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,

Appellees/Respondents. 4D07-148, 4D07-149, 4D07-150, 4D07-151, 4D07-153, and 4D07-154

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APPELLANTS/PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT REGARDING RECORD

Plaintiffs Daniel Williams, Peter Britt, Russell Fink, Earl Mixon, Edward Nixon, Merrell Ponder, Lewis Martin, Charlie Pittman, Wayne Smith, Bill Martinez, Floyd Perry, Walter Spiewak, and Eric Meyers will collectively be referenced as "Plaintiffs."

The Fourth District consolidated the Williams, Britt, Fink, Mixon, Nixon, Ponder, Martin, Pittman, Smith, Martinez, and Perry appeals. The record on appeal in those cases will be referenced as WR[volume]:[pages]. The Fourth District separately consolidated the Spiewak and Meyers appeals. The record on appeal in those cases will be referenced as SR[volume]: [pages].

The Supplemental Record filed below in the Williams consolidated cases will be referenced as Supp.R[volume]:[pages].

Defendants American Optical Corporation; Ametek, Inc.; Bird, Inc.; CertainTeed Corporation; Cleaver Brooks; Crane Co.; Dana Companies f/k/a Dana Corp.; Weil-McClain Co.; Flowserve Corporation; General Electric Company; Goulds Pumps, Inc.; Hobart Brothers Company; Kelly-Moore Paint Company, Inc.; Lincoln Electric Company; Mobil Corporation; The Goodyear Tire & Rubber Co.; Rapid-American Corporation; and Bondex International, Inc., will collectively be referenced herein as "Defendants."

Defendants' Appendix filed herein will be referenced as A[tab]:[pages].

STATEMENT OF CASE AND FACTS

I. Background

This is an appeal from the decision of the Fourth District Court of Appeal invalidating, on constitutional grounds, the application of the Asbestos and Silica Compensation Fairness Act (the "ASCFA" or "Act") to Plaintiffs' claims. *Williams v. American Optical Corp.*, 985 So. 2d 23 (Fla. 4th DCA 2008).

Plaintiffs filed their complaints against Defendants between February 17, 1998, and February 20, 2004, alleging they had sustained various physiological changes in their lungs—but not alleging any impairment—as a result of exposure to Defendants' products. WR1:1; 17:3316, 33:6594, 55:10967, 75:14826, 91:18171, 113:22426, 134:26757, 149:29709, 179:35796, 197:39231; SR1:1; MR1:1. While their cases were pending, the Florida Legislature adopted the Act. Ch. 2005-274, Laws of Fla., *codified at* § 774.201 et seq., Fla. Stat. (2005).

The Act requires plaintiffs who claim non-malignant asbestos-related conditions to make a *prima facie* showing before trial that their health has been impaired as a result of asbestos exposure. § 774.204(2), Fla. Stat. (2005). This *prima facie* showing must include evidence of minimal impairment and a diagnosis by a "qualified physician" that the plaintiff suffers from a disease substantially caused by asbestos exposure. § 774.205(2). The Act provides that a court shall dismiss without prejudice the claim of any plaintiff who cannot make this *prima*

facie showing, but the Act tolls any applicable statute of limitations until the plaintiff's health actually becomes impaired. §§ 774.205(2), 774.206(1).

The Florida Legislature adopted the Act to address a multitude of pressing concerns identified in the enacting bill's preamble. Specifically, the Legislature recognized that "millions of American workers and others" have been exposed to asbestos over the last 50 years. Ch. 2005-274, Laws of Fla. (preamble). Such exposure "has created a flood of litigation in state and federal courts that the United States Supreme Court . . . has characterized as an 'elephantine mass' of cases that 'defies customary judicial administration.'" *Id.*

The Legislature observed that "the vast majority of asbestos claims are filed by individuals who allege they have been exposed to asbestos and who may have some physical sign of exposure but who suffer no present asbestos-related impairment." *Id.* It also found that "the cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future." *Id.*

The Legislature cited reports and studies documenting "the inefficiencies and societal costs of asbestos litigation," including dozens of bankruptcies that deprived thousands of workers of jobs.[1] *Id.* It relied upon the RAND Institute's

[1] During the trial court proceedings, one of the defendants—ACandS, Inc.—initiated federal bankruptcy proceedings. SR5:912. Between the jurisdictional and merits briefing stages of the proceedings in this Court, another defendant—TH

study, *Asbestos Litigation Costs and Compensation*; Joseph E. Stiglitz's study, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*; Dr. Joseph Gitlin's report, *Comparison of B Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*; and the *Report to the House of Delegates from the American Bar Association Commission on Asbestos Litigation*. *Id.*

The Legislature expressed concern that "the seriously ill too often find that the value of their recovery is substantially reduced due to defendant bankruptcies and the inefficiency of the litigation process." *Id.* At the same time, it was aware that "concerns about statutes of limitations may prompt claimants who have been exposed to asbestos or silica but who do not have any current injury to bring premature lawsuits in order to protect against losing their rights to future compensation should they become impaired." *Id.*

Based on these findings and others, the Legislature determined that there exists "an overpowering public necessity to defer the claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related and silica-related injuries and to safeguard the jobs, benefits, and savings of workers in this state and the well-being of the economy of this state." *Id.*

The Act recites that it was intended to serve several purposes. First, it was

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Agriculture & Nutrition, LLC—initiated federal bankruptcy proceedings. This brief is accordingly not filed on behalf of TH Agriculture & Nutrition, LLC.

intended 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." § 774.202, Fla. Stat. (2005). Second, it was intended to "[f]ully preserve 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." *Id.* Third, the Act was intended to [e]nhance the ability of the judicial system to supervise and control asbestos and silica litigation." *Id.* Fourth, it was intended to "[c]onserve the scarce resources of the defendants to allow compensation to cancer victims and others who are physically impaired by exposure to asbestos or silica while securing the right to similar compensation for those who may suffer physical impairment in the future." *Id.*

Finally, because the Act permits claimants to seek recovery if their health actually becomes impaired, the Legislature expressly stated that the Act did not impair vested rights because it "preserves the rights of all injured persons to recover full compensatory damages for their loss." Ch. 2005-274, § 10. The Legislature likewise defined the Act as remedial "because it enhances the ability of the most seriously ill to receive a prompt recovery . . . ." *Id.*

II. Trial Court Proceedings

After the Act took effect, the trial court directed Plaintiffs to demonstrate compliance with the Act's *prima facie* showing requirements. *E.g.*,

WR202:40284-87, 205:40895-99. Plaintiffs admitted they could not do so. WR4:695, 20:3978, 37:7378, 61:11953, 80:15999, 96:19149, 139:27721, 154:30817, 186:37099, SR5:886; MR6:1092. They claimed the Act's impairment requirement could not be applied constitutionally to their cases, and they insisted they "should not have to needlessly waste . . . money and time" complying with the Act's *prima facie* showing requirements. 4DCA Ini. Brs., at 9-10.

Defendants moved to dismiss Plaintiffs' claims without prejudice on the ground that Plaintiffs had not satisfied the Act's *prima facie* showing requirements. WR4:743, 21:4019, 39:7708, 62:12223, 82:16326, 98:19465, 120:23878, 140:27864, 156:31164, 188:37426. The trial court conducted a hearing on Defendants' motions to dismiss with respect to 11 of the 13 Plaintiffs on November 3, 2006. Supp.R1:44044-103, 2:44104-107. During that hearing, these Plaintiffs again admitted they could not meet the Act's *prima facie* showing requirements. Supp.R1:44062. They contended the Act unconstitutionally changed what should be considered an injury, now requiring proof "of a certain amount of scarring . . . plus you're [sic] breathing capacity has to be diminished by a certain degree." Supp.R1:44070-71. Those Plaintiffs asserted that, under their view of "the common law," they would have had a claim prior to the Act's passage based on their x-ray readings. Supp.R1:44064. They relied upon oral anecdotes concerning one case their counsel had tried that did not result in any reported

decision and two cases that were ultimately reported but did not address what constitutes a compensable injury. Supp.R1:44098-100.

The record contains x-ray readings, called "B-readings," and similar reports stating that x-rays of these 11 Plaintiffs indicated they may have lung abnormalities "consistent with" asbestos exposure. A15-25. However, as one of the doctors who graded Plaintiffs' x-rays admitted in a sworn affidavit, such readings alone are *not* diagnoses of asbestos-related disease. SR5:966-98; Supp.R1:44081-82. Thus, at the November 3, 2006 hearing, Plaintiffs' counsel referred to B-readings for various Plaintiffs but adduced no evidence establishing actual diagnoses of asbestos-related disease, except to say "I actually have a diagnosis for Mr. Martinez," but "[t]he reason I didn't file it, Judge, is it doesn't qualify under the statute so it doesn't really matter." Supp.R1:44067.

Ultimately, those 11 Plaintiffs adduced no evidence demonstrating they suffered from any actual impairment to their health. As Plaintiff Britt testified in deposition, he contacted Plaintiffs' counsel for legal representation not because he was sick but because he was concerned "[a]bout the future." Supp.R1:44103. He stated, "If you ever have any problems in the future, if things come on you years later and stuff like that, it would be good to have a law firm to help you out." *Id.*

On December 8, 2006, in separate detailed orders, the trial court dismissed those 11 Plaintiffs' claims without prejudice. WR17:3290, 33:6568, 55:10940,

74:14784, 91:18126, 112:22396, 134:26698, 149:29627, 179:35736, 196:39185, 220:43846. The court cited those Plaintiffs' admissions that they had not satisfied the *prima facie* showing requirements of section 774.204(2), which the Legislature expressly made applicable to all pending cases. *Id.* The court ruled that Plaintiffs had not shown that their claims had actually accrued due to a legally cognizable injury, and thus it was "unclear that Plaintiff[s] had a *vested* property right to pursue [their] claim[s] upon filing suit." *Id.* n.6. Instead, Plaintiffs "may have had a mere expectant property right that [they] would recover a judgment, if [they were] able to prove the facts alleged and if Florida law continued to permit recovery." *Id.*

Further, the trial court determined that the Act's requirements were procedural in any event and thus the court concluded that retroactive application of the Act did not violate Plaintiffs' constitutional rights. Alternatively, the court ruled that even if some of the Act's requirements affected Plaintiffs' rights to due process and access to courts, the Act is nonetheless constitutional under the tests set forth in *Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), and *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

On January 5, 2007, the same trial court held a similar hearing with regard to the remaining two Plaintiffs, Spiewak and Meyers. Those plaintiffs filed what they characterized as medical reports diagnosing them with "asbestosis." A22; A27.

But they admitted during the hearing that those "reports" were "not filed or prepared by a qualified physician under the terms of the Act." A42:535. Plaintiffs further admitted that this requirement was "procedural." *Id.* at 539. In addition, the physician who prepared those reports expressly disclaimed the existence of a doctor-patient relationship with these plaintiffs, A14, contrary to the requirements of section 774.203(23).

Relying upon unsworn materials their counsel submitted to the Legislature when it considered the Act, Spiewak and Meyers argued the Act imposed new substantive requirements they could not meet and was based on erroneous findings, but they adduced no evidence in support of their arguments. A42:534-75. The court repeatedly asked Plaintiffs to adduce admissible evidence to support their "assertions of fact," but Plaintiffs declined to do so. *Id.*

Thereafter, and consistent with its December 8 orders, the trial court dismissed the Spiewak and Meyers complaints without prejudice for failure to comply with the Act's *prima facie* showing requirements. SR15:2883; MR17:3361.

III. The Fourth District Appeals

All 13 Plaintiffs appealed the dismissal orders to the Fourth District. Before the district court, Plaintiffs' Initial Briefs challenged the constitutionality of only subsections 774.204(2)(e) and (f), contending that "[s]ince Appellants' injuries are

not considered injuries according to Fla. Stat. § 774.204(2)(e) or 774.204(2)(f), Appellants could not make a *prima facie* showing." *E.g.*, Williams Ini. Br., at 13. In their Reply Briefs, Plaintiffs stated that their challenge was to subsections 774.204(2)(d), (e), and (f), which relate to demonstrating impairment. *E.g.*, Williams Reply Br., at 1, 9, 14.

The first challenged provision requires "[a] determination by a qualified physician, on the basis of a medical examination and pulmonary function testing, that the exposed person has a permanent respiratory impairment rating of at least Class 2"—the minimum discernible impairment—"as defined by and evaluated pursuant to the [American Medical Association] Guides to the Evaluation of Permanent Impairment." § 774.204(2)(d).

The second challenged provision requires "[a] diagnosis by a qualified physician of asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening." § 774.204(2)(e).

The third challenged provision requires "[a] determination by a qualified 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" diminished "total lung capacity" or "forced vital capacity" in

relation to "the predicted lower limit of normal" or a chest x-ray meeting certain minimal requirements. § 774.204(2)(f).

The Fourth District upheld Plaintiffs' challenge to these provisions and reversed the trial court's orders, consolidating all cases for purposes of its decision. *Williams v. American Optical Corp.*, 985 So. 2d 23 (Fla. 4th DCA 2008). The district court held that a cause of action is a "form of intangible property" that cannot be taken without compensation, referencing the eminent domain provisions in the Florida Constitution without mention of the state's police power. *Williams*, 985 So. 2d at 25-26 & nn.4-5. The court then held, "[w]here a cause of action has accrued but claimant has not yet filed an action for damages when new legislation substantively affecting the cause of action becomes effective, the new statute may not be applied to the cause of action when filed." *Id.* at 28. The court said, the "question therefore devolves into an inquiry whether plaintiffs are correct in their assertion 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. Our research confirms their assertion." *Id.* On this basis, the court held the Act unconstitutional as applied to Plaintiffs.

In reaching this conclusion, the court relied on the Third District's decision in *Eagle-Picher Industries Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985), and on decisions by this Court approving *Eagle-Picher*. The district court interpreted

these decisions as "establish[ing] that genuine emotional effects from contracting asbestosis are actionable under Florida law even though no physical impairment or cancer has resulted." *Id.* The court certified that its decision conflicted with the Third District's decision in *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007).

IV. Appeal to This Court

Defendants timely sought appellate and discretionary review in this Court. Defendants invoked the Court's mandatory appellate jurisdiction based on the Fourth District's invalidation of the Act on constitutional grounds as it applies to Plaintiffs' cases. Art. V, § 3(b)(1), Fla. Const. Defendants also invoked the Court's discretionary jurisdiction as a result of the Fourth District's certification of conflict with *Hurst*, express and direct conflict with the decision in *Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), and the district court's express construction of the state constitution. Art. V, § 3(b)(3)-(4). The Court has accepted jurisdiction and consolidated the appellate and discretionary review proceedings from each case into this single proceeding.

SUMMARY OF ARGUMENT

In enacting the ASCFA, the Legislature crafted a remedial and procedural mechanism to ensure the fair and efficient management of asbestos claims that courts could not as effectively handle with conventional tools. To this end, the Act

requires claimants to produce, early in the proceedings, a diagnosis that their health has actually been impaired from a disease caused by asbestos, which they would have to be able to do at trial to obtain a recovery under prevailing common law standards. At the same time, the Legislature tolled all statutes of limitations for claimants who could not make this showing at the present time until such time, as ever, that they suffer impairment from an asbestos-related disease. This remedial and procedural scheme reasonably balances the interests of claimants who most urgently need relief in getting priority for their claims in court while protecting the rights of persons rushing into court prematurely due to fear of a time bar. The Act is a classic example of remedial and procedural legislation that does not impair substantive rights but provides for the effective and fair effectuation of such rights. As such, the Act may be applied to claims that were pending at the time of its enactment.

The Fourth District erred in holding that the Act impairs Plaintiffs' substantive rights. The Fourth District based its decision on the erroneous conclusion that the common law permits Plaintiffs to maintain a cause of action for asbestos-related disease without any impairment to their health. In fact, in Florida and other jurisdictions around the country, claimants who allege that they suffer from latent diseases must adduce evidence of actual impairment, not simply exposure, in order to obtain a recovery. The Act thus effectively codifies Florida

common law and imposes procedural, not substantive, requirements to help prioritize lawsuits for claimants able to demonstrate early in the proceedings that they may have cases ripe for adjudication.

In any event, the Act may be upheld as a valid exercise of the Legislature's police power. In *Knowles*, this Court held that due process protection of property is not absolute. Rather, this Court employs a balancing process to determine whether a statute may be applied retroactively. The Court considers the strength of the public interest served by the statute, the nature of the right affected, and the extent of any impairment to that right.

Taking into account all these considerations, the Act constitutes a valid exercise of the Legislature's authority. The Legislature adopted the Act to address an overpowering public necessity caused by the mass filing of asbestos-related claims by persons with no actual impairment. The Act does not abrogate or even diminish the value of valid or potentially valid claims. Instead, it provides an orderly procedure for the resolution of all claims, while strengthening the rights of all claimants.

Finally, the Legislature did not infringe upon Plaintiffs' right of access to courts. To the contrary, the Legislature acted to enhance access for persons whose claims have actually accrued while preserving all potentially valid claims by tolling applicable statutes of limitations for persons without present impairment.

Thus, the Act provides a reasonable alternative to the indiscriminate filing of premature claims. The Act also fairly addresses pressing public needs. The Act is carefully adapted to provide for the orderly management of asbestos-related claims and to afford priority to claims of persons who are actually impaired.

STANDARD OF REVIEW

This Court reviews *de novo* the Fourth District's ruling that the Act cannot be constitutionally applied to Plaintiffs' cases. *E.g., Dep't of Children & Families v. F.L.*, 880 So. 2d 602, 607 (Fla. 2004). The Court must begin its review with a presumption that the statute is constitutional. *E.g., Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005). To overcome this presumption, Plaintiffs must demonstrate unconstitutionality beyond all reasonable doubt. *Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008).

ARGUMENT

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.

It is well settled that the Legislature may constitutionally provide for the retroactive application of a remedial or procedural statute to pending cases. *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978) ("Remedial or procedural statutes do not fall within the constitutional prohibition

against retroactive legislation and they may be held immediately applicable to pending cases."); *see also Fla. Patient's Comp. Fund v. Von Stetina*, 474 So. 2d 783, 788 (Fla. 1985); *Paley v. Maraj*, 910 So. 2d 282, 283 (Fla. 4th DCA 2005). The retroactive application of a statute will raise due process concerns only when it substantively impairs vested property rights, such as fully accrued causes of action. *E.g., Rupp v. Bryant*, 417 So. 2d 658, 665-66 (Fla. 1982). The ASCFA is a remedial and procedural law that does not impair Plaintiffs' vested rights.

The Legislature expressly made clear in enacting the ASCFA that in both design and application the Act is a remedial and procedural law that does not abridge substantive rights. Specifically, the Legislature stated that the Act was intended 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." § 774.202, Fla. Stat. (2005). At the same time, the Act "[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." *Id.* Further, the Act was intended to [e]nhance the ability of the judicial system to supervise and control asbestos and silica litigation." *Id.* Finally, the Act was intended to "[c]onserve the scarce resources of the defendants to allow compensation to cancer victims and others who are physically impaired by exposure to asbestos or silica while securing the right to similar compensation for

those who may suffer physical impairment in the future." *Id.*

In permitting claimants to seek recovery when their health becomes impaired, the Legislature expressly stated that the Act did not impair vested rights because it "preserves the rights of all injured persons to recover full compensatory damages for their loss." Ch. 2005-274, § 10. The Legislature expressly defined the Act as remedial "because it enhances the ability of the most seriously ill to receive a prompt recovery . . . ." *Id.*

Based on the structure, operation, and stated intent of the Act, the Third District in *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007), correctly held that the ASCFA is a procedural statute that may be applied retroactively to pending claims without violating due process. The court in *Hurst* explained that the Act "does not impair or eliminate the plaintiff's right to sue for asbestos-related injuries." *Id.* at 287. "Rather . . . [it] sets forth the procedures a plaintiff must follow to file or maintain an asbestos cause of action [and] the plaintiff's burden of proof[;] and [it] shifts the timing of when the plaintiff must present evidence that exposure to asbestos substantially contributed to the alleged injury." *Id.* The court held that, because "the Act merely affects the means and methods the plaintiff must follow when filing or maintaining an asbestos cause of action, the [Act] is procedural in nature, and may be applied retroactively." *Id.*

Likewise, the trial court in the cases before this Court held that the Act

operates like the "pre-suit screening requirement for medical malpractice actions," which are "procedural, and their retroactive application does not violate either the federal or state Due Process Clause." A0372-73 (citing *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005)). The trial court correctly held that the Act "may delay a plaintiff's right to bring a claim," but it "does not abrogate the right to bring a claim, though, and so its application [in this respect], too, is not subject to a constitutional due process challenge." *Id.* at A0373.

Florida courts have upheld the retroactive application of laws like the Act on many occasions. For instance, in *Paley v. Maraj*, 910 So. 2d at 283, the Fourth District upheld the retroactive application of the medical malpractice act's requirement that a medical affidavit be presented at a case's inception and demonstrate that the defendant's medical negligence caused the plaintiff injury. Likewise, this Court approved the retroactive application of the Uniform Contribution Among Tortfeasors Act, which ended the common law rule against contribution and provided for a more "equitable distribution of the common burden," thus "chang[ing] the form of the remedy without impairing substantial rights." *Village of El Portal*, 362 So. 2d at 278.

In fact, this Court has repeatedly upheld the retroactive application of laws that affect the prosecution of claims or defenses. *E.g.*, *Yisrael v. State*, 986 So. 2d 491, 495 n.5 (Fla. 2008) (retroactive application of rules of evidence does not

violate Ex Post Facto Clauses of the federal and Florida Constitutions); *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) (upholding retroactive change to burden of proof); *Glendening v. State*, 536 So. 2d 212 (Fla. 1988) (amendment to hearsay rules applicable to offense predating amendment); *The Fla. Bar, In re Amendment of Fla. Evidence Code*, 404 So. 2d 743 (Fla. 1981) (amendments to Evidence Code may be applied retroactively); *Stuart L. Stein, P.A. v. Miller Indus., Inc.*, 564 So. 2d 539, 540 (Fla. 4th DCA 1990) (upholding retroactive application of amendment increasing burden of proof from a preponderance of the evidence to clear and convincing evidence). If significant evidentiary rule changes may be applied retroactively to cases brought against persons accused of crimes, then certainly the Act's standards may be applied retroactively as a reasonable means to address Plaintiffs' asbestos-related claims without violating Plaintiffs' due process rights in these civil cases.

In this litigation, Plaintiffs have not challenged all of the Act's provisions. They challenge only three subsections that they claim prevent them from pursuing previously valid and accrued claims, namely, sections 774.204(2)(d), (e) and (f). Those provisions require a diagnosis by a qualified physician that (1) the claimant has a Class 2 permanent health impairment—the minimum degree of impairment discernible, *see* A11:174—under American Medical Association standards; (2) the claimant has asbestosis or diffuse pleural thickening, based on radiological or

pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening; and (3) the claimant's condition was caused in substantial part by asbestos-related disease, based on demonstrated impairment of lung capacity in relation to the "lower limit of normal" or specified radiological evidence.

Requiring plaintiffs to make such *prima facie* showings to proceed in litigation, however, is plainly a procedural matter. This procedural requirement 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 trial court in these cases correctly held that the provisions Plaintiffs challenged were procedural in nature and that Plaintiffs failed to adduce any showing that these provisions impaired any causes of action that had actually accrued and vested prior to the Act. As the trial court ruled, Plaintiffs showed only that they had filed their claims at the time of the Act's adoption and that they had some expectation the court would eventually apply common law standards to determine whether they had in fact incurred any legally cognizable injury caused by asbestos exposure.

Recently, the Supreme Court of Ohio considered a retroactivity challenge to an Ohio law that, like the Act, required a *prima facie* showing of impairment to bring an asbestos-related claim. *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118

(Ohio 2008). The Ohio Supreme Court rejected that challenge and held that the statute's requirements were remedial and procedural and could be applied retroactively. *Id.* at 1121-26. This Court likewise should conclude that the ASCFA 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.

Nonetheless, before the Fourth District, Plaintiffs insisted that the challenged provisions were substantive, not procedural, and thus could not be applied to them retroactively. Although admitting that, on their face, the *prima facie* requirements of the Act "appear to be procedural by defining the form and source of evidence required to maintain an asbestos claim," Plaintiffs contended that the Act substantively abridged vested rights because they "*dramatically modifie[d] the elements of their preexisting asbestos claims*," 4DCA Williams Ini. Br., at 27 (emphasis added). *Id.*

The Fourth District upheld Plaintiffs' contention. The court did so based on its conclusion that a cause of action for asbestos-related diseases accrued at common law based merely upon exposure to asbestos or upon the physiological responses of the body to any such exposure—such as internal scarring or pleural thickening—without regard to whether these changes progress to a disease that

actually impairs the claimant's health. The premise for the Fourth District's decision is fundamentally mistaken. Millions of healthy persons walk around with physiological evidence of exposure to asbestos or other substances through every-day circumstances, but they do not have asbestos-related diseases or vested rights of recovery for asbestosis or other actual impairments to their health. To the contrary, the courts in Florida (and other jurisdictions) have held that, to obtain a recovery for a latent disease, a plaintiff must exhibit signs of actual impairment to their health, not just exposure.

Thus, in *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985), this Court made clear that a cause of action for exposure to asbestos does *not* arise merely upon ingestion of asbestos fibers or even upon development of physiological changes resulting from that exposure. As this Court described, "[I]n a case where the injury is a 'creeping-disease,' like asbestosis 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 538-39 (emphasis added). In *Copeland*, the plaintiff's "condition '*slowly deteriorated* until he . . . was *unable to work due to shortness of breath*," thus creating a fact issue for the jury about "when the disease manifested itself." *Id.* at 538-39 (emphasis added). The plaintiff's manifestation of disease, therefore, was tied to the development of actual symptoms demonstrating impairment of health.

Likewise, in *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988), Justice Barkett (concurring in the Court's conflict-of-laws decision concerning statutes of limitations) explained that "[w]hen asbestos particles enter the lungs, fibrous lung tissue surrounds the particles," *id.* at 150 n.2, which is sometimes referred to as scarring. She emphasized, however, that "all exposure will not lead inevitably to asbestosis." *Id.* at 150. Despite these physiological changes, "[a]t *early stages*, a plaintiff could at most *speculate* that he or she *might be injured* and obviously could *not* establish proof to the 'reasonably certain' damages necessary to establish a *compensable injury*." *Id.* (emphasis added). Justice Barkett emphasized that "the disease of 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). This plainly describes the physical impairment required by the common law for a cause of action to accrue.

Further, because the disease of asbestosis is "*progressive* once it begins and is *incurable*," *id.* (emphasis added) a truly cognizable claim of asbestosis must be based upon the existence of a *permanent* and progressively debilitating *impairment* of health. This is entirely consistent with the Act. In fact, Justice Barkett actually anticipated the Act's requirements that plaintiffs demonstrate at least the minimum "permanent respiratory impairment" ascertainable as a *prima facie* requirement for asserting a claim for asbestos-related disease. § 774.204(2)(d).

In reaching its erroneous contrary conclusion, the Fourth District relied upon the Third District's decision in *Eagle-Picher Industries v. Cox*, and this Court's decisions approving *Eagle-Picher*, namely, *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995), and *Willis v. Gami Golden Glades LLC*, 967 So. 2d 846 (Fla. 2007). The Fourth District stated:

> In *Eagle-Picher* . . . plaintiff contracted asbestosis and sued the supplier of the asbestos for incurring the disease, and for the negligent infliction of emotional distress suffered as a result of inhaling it. *The court concluded that his exposure to the asbestos satisfied the impact rule. Accordingly, he was not required to establish any physical manifestation of his alleged emotional distress* in order to recover from the manufacturer of the asbestos products to which he had been exposed. The negligent infliction of emotional distress resulting from the increased probability of contracting cancer in the future was actionable without further physical injuries.

985 So. 2d at 28 (emphasis added).

The Fourth District misconstrued *Eagle-Picher*, however, and omitted critical parts of that decision from the discussion. The *Eagle-Picher* court expressly held that actual physical injury from asbestos, not merely asbestos inhalation, was required to maintain an action, and the court's holding concerning the nature of the required injury was in no way inconsistent with the codification of Florida common law embodied in the Act. In fact, the Third District in *Eagle-Picher* engaged in exactly the kind of policy analysis and reached exactly the kind of conclusion the Florida Legislature did in adopting the Act.

Specifically, in *Eagle-Picher*, the Third District unequivocally held "that the

plaintiff *cannot* recover damages . . . for his enhanced risk of contracting cancer" based upon mere inhalation of asbestos fibers. 481 So. 2d at 520 (emphasis added). Rather, the court held that the plaintiff could only bring suit for such damages later "*if and when he actually contracts cancer.*" *Id.* (emphasis added).

The court further held that a plaintiff could *not* obtain damages for emotional distress simply arising from exposure to asbestos unless and until the plaintiff *also* manifested actual physical injury from that exposure, such as asbestosis, which the court understood to constitute "a *chronic, painful and concrete* reminder that he has been *injuriously* exposed to a substantial amount of asbestos." 481 So. 2d at 529 (latter emphasis in original). Notably, in the proceedings below, an attorney for Defendants represented to the trial court that she had tried the *Eagle-Picher* case, and the plaintiff there had proved asbestosis supported by the same quality x-ray reading (1/1 or 1/2) that may be used under the Act today. Supp.R1:44074.

In *Eagle-Picher*, the Third District based its holdings on the same considerations that prompted the Legislature to adopt the ASCFA. Much like the findings contained in the Act's preamble, the court explained that the "dimensions of asbestos litigation are so vast, and the potential for inequity so great" that adopting sensible prerequisites for the assertion of asbestos-related claims was imperative. 481 So. 2d at 525. As the court observed:

> No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of claims premised on asbestos exposure. . . . The long latency periods for asbestos-related diseases, usually ranging between 15 and 40 years, make it difficult to ever determine if all possible claimants exposed within a given time period have been identified.

Id. (quoting *Jackson v. Johns-Manville Sales Corp.*, 750 F. 2d 1314, 1335 (5th Cir. 1985) (en banc)). The court continued, "Given the immensity of the demands made and yet to be made upon asbestos litigation defendants, the finite resources available to pay claimants in mass tort litigation, and the real danger that over-compensation of early claimants who may not contract cancer will deplete these finite resources to the detriment of future claimants who do, public policy requires that the resources available for those persons who do contract cancer not be awarded to those whose exposure to asbestos has merely increased their risk of contracting cancer in the future." 481 So. 2d at 525.

Further, the Third District expressed concern that overly lax standards for the assertion of asbestos-related claims "encourages the use of speculative testimony and leads, necessarily, to inequitable results." *Id.* at 521. The court embraced the "desirable goal that cases be decided on the best quality evidence available and that jury verdicts speak the truth." *Id.* at 523. The court also emphasized that "evidence in latent disease cases tends to improve over the course of time," and this "evidentiary consideration counsels narrower delineation of the dimensions of a claim." *Id.* (quoting *Wilson v. Johns-Manville Sales Corp.*, 684

F.2d 111, 119 (D.C. Cir. 1982)).

Properly understood, *Eagle-Picher* represents a sensible *limitation* on the assertion of asbestos-related claims, not an announcement of "open season" for such claims. Indeed, foreshadowing the Act, the Third District described asbestosis as a chronic, painful, and progressive disease—which is flatly inconsistent with a plaintiff's being asymptomatic—and spoke of the need for asbestos-related claims to be brought based on the "best quality evidence available" to demonstrate the actual manifestation of cancer or injuries associated with asbestosis. *Id.* at 523, 529.

The Fourth District's reliance on *Zell* and *Willis*, which approved the Third District's decision in *Eagle-Picher*, is also misplaced. These decisions discussed the impact rule for emotional distress claims in different contexts entirely. They did not take issue with the Third District's insistence that a claim for asbestos-related injuries cannot be premised merely upon the ingestion of asbestos fibers, absent actual impairment of the claimant's health.

Willis involved a claim for emotional distress brought by a woman who asserted she was molested while a gun was held to her head—facts having nothing to do with benign internal physiological changes from exposure to a toxic substance. Specifically responding to a concern expressed in Justice Cantero's dissent that the Court's opinion might be read to grant to "every plaintiff *ever*

exposed to asbestos fibers a *prima facie* case for negligent infliction of emotional distress," Justice Lewis stated, "These assertions that 'the sky is falling' amount to little more than scare tactics *without support in the law*." 967 So. 2d at 859 n.7 (Lewis, J., concurring) (emphasis added). Later in his concurrence, Justice Lewis suggested that "physical injury" in addition to "impact" was required in cases involving "a special type of tort," namely, "cases involving exposure to toxic substances." *Id.* at 861 n.8. In *Zell*, this Court permitted a claim for emotional distress where actual "*physical impairment*" was present and causally connected to an "impact" the plaintiff had experienced but where that impairment occurred some time after the impact. 665 So. 2d at 1049 (emphasis added). *Willis* and *Zell* thus lend no support to the Fourth District's conclusion that Plaintiffs had an accrued cause of action under the common law for asbestos exposure that caused no impairment of their health.

To the contrary, as this Court explained in *Copeland* and *Meehan*, the human body responds to the ingestion of fibers in multiple ways. Asbestos fibers may cause scarring initially in the pleura, outside the lungs, taking the form of pleural plaques or pleural thickening. Pleural plaques and early-stage pleural thickening ordinarily present no functional impairment. A12:188. More extensive diffuse pleural thickening, however, can restrict the lung's ability to expand and reduce pulmonary functioning, *id.*, and thus may give rise to a claim at common

law and under the Act. Likewise, asbestosis is extensive fibrosis (scarring) of tissue inside the lungs that can interfere with the lung's ability to oxygenate the blood (reducing lung capacity). *Id.* Thus, an actual diagnosis of asbestosis may also give rise to a claim at common law and under the Act. Each of these non-malignant conditions is distinct from malignant diseases that may develop following asbestos exposure, namely mesothelioma and lung cancer, A12:187-89, which are also actionable.

The common physiological responses to asbestos exposure—scarring and pleural plaques or thickening—are not themselves actionable under Florida common law. Otherwise, the courts would be inundated with claims by millions of persons casually exposed to asbestos in everyday life. Only when the "encapsulation process" discernibly impairs pulmonary function, *Meehan*, 523 So. 2d at 150 n.2, and the "accumulated effects" become sufficiently manifest through the "deteriorat[ion]" in the plaintiff's physical condition, does "the action accrue[]," *Copeland*, 471 So. 2d at 538-39.[2]

In sum, by codifying the procedures and quality of proof needed to assert

[2] *See generally Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1290 (9th Cir. 1983) ("Asbestosis begins when asbestos fibers become embedded in the lungs. The average person, however, would not consider himself 'injured' merely because the fibers were embedded in his lung. Indeed, expert testimony presented to one court showed that 'over 90% of all urban city dwellers have asbestos-related scarring.' Moreover, 'even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable.'" (citations omitted)).

and maintain an asbestos-related claim, the Florida Legislature did not abrogate or impair a previously accrued cause of action. Rather, the Legislature enacted a remedial statute "relating to remedies or modes of procedure" that "operate[s] *in furtherance of the remedy or confirmation of rights already existing . . . .*" *Von Stetina*, 474 So. 2d at 788 (emphasis added). *See* § 774.204(2)-(6) (setting forth circumstances where *prima facie* showing must be made or need not be made, varying with claimed injury and personal history); *see also DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007) (holding the Act's *prima facie* showing requirements under § 774.204(3) are procedural).

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

In requiring impairment to establish a legally cognizable asbestos-related injury, Florida common law is consistent with the common law of other jurisdictions. Numerous courts have required impairment under the common law to show injury from asbestos exposure. *E.g.*, *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987) (internal pleural changes insufficient absent impairment); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990) (mere presence of asbestos fibers, pleural thickening, or pleural plaques in lungs insufficient unless accompanied by objectively verifiable functional impairment, applying Hawaii law); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996)

(asymptomatic pleural thickening without physical impairment not a compensable injury); *Howell v. Celotex Corp.*, 904 F.2d 3 (3d Cir. 1990) (pleural thickening not a compensable injury, applying Pennsylvania law); *Owens-Ill. v. Armstrong*, 591 A.2d 544 (Md. Ct. Spec. App. 1991) (holding jury could not award damages based on pleural plaques or thickening without impairment), *aff'd in pertinent part*, 604 A.2d 47 (Md. 1992); *ACandS, Inc. v. Abate*, 710 A.2d 944 (Md. Ct. App. 1998) (pleural plaques or pleural thickening not compensable injuries), *abrogated on other grounds*, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

Two state supreme courts have addressed constitutional challenges to similar legislation. In *DaimlerChrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006), the Georgia Supreme Court declared a similar act unconstitutional because it altered the common law standard for proving causation by requiring that the defendant's conduct be a "substantial" contributing factor to the plaintiff's injury, not just a contributing factor. Florida's Act also requires the defendant's conduct to be a "substantial" contributing cause, but Florida common law has long applied that standard for causation, making *Ferrante* inapplicable here. *See* Florida Std. Jury Instr. (Civil) 5.1a (defining causation).

Most recently, the Supreme Court of Ohio considered a challenge to an Ohio law requiring a *prima facie* showing of impairment to bring an asbestos-related claim. *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008). Exactly as

the Plaintiffs in this case argue, the plaintiffs in *Ackison* contended that under Ohio's common law, a mere exposure-based physiological change such as pleural thickening was sufficient to bring a claim for asbestos-related injury. The Ohio Supreme Court carefully considered the law in this area and rejected that argument, overruling prior lower court decisions to the contrary, to hold that the common law requires impairment to bring a claim for asbestos-related injuries. *Id.* at 1124-26.

3. Plaintiffs Are Incorrect That Impairment Is Not Required.

Before the trial court, Plaintiffs in this case insisted that the challenged provisions of the Act changed substantive law. Their support consisted of anecdotal assertions by an attorney for Plaintiffs that he had tried two cases with evidence as weak as what Plaintiffs offered in these cases and had obtained a jury verdict in those cases. Supp.R1:44098-100. This hardly proves anything, let alone the unconstitutionality of a statute duly enacted by the Legislature. The evidence of injury in those cases is entirely unknown, as is what arguments or objections were made by the defendants, except for what appears in the single appellate decision concerning one of those cases.

In the one reported case, *W.R. Grace & Co. v. Pyke*, 661 So. 2d 1301 (Fla. 3d DCA 1995), the court commented that the plaintiff had "mild" asbestosis, which 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

discernible by medical professionals. The plaintiff obtained a verdict of $245,000 for pain and suffering and $810,000 in future wages. The defendants appealed the future wages award, arguing it was unsupported by the evidence. On that issue, the Third District held that, "*assuming* plaintiff submitted sufficient evidence of injury," he had not adduced evidence sufficient to support the jury's award for future lost earnings. *Id.* at 1304 (emphasis added). In fact, although the plaintiff had "introduced no evidence at trial to support a finding that he was *totally* disabled," the jury awarded the plaintiff more money than he was earning while fully employed. *Id.* at 1303-04 (emphasis added).

Thus, while *Pyke* may stand for the proposition that juries and even trial judges do not always screen out baseless claims, it does not hold that a plaintiff can bring suit for asbestosis without impairment. It merely holds that a jury cannot award damages for lost future earning capacity without sufficient proof.

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

Every Plaintiff admitted below that he could not demonstrate impairment through a diagnosis by a qualified physician. Nonetheless, Plaintiffs often pointed to their B-read x-ray reports and other reports to suggest injury. It may be helpful to this Court to review what those reports actually mean, including why those reports and the readings they contain *can* be acceptable under the Act to demonstrate impairment if accompanied by other evidence.

In their appellate briefs in *Williams*, Plaintiffs focused their arguments on the evidence regarding two Plaintiffs, Pittman and Martin, each of whom had B-read x-ray readings of 1/1. A21:276; A23:289. The remaining Plaintiffs had readings, if any, of 1/0. 4DCA Williams Reply Br., at 1-3; A15-20, 22, 24-27.

A B-read report is the report of a federally certified B-reader regarding findings from a person's chest x-ray. *See* § 774.203(11); 42 C.F.R. § 37.51(b). The figures use the International Labour Office's "ILO Scale," which follows an abnormality scale of 0-3, with 0 representing normal lungs, 1 representing the lowest discernible deviation from normal, and 2 or more representing more extensive lung abnormalities. A13:216-17. The first figure is the reader's best impression, while the second figure is the reader's second-best impression. *Id*. Thus, a reading of 1/0 indicates the perception of some lung abnormalities, but the reader admits the lungs may be normal. *Id.* Plaintiffs argued that, before the Act's adoption, Pittman and Martin's 1/1 readings "would have been submitted to a jury for its determination of value," but now "they are not 'injured enough' to seek compensation according to Fla. Stat. § 774.204(2)(f)." Williams Reply Br., at 2.

Plaintiffs overlook the point that the Act's *prima facie* showing requirements may be *satisfied* by persons with 1/1 or even 1/0 B-readings. Specifically, section 774.203(24) defines "radiological evidence of asbestosis" as "a quality 1 chest X ray . . . showing small, irregular opacities (s, t, u) graded by a certified B-reader as

at least 1/1 on the ILO scale." Subsection 774.204(2)(g) permits use of a 1/0 reading so long as "a qualified physician, relying on high-resolution computed tomography, determines to a reasonable degree of medical certainty that the exposed person has asbestosis and forms the conclusion set forth in paragraph (h)." Subsection (h) provides that "the exposed person's medical findings and impairment were not more probably the result of causes other than the asbestos exposure revealed by the exposed person's employment and medical history." § 774.204(2)(g)-(h). Similarly, subsection (f) requires that a qualified physician determine "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 on a 2/1 B-reading *or* based on certain below-normal physical lung measurements. § 774.204(2)(f)1-3. Plaintiffs' oversight of these aspects of the Act is significant for three reasons.

First, Plaintiffs ignore that a B-reading is not itself a diagnosis, as one of their own physicians admitted below. SR5:966-98; Supp.R1:44081-82; *see also* A12:189 (explaining that for-profit litigation "screening" companies use B-readers who may not be licensed to practice in the state where x-rays are taken and who disclaim a doctor/patient relationship and the provision of medical diagnoses). A B-reading can be an important tool in the diagnosis of asbestos-related disease, but particularly where low readings are made, markings "consistent with" asbestos

exposure may also be consistent with dozens of other possible causes. A12:187, 188-97. Thus, more is required to show *impairment caused by asbestos exposure*.

Second, that the Act permits the use of 1/1 B-readings shows that had Pittman and Martin taken the trouble to comply with the admittedly procedural *prima facie* requirement of getting a medical diagnosis by a qualified physician, they may have *satisfied* the Act's *prima facie* showing requirements. Likewise, even Plaintiffs with 1/0 B-readings could have shown impairment if they obtained a diagnosis from a qualified physician based not solely on an x-ray but also on high resolution computed tomography.

Third, that the 1/1 B-readings of Pittman and Martin could be sufficient readings under the Act is also significant because it makes even less probative Plaintiffs' unsupported assertions below that Plaintiffs' counsel had tried cases before the Act's adoption using the same quality of evidence that Plaintiffs have in this case. It may well be true that the totality of evidence Plaintiffs' counsel used previously would be acceptable under the Act today, and a plaintiff need simply make a *prima facie* showing earlier in the proceedings.

In short, Plaintiffs failed to prove either legally or factually that the Act changed the substantive elements of pre-existing vested causes of action. Properly understood, the Act did nothing of the sort. It is a constitutionally valid law that effectuates and enforces claims recognized under the common law by using a

procedure requiring *prima facie* showings.

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

Moreover, whether the Act materially encroaches upon vested rights does not dispose of the due process issue. *Dep't of Agriculture & Consumer Servs. 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."). The Act is based on a valid exercise of the Legislature's police powers, and Plaintiffs' due process challenge should be rejected for this reason as well.

Due process protections of property rights are not absolute. *Dep't of Transp. v. Knowles*, 402 So. 2d 1155, 1158 (Fla. 1981). To the contrary, *all* property rights are subject to the exercise of the state's police power. *Haire v. Dep't of Agriculture & Consumer Servs.*, 870 So. 2d 774, 782-84 (Fla. 2004); *see also Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 884 (Fla. 1974) ("Constitutional guaranties have never been thought to be immune from regulation or limitation in the interest of the common good.").

Under longstanding authority from this Court, when the Legislature has provided for the retroactive application of a statute affecting property rights, including rights involving causes of action, the Court determines whether the infringement of any "vested" right may be constitutional by weighing the strength of the public interest served by the statute, the nature of the right affected, and the

extent to which that right may be affected. *Knowles*, 402 So. 2d at 1158; *see also Bonanno*, 568 So. 2d at 30; *Rupp*, 417 So. 2d at 666. The Fourth District ignored *Knowles* and the Legislature's police power, confusing the latter with the Legislature's eminent domain power. *See Williams*, 985 So. 2d at 25-26 & nn.4-5.

This Court's decision in *Knowles* is based on the indisputable proposition that constitutional rights are rarely, if ever, absolute, including rights upholding property interests. In fact, this Court has permitted the state to regulate intrusively even real property in which the owner held fee title prior to the time the state undertook to regulate it. *See, e.g., Graham v. Estuary Prop., Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981) (upholding agency requirement that proposed development be reduced by half as valid exercise of police power stating that the "owner of private property is not entitled to the highest and best use of his property if that use will create a public harm"); *Dep't of Agriculture & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 30 (Fla. 1990) (applying *Knowles* in upholding retroactive application of statute substituting administrative hearing process for compensation claims relating to state's destruction of citrus to eradicate disease); *Glisson v. Alachua County*, 558 So. 2d 1030, 1032 (Fla. 1st DCA 1990) (upholding land use regulations that reduced property owner's "future use of their property"). As Justice Pariente explained in *Haire v. Dep't of Agriculture and Consumer Servs.*, 870 So. 2d 774, 781-84 (Fla. 2004), the state may at times destroy property under its police power.

Expressly relying on numerous studies and reports, the Legislature adopted the Act to address compelling concerns discussed by the Third District in *Eagle-Picher*. On the face of the Act itself, the Legislature identified serious concerns with the proliferation of Florida asbestos claims brought by persons who are not actually sick but who are prosecuting potential claims prematurely to avoid a time bar on valid claims for injuries that might later become manifest. This dilemma has been widely documented not only in literature but in the case law, as discussed by the Third District in *Eagle-Picher.*

In crafting a solution, the Legislature expressly sought to *avoid* abrogating *any* claims and took great pains not to do so. The Act establishes procedures for an orderly adjudication of these respective claims by affording priority to plaintiffs who can make a *prima facie* showing of impairment and causation, while deferring *and preserving* the potentially valid claims of persons who cannot make that showing *at this time*. The Act thereby confers a positive benefit upon all claimants with potentially developing or extant asbestos-related diseases and abrogates the claims of none. Because this Court has recognized that asbestos-related diseases are incurable and progressive, if a person truly is afflicted with such a disease, his or her proof of that will only grow stronger, not weaker, in time, as the Third District discussed in *Eagle-Picher*.

Knowles also requires consideration of the nature of the right affected.

Plaintiffs in this case seek to assert causes of action that have not yet been adjudged meritorious or reduced to judgment. Even the Fourth District recognized that legal claims run a spectrum from mere expectancy that the law will remain unchanged (which is clearly not vested) to an enforceable judgment (which is vested). 985 So. 2d at 27.

Even assuming plaintiffs' claims represent a species of property under Florida law, it is one that has not been adjudicated as having monetary worth. It is certainly not one that has been assigned any measurable value through the rendition of a verdict and judgment. The economic value of any such property right is merely the expected value of any eventual verdict and judgment, which is some number between zero and whatever number plaintiffs might project, qualified by the likelihood of actually obtaining that result. Even that indefinite value cannot be tied to any date certain due to the uncertainty of the judicial process.

The Act has done nothing to reduce that value. To the contrary, the Act will in all likelihood increase that value by eliminating for the strongest claimants the dilutive effect of other claimants' congesting the court system and leveraging insubstantial claims to obtain nuisance settlements. At the same time, the Act enhances the value of claims that might be rejected or given little value if asserted prematurely due to fear of a time bar, by preserving those claims and extending the time for their assertion to a date when the plaintiff will enjoy a greater chance of

obtaining a significant recovery.

The Third District in *Eagle-Picher* addressed this very issue, pointing out that a plaintiff who brings a claim for asbestos-related disease prematurely and "is unsuccessful in his efforts to recover" may later actually get the disease "but no damages." 481 So. 2d at 524. Even if the plaintiff obtains some recovery, the jury may have "awarded less than one hundred percent damages" based on the speculative nature of the proof. *Id.* "Finally," the court said, "inequitable awards are more likely to result from [an action for] future damages . . . simply because the damages cannot be known," whereas "[i]f the disease has advanced—or even come into existence—the actual financial needs of the plaintiff can obviously be more accurately assessed." *Id.* Although the court was concerned primarily about preventing premature claims for cancer, it hastened to add that "[w]hat has been said thus far in support of the proposition that risk of cancer damages should not be recoverable might well be said about any late developing disease or injury." *Id.*

Seen in this light, the Act strengthens the rights of *all* claimants. Those who meet the statutory criteria today will have greater and more immediate access to justice. Those who cannot meet the statutory criteria at this time will be given sufficient opportunity to determine whether they even have a claim and, if so, to assert it in due course based on sufficiently probative evidence.

These considerations stand in stark contrast to the situation in *Knowles*.

There, the plaintiff had obtained an actual jury verdict against the defendant, and retroactive application of the law in question would have operated to reduce that verdict in a substantial and quantifiable way. No such reduction is at issue here.

Plaintiffs contend that this Court has receded from *Knowles* or did not mean what it said in that decision. 4DCA Ini. Brs., at 33-37. Plaintiffs argue that in the Court's analysis of how due process protects one form of property—an accrued cause of action—this Court has consistently applied a "bright line" test to erect an absolute bar against any impairment by the retroactive application of legislation.

Given that this Court uses a balancing test to uphold legislation that affects constitutional rights to free speech, equal protection, access to courts, contractual obligations, and every other constitutional right imaginable, including legislation that in some cases has substantially eroded the value of fee interests in *real* property, it is inconceivable that the Court should afford absolute protection to so intangible a species of property as a cause of action not yet judged meritorious, let alone reduced to judgment. That is not the law. *Knowles* is the law.[3]

[3] Federal law is well settled regarding the process due when a law impacts an accrued cause of action. Under the modern view of federal law, an accrued cause of action in tort is a species of property protected by due process, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), but the claim is not a "vested" interest until it has been reduced to a final, unreviewable judgment. *See, e.g.*, *Hammond v. United States*, 786 F.2d 8, 11-14 (1st Cir. 1986) ("Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort."). This Court's decision in *Clausell v. Hobart Corp.*, 515

In fact, this Court expressly followed and applied the *Knowles* balancing test in *Bonanno*. There, the Court upheld the use of a streamlined compensation process for compensating those whose citrus trees were destroyed in a citrus canker eradication program. 568 So. 2d at 30-31; *see also Rupp*, 417 at So. 2d at 666. The Legislature certainly understood *Knowles* to be the law—the case is cited in the legislative history. A3:39-40. Applying the *Knowles* test under the circumstances here, the Act's challenged portions do not violate due process.

II. THE ACT DOES NOT VIOLATE ACCESS TO COURTS.

For essentially the same reasons, this Court should reject any contention that the Act violates article I, section 21, of the Florida Constitution by wrongfully denying Plaintiffs access to the courts. The trial court rejected this argument, and the Fourth District did not reach it, but because Plaintiffs may raise this ground as an alternative basis to affirm, Defendants address it at this time.

So. 2d 1275 (Fla. 1987), holding that no federal due process violation existed where a judicial decision was given retroactive effect, was based on these federal principles, which are well established today. *E.g.*, *Dist. of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 173-81 (D.C. Ct. App. 2008) (no due process violation where federal law abolished plaintiffs' municipal claims during litigation); *Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 553-55 (8th Cir. 1997) (en banc) (no due process violation where state law retroactively restricted guaranty benefits; explaining modern due process analysis); *Austin v. City of Bisbee*, 855 F.2d 1429, 1435-36 (9th Cir. 1988) (no due process violation where retroactive application of federal law barred plaintiff from pursuing suit commenced prior to effective date).

Of course, any law must have a rational basis to survive scrutiny under a federal substantive due process challenge, but Plaintiffs have not contended, let alone proved, that the Act lacks a rational basis.

Florida's access to courts constitutional provision states that Florida's courts "shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. Under this provision, the Legislature may not abolish a right of redress for a particular injury without providing a "reasonable alternative" or a "commensurate benefit," absent an "overpowering public necessity" and the lack of any alternative means for meeting this need. *Smith v. Dep't of Insurance*, 507 So. 2d 1080, 1088 (Fla. 1987) (invalidating damages cap on non-economic damages); *see, e.g., Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974) (upholding provision denying recovery for pain and suffering below $1,000 threshold because legislature provided alternative remedy and commensurate benefit in form of no-fault insurance); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (invalidating restriction on right to sue for economic damages under $550 without reasonable alternative or commensurate benefit).

The Act's challenged requirements in no way violate this right. As a preliminary matter, the right of access to courts is implicated only where the Legislature prevents access to courts; no violation exists where the legislature has merely "laid down conditions upon the exercise of such a right." *Bauld v. J. A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fla. 1978) (upholding retroactive application of revision of statute of limitations reducing time for bringing suit by seven months); *see also Alterman Transport Lines, Inc. v. Florida*, 405 So. 2d 456,

459 (Fla. 1st DCA 1981) (holding "[n]o substitute remedy need be supplied by legislation which only reduces but does not destroy a cause of action[;] [n]or does the elimination of one possible ground of relief require the Legislature to provide some replacement").

Here, the Legislature has acted to codify the common law's impairment requirement for asbestos-related claims and established both methods and means by which Plaintiffs must demonstrate a *prima facie* claim. Far from abridging the rights of persons who may be in some stage of developing a latent disease that has not yet impaired that person's health, the Legislature has acted to *preserve* such claims by *tolling* statutes of limitations that might be argued to lapse and extinguish those claims.

By the same token, these provisions operate to provide a reasonable alternative to the indiscriminate assertion of all claims at any time, however prematurely, and a more than "commensurate benefit" to persons whose claims are deferred. By tolling the statutes of limitations applicable to claims for asbestos-related diseases, § 744.206(1), the Legislature has provided a sensible and effective alternative to the rushed assertion of the most dubious claims now. *Cf.*, *e.g.*, *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) (no-fault auto insurance law constitutional because it replaced judicial remedy with compulsory insurance and relieved claimant of the burden of proving fault); *De Ayala v. Fla. Farm Bureau*

Cas. Ins. Co., 543 So. 2d 204 (Fla. 1989) (workers' compensation law constitutional because it replaced judicial remedy with compulsory insurance and relieved claimant of the burden of proving fault); *Univ. of Miami v. Echarte*, 618 So. 2d 189, 191 (Fla. 1993) (medical malpractice statute constitutional because it replaced judicial remedy with arbitration).

Finally, the Legislature expressly and fairly found that no other method existed for meeting the public necessity identified. Any other conceivable reform that would effectively address all the needs identified—preserving claims of all injured persons, providing for the orderly management of such claims, affording priority to claims of those persons who are actually sick, and protecting defendant companies and other Florida stakeholders from the economic consequences of defending numerous claims brought by persons not sick—may well be more draconian than the reasonable balance struck by the Legislature through the Act. Much like medical malpractice reform, asbestos litigation reform does not lend itself to purely judicial solutions in a common law system designed to decide one case at a time.

In the courts below, Plaintiffs attacked the process that led to the Act's adoption, asserting that the Legislature did not actually conduct "hearings" or make "findings," but rather accepted information and proposed language from defense interests, used "whereas" clauses in lieu of more formal fact findings, and

operated in the dark about what was taking place in Florida.

The legislative history confirms, however, that the Legislature was fully informed about how asbestos cases were being managed in Florida and heard from all sides of the controversy—including Plaintiffs' own attorneys, WR:40913 & n.4—as it made numerous changes to the proposed legislation throughout the legislative process. The bill that would become the ASCFA began as House Bill 1019 of the 2005 legislative session. It was heavily debated, the subject of public comment, and amended over 20 times before passing through multiple committees and, thereafter, the full House by a vote of 90 to 22. *See* SR10:1992-97 (citing history). The companion bill in the Senate, Senate Bill 2562, was likewise debated, the subject of public comment, and amended numerous times before passing through multiple committees and the full Senate. *Id.*

During this process, the Legislature had the benefit of multiple Staff Analyses, which relied upon extensive legislative, medical, judicial, and other authorities to analyze the national and Florida asbestos crisis. The two bills were ultimately reconciled, and after extensive additional debate, the Senate passed the substitute bill by a vote of 30 to 8, and the House did likewise—this time by a vote of 103 to 13. *Id.*

Plaintiffs misunderstand the very nature of the legislative process. It is not an adjudicative one that requires or even commonly involves formal evidentiary

hearings. It is a policy-making process. The Legislature receives information from many stakeholders in many ways and expresses findings in many forms. Indeed, the separation of powers principle precludes the judiciary from determining how the Legislature must make decisions, or even from enforcing any such requirements were the Legislature to adopt them. *See Florida Senate v. Florida Public Employees Council 79, AFSCME*, 784 So. 2d 404 (Fla. 2001).

Contrary to Plaintiffs' arguments below, numerous decisions relied upon legislative determinations set forth in preambles featuring "whereas" clauses. *E.g.*, *Univ. of Miami v. Echarte*, 618 So. 2d at 196; *Carr v. Broward County*, 541 So. 2d 92, 94 (Fla. 1989); *see also Haire v. Dep't of Agriculture & Consumer Servs.*, 879 So. 2d 774 (Fla. 2004); *Fla. Patient Fund*, 474 So. 2d at 788-89. These cases confirm that the Legislature may and often does rely upon studies brought to its attention in lieu of testimony. *See Univ. of Miami*, 618 So. 2d at 194-97; *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 423-24 (Fla. 1992), *receded from on other grounds, Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239 (Fla. 1996). Here, the Legislature's findings are entirely supported by the thorough and well documented studies and authorities that the Legislature expressly cited.

Finally, where, as here, the Legislature expressly determines that the betterment of the health and welfare of the State's citizens requires particular

legislative action, such policy determinations are presumed to be correct. *E.g.*, *Westerheide v. State*, 831 So. 2d 93, 101 (Fla. 2002). If Plaintiffs believed that the Legislative findings were baseless, it was incumbent upon Plaintiffs to present admissible evidence to overcome those findings and the specific authorities upon which the Legislature relied. *E.g.*, *North Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612 (Fla. 2003). Instead, they presented to the trial court the same unsworn assertions they had already presented to the Legislature. Thus, their access to courts challenge fails.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the Fourth District's decision below and remand this case with directions to dismiss Plaintiffs' claims in accordance with the trial court's original dismissal orders.

Respectfully submitted,

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I hereby certify that on August 11, 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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