IN THE SUPREME COURT OF FLORIDA

AMERICAN OPTICAL CORP., et al.,

Appellants/Petitioners,

v.

DANIEL N. WILLIAMS, et al.

Appellees/Respondents.

_____/

Case Nos. SC08-1617 & SC08-1639
(consolidated by Supreme Court)

L.T. Case Nos. 4D07-143, 4D07-144
4D07-145, 4D07-146, 4D07-147,
4D07-148, 4D07-149, 4D07-150,
4D07-151, 4D07-153, and 4D07-154
(consolidated by Fourth District)

PETITIONERS' AMENDED COMBINED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

According to the district court decision below, the Appellees/Respondents in these consolidated cases ("Plaintiffs") filed separate lawsuits in the circuit court to recover from Appellants/Petitioners ("Defendants") for what Plaintiffs claim to be asbestosis. A. 2. No Plaintiff, however, presents any actual physical impairment or existing malignancy caused by asbestos. *Id.*

In 2005, the Legislature passed, and the Governor signed, the Florida Asbestos and Silica Compensation Fairness Act (the "Act"), ch. 2005-274, Laws of Fla., *codified at* §§ 774.201 *et seq.*, Florida Statutes. *Id.* In doing so, the Legislature found that the vast majority of asbestos claims are filed by individuals who allege exposure to asbestos and who may have some physical indicia of exposure but who suffer no asbestos-related impairment. Ch. 2005-274, Law of Fla. (preamble). The Legislature recognized the documented inefficiencies and societal costs of asbestos claims by those who are not injured, including substantially reduced recoveries for the seriously ill; bankruptcies of defendants crushed by the "elephantine mass" of asbestos litigation; threatened savings, jobs, and retirement benefits of those employed by defendants; adversely affected communities where defendants operate; and the overburdening of our court system, which results in "unfair and inefficient" litigation that burdens litigants and taxpayers alike. *Id.*

The Legislature also recognized that the consolidation, joinder, and similar procedures to which some courts have resorted to deal with the mass of asbestos cases can undermine the appropriate functioning of the judicial process and encourage "the filing of thousands of cases by exposed individuals who are not sick and who may never become sick." *Id.* Accordingly, the Legislature found an overwhelming public necessity to defer the claims of exposed individuals who are not sick. *Id.* The Legislature expressly did so (1) to preserve, now and for the future, the ability of people who develop cancer and other serious asbestos-related diseases to be compensated, (2) to safeguard the jobs, benefits, and savings of workers in Florida, and (3) to safeguard Florida's economic well-being. *Id.*

The portion of the Act specifically at issue in this proceeding is its requirement that plaintiffs seeking relief for asbestos-related claims demonstrate impairment or malignancy. A. 2. The circuit court dismissed Plaintiffs' claims for failure to meet this requirement, and Plaintiffs appealed to the Fourth District. *Id.* They argued that, when they filed their suits, it was not necessary to establish a physical impairment or malignancy, and that application of this requirement to their claims amounted to an impermissible deprivation of due process. A. 2-3.

The Fourth District held that an accrued cause of action is a vested right and that the state cannot substantively affect Plaintiffs' vested rights through subsequent legislation. A. 4-5. The district court's articulation of this principle

was absolute: the state simply cannot apply legislation to an accrued cause of action where that legislation substantively affects the claim. A. 5, 9.

The Fourth District further held that, prior to the Act's adoption, Florida law recognized a cause of action for damages arising from the disease of asbestosis without any permanent impairment or the presence of cancer. A. 5. The Fourth District ultimately held that the Act may not constitutionally be applied to eliminate Plaintiffs' supposed vested rights. A. 10.

While holding the Act unconstitutional as applied to Plaintiffs, the Fourth District acknowledged that *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007), "does appear to hold that plaintiffs have no vested rights even in the . . . claims we confront in these lawsuits." A. 9. The Fourth District thus "certif[ied] conflict with *Hurst* to the extent that it does stand for a holding that the Act may be validly applied to asbestosis claimants with accrued causes of action for damages but without permanent impairments or any malignancy." A. 9.

Defendants thereafter sought this Court's review by filing a notice of appeal and a notice to invoke the Court's discretionary jurisdiction. The Court consolidated the two proceedings and thereafter ordered Defendants to file a combined brief on jurisdiction.

SUMMARY OF ARGUMENT

The Court has mandatory appellate jurisdiction to review the Fourth District's decision because the decision held a state statute to be invalid.

The Court also has discretionary jurisdiction to review the Fourth District's decision. The district court expressly construed a provision of the state constitution, it certified conflict with a decision of the Third District on the same question of law, and it conflicts expressly and directly with a decision of this Court regarding the proper due process test for retroactive legislation. Given the substantial crisis the Legislature identified in adopting the Act, and the overwhelming public necessity found to support the Act, the district court's decision on the Act's constitutionality should not be the last word on the Act's impairment requirement. This Court should review the decision below.

ARGUMENT

I. THE COURT HAS MANDATORY APPELLATE JURISDICTION TO REVIEW THE FOURTH DISTRICT'S DECISION BECAUSE THE DISTRICT COURT HELD A STATE STATUTE INVALID.

The Court has mandatory appellate jurisdiction to review decisions of a district court that declare invalid a state statute. Art. V, § 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(ii). The Fourth District's decision expressly declared the Act invalid as applied to Plaintiffs. Not only did the district court hold that the Act's impairment requirement violated Plaintiffs' due process rights, the court

determined that the requirement could not be severed from the Act and thus "the Act in its entirety may not constitutionally be applied to require claimants with accrued causes of action for damages resulting from exposure to asbestos to plead and prove that any malignancy or physical impairment resulted from their exposure to asbestos." A. 10.

This Court's mandatory jurisdiction exists whether a district court holds a statute is facially invalid or, as here, unconstitutional as applied. *See State v. Robinson*, 873 So. 2d 1205, 1207 (Fla. 2004); *see also* Anstead, Kogan, *et al.*, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 501 & nn.377-81 (2005) (citing, *e.g.*, *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995), and *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 420 (Fla. 1992)).

The Court accordingly has mandatory appellate jurisdiction to review the decision below.

II. THE COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE FOURTH DISTRICT'S DECISION AND SHOULD EXERCISE THAT DISCRETION IN THIS IMPORTANT CASE.

The Court has discretionary jurisdiction to review decisions of district courts that expressly construe a provision of the state constitution, certify direct conflict with a decision of another district court of appeal, or expressly and directly conflict with a decision of this Court. Art. V, § 3(b)(3)-(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii), (iv), (vi). In addition to mandatory appellate jurisdiction, the

Court has discretionary jurisdiction to review the Fourth District's decision under each of these grounds and should do so in this important case.

A. THE DECISION EXPRESSLY CONSTRUED THE FLORIDA CONSTITUTION'S DUE PROCESS PROVISION.

In reaching its holding that the Act is unconstitutional as applied to Plaintiffs, the Fourth District expressly construed, and based its holding upon, the due process provision found in Article I, section 9 of the Florida Constitution. A. 2 & n.4. Indeed, the district court expressly confirmed that it "necessarily construed provisions of the state constitution and . . . found the Act invalid as applied in these cases." A. 10-11 n.8.

B. THE DECISION CERTIFIES CONFLICT WITH THE THIRD DISTRICT'S DECISION IN *DAIMLERCHRYSLER CORP. v. HURST*.

The Fourth District held that the right to commence an action becomes vested when an event occurs that triggers the right to sue for damages and that such a right may not be defeated by later legislation. A. 9. On that basis, the Fourth District held that the Act improperly impairs Plaintiffs' vested rights. The Fourth District recognized that the Third District's decision in *Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007), reached the contrary conclusion. The Fourth District suggested that *Hurst* involved distinguishable facts, but the court nonetheless certified conflict with *Hurst* "to the extent that it does stand for a holding that the Act may

be validly applied to asbestosis claimants with accrued causes of action for damages but without permanent impairments or any malignancy." A. 9.

The Fourth District correctly acknowledged *Hurst*'s holding and the resulting conflict. The plaintiff in *Hurst* admittedly could not make the prima showing the Act required. 949 So. 2d at 282. The trial court held that the Act unconstitutionally impaired the plaintiff's vested rights, but the Third District disagreed, holding that while a statute "may not be retroactively applied to deprive a party of a vested right, such a situation simply does not exist here." *Id.* at 282, 286. The Third District determined that the Act's requirements do not affect substantive, vested rights. *Id.* at 287-88. Conflict therefore exists, as the district court certified.

C. THE DECISION CONFLICTS EXPRESSLY AND DIRECTLY WITH THIS COURT'S DECISION IN *STATE, DEPARTMENT OF TRANSPORTATION v. KNOWLES*.

The Fourth District squarely held that, once accrued, a cause of action constitutes a vested right, and subsequent legislation may not adversely affect that cause of action. A. 4, 9. The Fourth District's decision announced an absolute rule, without exception.

This Court, however, has previously held the due process rule against retroactive abrogation is *not* absolute. In *State, Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), this Court held:

> Under due process considerations, a retroactive abrogation of value has *generally* been deemed impermissible. *The rule is not absolute, however*, and courts have used a weighing process to balance the considerations permitting or prohibiting an abrogation of value. Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.

402 So. 2d at 1158 (emphasis added) (citations omitted). The Court applied the described balancing test and held the abrogation at issue in *Knowles* was constitutionally impermissible. *Id.* at 1158-59. The Court subsequently applied the *Knowles* balancing test in *Department of Agriculture & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 30 (Fla. 1990).

The Court has never receded from its holding in *Knowles* that the general rule against retroactive abrogation "is not absolute." Nor has the Court ever receded from use of the *Knowles* balancing test. To the contrary, the Court has expressly confirmed that it "does not intentionally overrule itself *sub silentio*" and that the Court's express holdings remain controlling law until this Court expressly recedes from them. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002).

In the decision below, the Fourth District ignored the *Knowles* balancing test and stated the rule against retroactive abrogation in absolute terms that *Knowles* rejected. Defendants disagree that the Act adversely affects Plaintiffs' vested rights, but after the Fourth District held such rights are affected, the Fourth District

was obligated to apply the *Knowles* balancing test to determine the constitutionality of the Act's application. It did not do so. Conflict exists.

D. THE COURT SHOULD EXERCISE ITS DISCRETION IN THIS IMPORTANT CASE.

The Legislature acts in the best interests of all Florida citizens. It adopted the Act to stem a systemic crisis created by a flood of asbestos claims—claims brought mostly by persons who are not, and may never be, sick. The Legislature's findings in support of the Act establish that carefully ordering the timing of asbestos-related claims will help countless persons, most particularly those truly injured by asbestos exposure.

The Fourth District overlooked how the Act is consistent with the common law requirement that injury must accompany claims for asbestos related injuries. The Fourth District also overlooked how the Act does not defeat the claims of those injured by asbestos. At most, it regulates them in a constitutionally permissible manner.

The Fourth District's decision, on the other hand, defeats the Act. Such a repudiation of the legislative will in so important an area should not begin and end with the Fourth District Court of Appeal. A final pronouncement on whether the Florida Constitution's due process provision bars the Legislature's chosen solution to the asbestos litigation crisis should come from the Supreme Court of Florida.

CONCLUSION

For all of the forgoing reasons, the Court should determine that it has jurisdiction and will exercise that jurisdiction to review the Fourth District's decision below.

Respectfully submitted,

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I hereby certify that on September 26, 2008, a copy of the foregoing was served by U.S. Mail on those shown on the following service list.

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CERTIFICATE OF FONT COMPLIANCE

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

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