true under the law

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damages than allowed by new statute a vested right); *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985) (statute authorizing award of attorneys' fees cannot be applied to cases that accrued before effective date of statute, because the right to enforce existing causes of action had already vested); *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989) (right to sue for higher damages than those allowed by new statute had vested); *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977) (statutory immunity "vested" before enactment of new statute); *Butler v. Bay Center/Chubb Ins. Co.*, 947 So. 2d 570, 571 (Fla. 1st DCA) ("parties have vested rights in the substantive law," and in workers' compensation cases "a claimant's substantive rights are established by the date of the accident"), *review denied*, 962 So. 2d 335 (Fla. 2007); *Romine v. Florida Birth Related Neurological Injury Compensation Ass'n*, 842 So. 2d 148, 154-55 (Fla. 5th DCA) ("The date of the child's birth and the injuries sustained at that birth, if any, establish the right of the infant to receive NICA benefits and the scope of those benefits. . . . [T]he Romines had a substantive, vested right the day Loren was born, because they had 'a present, fixed right of future enjoyment' to receive NICA benefits if she was otherwise qualified to receive such benefits"), *review denied*, 857 So. 2d 19 (Fla. 2003); *Cox v. Community Services Department*, 543 So. 2d 297, 298 (Fla. 5th DCA) ("persons, like appellant, who have an accrued cause of action although not yet reduced to judgment, have such a vested interest as cannot be constitutionally retroactively divested by legislative action"), *review denied*, 551 So. 2d 460 (Fla. 1989); *City of Winter Haven v. Allen*, 541 So. 2d 128, 131 (Fla. 2d DCA) (collection of debt by lawsuit even though judgment had not been obtained or entered), *review denied*, 548 So. 2d 662 (Fla. 1989).

This Court's decision in *Clausell v. Hobart Corp.*, 515 So. 2d 1275 (Fla. 1987), *cert. denied*, 485 U.S. 1000 (1988), does not hold that only judgments can confer vested rights. It dealt with a statutory defense (the statute of repose)--not a cause of action: "[W]e can distinguish *Clausell* on the ground that *Clausell* . . . was . . . not concerned with the abolition of full recovery for an existing cause of action . . . ." *City of Winter Haven v. Allen*, 541 So. 2d 128, 132 (Fla. 2d DCA), *review denied*, 548 So. 2d 662 (Fla. 1989). *See Resolution Trust Co. v. Fleischer*, 892 P.2d 497, 503-04 (Kan. 1995) (factually distinguishing *Clausell*).

[25]*See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) ("cause of

other jurisdictions: "[The plaintiff's] cause of action [for asbestos exposure] was accrued and pending, or vested, prior to the effective date of the Statute . . . . The Legislature may not retroactively extinguish or eliminate accrued and pending causes, either by procedural changes such as shortening statutes of limitations, or by substantive changes, such as creating new affirmative defenses." *Satterfield v. Crown Cork & Seal Co., Inc.*, 268 S.W. 3d 190, 207, 208 (Tex. Civ. App. 2008).[26]

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action is a species of property protected by the Fourteenth Amendment's Due Process Clause"), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill . . . is property protected by the Fourteenth Amendment . . . [and] . . . a protected property interest"); *Martinez v. State of California*, 444 U.S. 277, 281-82 (1980) (finding that a state tort claim is "a species of property right" protected by the Due Process Clause); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ("a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs"). The Defendants may be correct (Brief at 42 n.3) that under federal law, such rights do not vest short of a judgment. As noted, however, they do under Florida law.

[26]*See Brown v. Hauser*, 292 S.E.2d 1, 2 (Ga. 1982) (retroactive repeal of statute creating a vested cause of action unconstitutional); *First of America Trust Co. v. Armstead*, 664 N.E.2d 36, 40 (Ill. 1996) (vested right in the law in effect at the time the complaint was filed); *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 462 (Iowa 1989) ("We believe that plaintiff had a vested property right in her cause of action against Casey's and that the retroactive application of the 1986 Amendment destroyed that right in violation of due process under both the federal and state constitutions"); *In re Certified Questions from U.S. Court of Appeals for the Sixth Circuit*, 331 N.W.2d 456, 464 (Mich. 1982) ("lt is clear that once a cause of action accrues--*i.e.*, all the facts become operative and are known--it becomes a 'vested right'"); *Albert v. Allied Glove Corp.*, 944 So. 2d 1 (Miss. 2006) ("It is without question" that a cause of action is a species of property; "[T]he Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to

Therefore, the Plaintiffs' pre-existing causes of action, which were abolished by this Statute, remanding them to a merely-potential claim that they already had, was a vested right. As such, it is entitled to constitutional protection. For this reason too, the Statute is unconstitutional in its retroactive application.[27]

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redress grievances"); *Rivas v. Parkland Manor*, 12 P.3d 452, 458 (Okla. 2000) ("A person acquires a vested right to a remedy for a cause of action when that cause of action accrues"); *Gibson v. Commonwealth*, 490 Pa. 156 (1980)(substantive rights are governed by the law in effect at the time a cause of action accrues; vested right in accrued cause of action); *Hasell v. Medical Society of South Carolina, Inc*., 342 S.E.2d 594, 595 (S.C. 1986) ("[I]t is obvious that a statute enacted two years after the injury cannot be used to deny appellant rights which she enjoyed at the time of injury), *overruled on other grounds, Hanvey v. Oconee Memorial Hosp*., 416 S.E.2d 623 (S.C. 1992); *Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978) (claimant who filed a claim with administrative agency had a vested right in cause of action); *Berry By and Through Berry v. Beech Aircraft Corp*., 717 P.2d 670, 676 (Utah 1985) ("[O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment"); *Hunter v. School District of Gale-Ettrick-Trempealeau*, 293 N.W.2d 515, 519 (Wis. 1980) ("Thus, as the court of appeals ruled, she acquired a vested right in a cause of action as a result of her injury . . .").

[27]Although retroactive legislation typically invokes the due process clauses, the Defendants also have argued that the Statute does not violate the constitutional right of access to courts, under Article I, §21 of the Florida Constitution (Brief at 43-49). *See Kluger v. White*, 281 So. 2d 1 (Fla. 1973). To the extent that this analysis is relevant to retroactivity, we respectfully disagree. As noted, the Defendants have pointed to no compelling governmental interest that requires retroactive application of this Statute, as opposed to its prospective application. They simply catalog the legislative objectives of the Statute as a whole. Moreover, as noted repeatedly, there is no merit to the Defendants' contention that the Statute provides a reasonable alternative to the Plaintiffs. It provides them nothing that they did not already have--a right of action if cancer should develop. But it takes

VII.
CONCLUSION

It is respectfully submitted that the decision of the District Court should be approved.

Respectfully submitted,

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away a different right of action that they possessed--to sue for asbestosis or pleural thickening, in the absence of cancer. For that right, the Legislature gave the Plaintiffs no compensating benefit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 8th day of October, 2009 to all counsel on the attached Service List.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated Brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

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