SC13-54

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-_____
L.T. NO. 3D12-779

KIMBERLY ANN MILES
AND **JODY HAYNES**, HER HUSBAND,

PETITIONERS,

VS.

DANIEL WEINGRAD, M.D.,

RESPONDENT.

PETITIONERS' BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

This case concerns the retroactive application of a statute. The opinion of the district court states:

> Finding no conflict between our prior opinion in *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010), and the Supreme Court's opinion in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011), we affirm.

Miles v. Weingrad, 2012 WL 6602906 (Fla. 3d DCA Dec. 19, 2012).

As explained in the argument section of this brief, Petitioners/Plaintiffs Miles and Haynes submit that there is conflict between the Third District's decision and this Court's decision in *American Optical*.

As background, we provide the following explanation of the unusual procedural history of the case.

THE CASE HISTORY

In the prior opinion, *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010), the Third District held that the medical malpractice cap on damages in Section 766.118, Florida Statutes, could be applied retroactively because a plaintiff does not have a vested right when a cause of action accrues. Judge Cope dissented. This decision conflicted with *Raphael v. Shecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009),

in which the Fourth District held that the cap on damages could *not* be applied retroactively, as a plaintiff's rights are vested when a cause of action accrues.

Both *Weingrad* and *Raphael* were in this Court at the time that *American Optical* was being considered, and the Court stayed both medical malpractice cases pending the decision in *American Optical*. Order in *Miles v. Weingrad*, case no. SC10-558 (Fla. April 28, 2010); Order in *Shecter v. Raphael*, case no. SC09-2153 (Fla. March 3, 2010).

This Court eventually ruled in *American Optical* that the plaintiff had a vested right, and that the statute (the Asbestos and Silica Compensation Fairness Act) impaired those vested rights. *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011).

Having decided *American Optical,* the Supreme Court then issued orders to show cause in the two conflicting medical malpractice cases.

In the *Raphael* case, in which the Fourth DCA had found rights to be vested, the Court asked the defendant to "show cause . . . why this Court's decision in *Williams v. American Optical,* Case Nos. SC08-1617 and SC08-1639, is not controlling in this case and why the Court should not decline to accept jurisdiction in this case." Order in *Shecter v. Raphael*, case no. SC09-2153 (Fla. Sept. 1, 2011). The

Court in *Raphael* eventually entered an order consistent with the order to show cause: "the Court has determined that it should decline to accept jurisdiction in Case Nos. SC09-2153 and SC09-2154. Therefore, the petition for discretionary review is denied and the appeal is dismissed. *See American Optical Corp. v. Spiewak,* 36 Fla. L. Weekly S435 (Fla. 2011)." Order in *Shecter v. Raphael*, case no. SC09-2153 (Fla. Nov. 7, 2010).

In the *Weingrad* case, the Court asked the Defendant to show cause why, under *American Optical*, he should not lose. The Defendant was ordered to "show cause . . . why this Court should not accept jurisdiction in this case, summarily quash the decision being reviewed, and remand for reconsideration in light of our decision in *Williams v. American Optical*, Case Nos. SC08-1617 and SC08-1639." Order in *Miles v. Weingrad*, case no. SC10-558 (Fla. Sept. 1, 2010).

In *Weingrad,* rather than entering an order consistent with the order to show cause, this Court declined to exercise discretionary review:

> Upon review of the response(s) to this Court's order to show cause dated September 1, 2011, the Court has determined that it should decline to accept jurisdiction in this case. *See American Optical Corp. v. Spiewak*, 36 Fla. L. Weekly S435 (Fla. 2011). The petition for discretionary review is, therefore, denied.
>
> No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

Order in *Miles v. Weingrad*, case no. SC10-558 (Fla. Nov. 7, 2011). The Plaintiffs filed a Motion for Clarification, but the Court struck the motion as unauthorized. Order in *Miles v. Weingrad*, case no. SC10-558 (Fla. Dec. 16, 2011).

On remand, the trial court entered a final judgment for the Plaintiffs based on the statutory cap on damages. The Plaintiffs appealed to the Third District, arguing that (among other things) the pre-*American Optical* decision in *Weingrad v. Miles* was no longer good law. The Third District rejected this argument in its short opinion.

SUMMARY OF THE ARGUMENT

The decision of the Third District expressly and directly conflicts with this Court's decision in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011). *American Optical* held that a plaintiff has a vested right in a cause of action when the cause of action accrues. In adhering to its decision in *Weingrad v. Miles*, the district court held to the contrary.

The Court should grant review because of the uncertainty which faces lower courts in light of the three conflicting cases—*Weingrad, Raphael,* and *Fitchner.*

ARGUMENT

THE DECISION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *American Optical Corporation v. Spiewak*, 73 SO. 3D 120 (FLA. 2011), ON VESTED RIGHTS AND THE RETROACTIVE APPLICATION OF STATUTES

There is conflict jurisdiction, and the Court should exercise its jurisdiction.

The Third District affirmed based on the conclusion that its prior decision in *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010), does not conflict with this Court's decision in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011). This was incorrect. The original *Weingrad v. Miles* opinion conflicts with *American Optical*, and so does the district court's most recent opinion.

The conflict between the Third District decisions and the *American Optical* decision is clear. In *Weingrad*, the Third District held that there is no vested right in an accrued cause of action: "Because we find that Appellees had no vested right to a specific damage award at the time the injury occurred, we conclude that applying the cap to Appellees' noneconomic damage award is constitutional." *Weingrad v. Miles*, 29 So. 3d at 408.

In *American Optical*, in contrast, this Court repeatedly indicated that there is a vested right in a cause of action which has accrued. The Court referred to "years of common law precedent . . . holding that ***a diagnosis of asbestos-related disease***

and injury, without regard to any particular threshold level of impairment suffered, ***constitutes an accrued cause of action that provides citizens vested rights to file actions based on the injuries***." *American Optical Corp. v. Spiewak*, 73 So. 3d at 130 (emphases added). The Court noted that each of the plaintiffs in that case suffered from injuries consistent with asbestos-related disease, that the plaintiffs therefore had "an accrued cause of action for the injuries," and that "these causes of action constituted a property interest in which the Appellees had a vested right." *Id.*. The Court quoted a district court statement that "once a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right." *American Optical Corp. v. Spiewak*, 73 So. 3d at 126 (quoting *R.A.M. of South Fla., Inc. v. WCI Communities*, Inc., 869 So.2d 1210, 1220 (Fla. 2d DCA 2004)). The Court also quoted a statement in one of its prior decisions that "[o]nce the defense of the statute of limitations has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest." *American Optical Corp. v. Spiewak*, 73 So. 3d at 126 (quoting *Wiley v. Roof*, 641 So.2d 66, 68 (Fla.1994)).

Indeed, the Court's opinion was clear enough that Defendant Weingrad conceded that "the opinion appeared to deem an accrued cause of action as a vested right, thus suggesting that this Court may have implicitly receded from past prece-

dent that a claimant has no vested property interest in merely pursuing a common law tort action to recover damages which has not yet been filed." Weingrad's Response to the Court's September 1, 2011 Order to Show Cause, at 2, in *Miles v. Weingrad*, case no. SC 10-558 (Fla. Oct. 3, 2011).

Now we recognize that this Court previously denied review of the underlying *Weingrad v. Miles* decision. But this should not deter the Court from granting review here.

First, the discretionary decision to deny review does not create precedent. The Court merely declined to exercise its discretion to review the case.

Furthermore, the legal issue of vested rights and the retroactive application of statutes has not gone away. Although the Court in *American Optical* seemed to preclude the retroactive application of statutes to causes of action which have accrued, a computer search of the *Weingrad* and *Raphael* district court opinions would suggest that these two irreconcilable decisions both remain good law—which surely cannot be the case.

Indeed, the conflict between *Weingrad* and *Raphael* has been noted by the First District, which agreed with the *Raphael* holding that there is a vested right in an accrued cause of action. The First District stated that in *Raphael* "the court rea-

soned that the right to assert a cause of action vests when the cause of action accrues," and that the Third District reached the opposite conclusion. "To the extent that the decision in the case before this court turns on the existence of a vested right to assert the cause of action, we agree with the decision of the Fourth District in *Raphael* and Judge Cope's dissenting opinion in *Weingrad*." *Fitchner v. Lifesouth Cmty. Blood Centers, Inc.*, 88 So. 3d 269, 281 (Fla. 1st DCA 2012), *rev. denied*, case no. SC12–1326 (Fla. Dec. 28, 2012).

So now there is a chasm between the districts. The Third District, with *Weingrad*, stands alone holding that an accrued cause of action does not create a vested right. The Fourth and First Districts are in direct and express conflict.

For the reasons stated above, there is conflict jurisdiction. Because of the uncertainty and the importance of this recurring issue, the Court should exercise its discretion in favor of jurisdiction.

CONCLUSION

We respectfully request that the Court grant review of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

We hereby certify that a copy of this document was served by email on this 11th day of January, 2013, to Bruce Stanley, Esq., bruce.stanley@henlaw.com, Henderson, Franklin, Starnes & Holt, P.A., P.O. Box 280, Fort Meyers, FL 33902-0280; and Mark Hicks, Esq., mhicks@mhickslaw.com, and Dinah Stein, Esq., dstein@mhickslaw.com, Hicks, Porter, Ebenfeld & Stein, P.A., 799 Brickell Drive, 9th Floor, Miami, FL 33131-2855.

We hereby certify that this brief is in Times Roman 14 point, and in compliance with the type requirements of the Florida Rules of Appellate Procedure.

APPENDIX

1. *Miles v. Weingrad*, 2012 WL 6602906 (Fla. 3d DCA Dec. 19, 2012)

2. *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010)

3. *American Optical Corporation v. Spiewak*, 73 So. 3d 120 (Fla. 2011)

2012 WL 6602906
Only the Westlaw citation is currently available.

District Court of Appeal of Florida,
Third District.

Kimberly Ann MILES and Jody Haynes, Appellants,
v.
Daniel WEINGRAD, M.D., Appellee.

No. 3D12–779. | Dec. 19, 2012.

An Appeal from the Circuit Court for Miami–Dade County, Jennifer Bailey, Judge.

Attorneys and Law Firms

Alex Alvarez; Robert S. Glazier, for appellants.

Henderson, Franklin, Starnes & Holt and Bruce M. Stanley, Sr., Ft. Myers; Hicks Porter, Ebenfeld & Stein, Dinah Stein and Mark Hicks, for appellee.

Before WELLS, C.J., and SUAREZ, J., and SCHWARTZ, Senior Judge.

Opinion

WELLS, Chief Judge.

*1 Finding no conflict between our prior opinion in *Weingrad v. Miles*, 29 So.3d 406 (Fla. 3d DCA 2010), and the Supreme Court's opinion in *American Optical Corp. v. Spiewak*, 73 So.3d 120 (Fla.2011), we affirm.

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29 So.3d 406
District Court of Appeal of Florida,
Third District.

Daniel WEINGRAD, M.D., Appellant,
v.
Kimberly Ann MILES and Jody Haynes, Appellees.

No. 3D08-1592. | March 3, 2010.

Synopsis

Background: Patient, who had tumor removed in an outpatient procedure and believed that no melanoma remained but sought a second opinion from doctor, brought medical malpractice action against doctor, who diagnosed patient as having residual melanoma in her leg that needed immediate attention when, in fact, test results later showed that the first procedure had removed all of the melanoma. The Circuit Court, Miami-Dade County, Kevin Emas, J., entered judgment on jury verdict awarding patient $1.5 million in noneconomic damages, and doctor appealed.

Holdings: The District Court of Appeal, Rothenberg, J., held that:

[1] statutory cap on noneconomic damages in certain medical malpractice actions was substantive in nature for purposes of determining whether statutory cap applied retroactively; and

[2] patient had no vested right to a particular damage award and, thus, suffered no due process violation with retroactive application of the statutory damages cap to her cause of action.

Reversed and remanded.

Cope, J., filed dissenting opinion.

West Headnotes (6)

[1] **Statutes**
Power to enact and validity

Statutes
Prospective Construction

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.3 Power to enact and validity
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 In general

Determining whether a statute may be retroactively applied requires consideration of whether the statute expresses the intent for retrospective application and if so, whether the retroactive application is constitutional.

[2] **Statutes**
Prospective Construction

Statutes
Statutes affecting substantive rights

Statutes
Statutes Relating to Remedies and Procedures

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 In general
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.8 Statutes affecting substantive rights
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.12 Statutes Relating to Remedies and Procedures
361k278.13 In general

The general rule is that procedural or remedial statutes may operate retrospectively, but substantive statutes may not unless the legislature has indicated a clear intent to the contrary, and substantive law prescribes duties and rights, whereas procedural law concerns the means and methods to enforce those duties and rights.

2 Cases that cite this headnote

[3] **Health**
Limitation of amount of liability

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk606 Limitation of amount of liability

Statutory cap on noneconomic damages in certain medical malpractice actions affected an individual's right to a certain amount of damages, but it did not affect the means and methods a plaintiff had to follow, and thus, the statutory cap was substantive in nature for purposes of determining whether statutory cap applied retroactively. F.S.2003, § 766.118.

[4] **Statutes**
Statutes affecting substantive rights
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.8 Statutes affecting substantive rights

Without clear legislative intent to the contrary, substantive statutes will not operate retrospectively.

2 Cases that cite this headnote

[5] **Statutes**
Express retroactive provisions
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 Express retroactive provisions

Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively.

5 Cases that cite this headnote

[6] **Constitutional Law**
Professional malpractice
Health
Limitation of amount of liability
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4418 Torts and Personal Injuries
92k4422 Professional malpractice
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk606 Limitation of amount of liability

Although injury to patient occurred prior to effective date of statutory cap on noneconomic damages in malpractice actions, because patient did not file her notice of intent to initiate litigation or her complaint or obtain a judgment prior to the enactment of the statutory cap, patient had at most a "mere expectation" or prospect that she might recover damages of an indeterminate amount at an unspecified date in the future, and thus, patient had no vested right to a particular damages award and, thus, suffered no due process violation with retroactive application of the statutory cap to her cause of action. U.S.C.A. Const.Amend. 14; F.S.2003, § 766.118.

1 Cases that cite this headnote

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Robert S. Glazier, Miami; Alex Alvarez, Coral Gables, for appellees.

William W. Large for the Florida Justice Reform Institute as amicus curiae in support of appellant.

GrayRobinson, George N. Meros, Jr., Tallahassee, and Andy V. Bardos, for the Florida Hospital Association as amicus curiae in support of appellant.

***408** Joel S. Perwin, Miami, for the Florida Justice Association as amicus curiae in support of appellees.

Before COPE and ROTHENBERG, JJ., and SCHWARTZ, Senior Judge.

Opinion

ROTHENBERG, J.

Dr. Daniel Weingrad appeals an award of $1.5 million in noneconomic damages to Kimberly Ann Miles ("Miles") and her husband, Jody Haynes (collectively, "Appellees"). The sole issue before this Court is whether the retroactive [1] application of section 766.118, Florida Statutes (2003), which capped noneconomic damages in certain medical malpractice actions at $500,000, is constitutionally permissible as applied to the facts of this case. Because we find that Appellees had no vested right to a specific damage award at the time the injury occurred, we conclude that applying the cap to Appellees' noneconomic damage award is constitutional, and we reverse and remand for proceedings consistent with this opinion.

1 The terms "retroactive" and "retrospective" are used synonymously. *A Dictionary of Modern Legal Usage* 768 (2d ed. 1995).

Background

In December 2002, Miles was diagnosed with melanoma and had a tumor removed in an outpatient procedure. She believed that no melanoma remained but sought a second opinion from Dr. Weingrad, who told Miles she had residual melanoma in her leg that needed immediate attention. Miles underwent surgery in January 2003. Test results later showed the first procedure had removed all of the melanoma.

In early 2003, Miles developed a serious infection from the second surgery, which she contends was unnecessary. She has permanent swelling and pain and limited mobility in her leg. She has difficulty walking up stairs at Florida International University, where she teaches English, and can no longer go biking, dancing, hiking or walking with her husband. On September 9, 2005, Appellees served a Notice of Intent to Initiate Medical Malpractice Litigation, and on January 4, 2006, they sued Dr. Weingrad for negligence in performing the operation and for his follow-up care.

On September 15, 2003, nearly two years prior to Appellees' service of their Notice of Intent, the legislation capping noneconomic damages in medical malpractice actions went into effect. The statute's enabling clause, included as a footnote to section 766.118, states:

> It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act.

The legislation was one of many reforms dating from 1975 whereby the Legislature attempted to alleviate an identified crisis in the medical malpractice insurance market. The 2003 tort reform followed extensive research by the Governor's Select Task Force on Healthcare Professional Liability Insurance, which found "an overwhelming public necessity" for the reform measures. (Report of the Task Force at 217-18).[2] The task force concluded that limitless noneconomic damage awards were "a key factor (perhaps the most important factor) behind the unavailability and unaffordability of medical malpractice insurance in Florida." *Id.* at 220. The ***409** task force further found that "no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs" without including a cap on noneconomic damage award amounts. *Id.* at 221.

2 Report of the Task Force is available at http://tinyurl.com/Task ForceReport.

In the present action, a jury found in favor of Appellees and awarded them $1.5 million in noneconomic damages: $1,450,000 for Miles' pain and suffering and $50,000 for her husband's consortium claims. Dr. Weingrad moved to limit the judgment pursuant to the statutory cap. The trial court denied the motion, holding that because the causes of action accrued prior to the statute's enactment, applying it to the Appellees' action would amount to an unconstitutionally retroactive application. This appeal followed.

Governing Law and Analysis

We review de novo whether the retroactive application of section 766.118, the "caps statute," is constitutionally permissible as applied to the facts of this case. *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478, 485 (Fla.2008). As Justice Pariente instructed in *Lawnwood Medical Center*,

Inc. v. Seeger, 990 So.2d 503, 508 (Fla.2008), "[w]e do not take lightly a contention that a statute passed by the Legislature is unconstitutional and we start with the well-established principle that a legislative enactment is presumed to be constitutional."

[1] Determining whether a statute may be retroactively applied requires consideration of whether the statute expresses the intent for retrospective application and if so, whether the retroactive application is constitutional. *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So.2d 1279, 1284 (Fla.2008); *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So.2d 494, 503 (Fla.1999). In light of this clearly articulated standard, our analysis considers four determinative issues culled from pertinent Florida Supreme Court case law: (1) Is the statute procedural or substantive? *See Vill. of El Portal v. City of Miami Shores*, 362 So.2d 275, 278 (Fla.1978) (finding that "procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases"); (2) Was there an unambiguous legislative intent for retroactive application? *State Farm Mut. Auto. Ins. v. Laforet*, 658 So.2d 55, 61 (Fla.1995); (3) Was Appellees' right vested or inchoate? *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla.1987) (holding that the retroactive application of a statute did not violate due process because the plaintiff had no vested right); and (4) Is the application of section 766.118 to these facts unconstitutionally retroactive?

1. Substantive vs. Procedural Statutes

[2] The general rule is that procedural or remedial statutes may operate retrospectively but substantive statutes may not unless the Legislature has indicated a clear intent to the contrary. *Laforet*, 658 So.2d at 61. Substantive law prescribes duties and rights, whereas procedural law concerns the means and methods to enforce those duties and rights. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352, 1358 (Fla.1994) (holding that a statutory amendment that limited punitive damages was substantive and did not apply retrospectively); *see also In re Rules of Criminal Procedure*, 272 So.2d 65, 65 (Fla.1972) (stating that substantive law "creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights").

In its analysis, the court in *Mancusi* stated that because punitive damages are assessed as a punishment against the wrongdoer as opposed to compensation to ***410** the injured plaintiff, the plaintiff's right to a claim for punitive damages is subject to the Legislature's plenary authority. The court found that the "establishment or elimination of such a claim is clearly a substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement." 632 So.2d at 1358.

In *DaimlerChrysler Corp. v. Hurst*, 949 So.2d 279, 287 (Fla. 3d DCA 2007), this Court found the statute that set forth the procedures for filing or maintaining certain asbestos causes of action was procedural in nature because it "merely affects the means and methods the plaintiff must follow" and does not eliminate a plaintiff's right to sue for asbestos-related injuries. As a result, this Court found that no constitutional analysis was required and the statute could constitutionally be applied retroactively. *Id.*

[3] In the instant case, the statutory cap on noneconomic damages affects an individual's right to a certain amount of damages. It does not affect the means and methods a plaintiff must follow in a medical malpractice action but instead prescribes and regulates the rights parties have to a particular damage award. Thus, the provision is substantive in nature. Because the caps statute is substantive, our analysis turns on the question of legislative intent and constitutionality.

2. Legislative Intent for Retroactive Application

[4] Without clear legislative intent to the contrary, substantive statutes will not operate retrospectively. *Laforet*, 658 So.2d at 61. The Legislature unambiguously provided that section 766.118 was to operate retrospectively and apply "to any medical incident for which a notice of intent to initiate litigation" was mailed on or after September 15, 2003, as long as the application would not be prohibited by the state or federal constitutions.

[5] Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively. *Doe v. Am. Online, Inc.*, 783 So.2d 1010, 1018 (Fla.2001). In *Doe*, the Florida Supreme Court upheld the retroactive application of the federal Communications Decency Act because the Act "clearly reflects Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose" and found that because Congress' intent was clear, it must be implemented. *Id.*

A federal court addressing an issue nearly identical to the instant action also properly deferred to the Legislature's intent in applying a medical malpractice cap retroactively to the plaintiff's medical malpractice action. *Wilson v. United States*, 375 F.Supp.2d 467 (E.D.Va.2005). The statutory cap on noneconomic damages in *Wilson* contained a "clear [and] unambiguous provision" that the cap apply to all causes of action filed on or after July 1, 2003. *Id.* at 471. The plaintiff suffered damages following a 2001 surgery allegedly due to a surgeon's negligence and sued on April 29, 2004. *Id.* at 468-69. The court found that the statutory cap was not unconstitutionally retroactive as applied, stating: "where, as here, 'a statute is clear and unambiguous and the legislative intent is plain, ... it is the duty of the courts not to construe but to apply the statute.' " *Id.* at 472 (internal citations omitted).

Because the Florida Legislature's intent to apply section 766.118 retroactively is clear and unambiguous, we address the final step in the analysis. Before doing so, however, we specifically reject the reliance by Appellees, the amicus curiae, and the Fourth District in ***411** *Raphael v. Shecter*, 18 So.3d 1152, 1156 (Fla. 4th DCA 2009), on cases rejecting retrospective application of a statute, where the statute in question contained no legislative language providing for the statute to apply retrospectively. Specifically, we reject reliance on: *Mancusi*, 632 So.2d at 1357 (where the statute at issue, section 768.73, Florida Statutes (1987), included no legislative intent for retroactive application); *Hotelera Naco, Inc. v. Chinea*, 708 So.2d 961, 962 (Fla. 3d DCA 1998) (holding that where no clear legislative intent exists, a substantive statute is presumed to operate prospectively); *Patria Publ'ns, Inc. v. Armesto*, 593 So.2d 574 (Fla. 3d DCA 1992) (where the statute in question stated that it would only apply prospectively); *Royal v. Clemons*, 394 So.2d 155, 158 (Fla. 4th DCA 1981) (holding that "[t]he Legislature did not incorporate within the statutory amendment a clear expression of intent for retroactive application.... As such, the amendment could never be the subject of retroactive application"). Clearly, these cases cannot be applied to the legal analysis in the instant action because without clear legislative intent for retroactive application of the statute, retroactive application would be prohibited and no constitutional analysis would be required.

3. Vested Rights

Even where the Legislature has stated its intent for retroactive application, the Florida Supreme Court has refused to apply the statute retroactively if it impairs vested rights, creates new obligations or imposes new penalties. *Laforet*, 658 So.2d at 61. On the issue of vested rights, our analysis is guided by the seminal case, *Clausell*, 515 So.2d at 1275, which we find controlling. In *Clausell*, the Florida Supreme Court addressed the question of whether the retroactive application of its decision in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla.1985), which overruled an earlier decision, violated Clausell's right to due process, where Clausell's cause of action accrued before the *Pullum* decision. The Court's analysis focused on whether Clausell had a vested right prior to the *Pullum* decision in pursuing his common law tort theory to recover damages. A unanimous court unequivocally determined that he did not. In reaching this conclusion, the Florida Supreme Court recognized that the United States Supreme Court had resolved this issue several years earlier in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), wherein the United States Supreme Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' " *Clausell*, 515 So.2d at 1275-76.

The Florida Supreme Court also relied on and specifically quoted from the following cases in determining whether Clausell possessed a vested right to pursue a common law tort action to recover damages. *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.1978), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (holding that: "**[i]t is well settled that a plaintiff has no vested right in any tort claim for damages under state law**" (emphasis added)); *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F.Supp. 1144, 1149 (S.D.Fla.1986), which rejected the very same argument advanced by Clausell and the Appellees in the instant case, stating:

> While the instant Plaintiff correctly posits that a statute may not be retroactively applied to deprive a party of a vested right, such a situation simply does not exist here. "A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, ***412** or a present fixed right of future enjoyment." *In re Will of Martell*, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). "**To be vested a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a**

demand." *Div. of Workers' Comp. v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982) (emphasis added). **The Plaintiff in the instant case had no vested contract or property right prior to the *Pullum* decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages.**

(emphasis added).

The *Clausell* Court also noted that the United States District Court for the Northern District of Florida reached the same conclusion in *Eddings v. Volkswagenwerk, A.G.*, 635 F.Supp. 45, 47 (N.D.Fla.1986), which held that the "plaintiffs had at most a mere expectation that they had a cause of action they could pursue."

The Florida Supreme Court's finding that Clausell had, at most, a mere expectation that he had a cause of action and possessed no vested right to pursue his common law tort to recover damages is supported by federal decisions prior to and subsequent to its holding and has been relied on by the District Courts of Appeal in this state. For example, in *Silver v. Silver*, 280 U.S. 117, 122, 50 S.Ct. 57, 74 L.Ed. 221 (1929), the United States Supreme Court held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that 'otherwise settled expectations' may be upset thereby."

In reviewing a Texas statute limiting noneconomic damages in a medical malpractice suit, a United States Circuit Court of Appeals in *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir.1986), held that the plaintiff's common law right to recover damages for a hospital's alleged negligence was not a property interest protected by the due process clause. Similar to the Appellees' cause of action in the instant case, the alleged malpractice in *Lucas* occurred prior to the enactment of the statute limiting noneconomic damages to $500,000. Citing to *Duke*, as our Florida Supreme Court did in *Clausell*, the Fifth Circuit Court of Appeals held that statutes limiting liability are relatively commonplace and have consistently been enforced by the courts, and that a person has no vested interest or right in any rule of the common law.

In *Lamb*, **a case specifically relied on by the Florida Supreme Court in *Clausell*, the United States District Court, in interpreting and applying Florida law,** specifically held that: "a plaintiff has no vested right in a tort claim"; "under Florida law a litigant has no vested right to the benefit of a statute of limitations in effect when his cause of action accrues"; and "[t]he mere prospect that Plaintiff might recover damages from a defendant on a tort theory is clearly not tantamount to a vested right." 631 F.Supp. at 1149.

The retroactive application of an amendment to Virginia's Medical Professional Liability Act, reducing the cap on noneconomic damages, was also found to be constitutional even though the alleged malpractice occurred in 2001, the amendment reducing the cap from $1 million to $250,000 for noneconomic damages was in 2003, and the complaint was filed in 2004. *Wilson*, 375 F.Supp.2d at 472. The court noted that the legislative intent was clear and unambiguous and found that the retroactive ***413** application of a legislative limitation on a common law measure of recovery, such as the one imposed under the Act, did not violate a fundamental constitutional right. *Id.*

> And, it is well-recognized that Congress has an unquestioned right to make economic legislation retroactive, provided that this does not require the revision of a judgment that has become final. It is also clear that Congress and state legislatures may, consistent with the Constitution, enact retroactive legislation provided they can establish a rational basis for doing so.... Moreover, as of the effective date of the 2003 amendments-July 1, 2003-plaintiff had not yet filed the instant action against the defendant, let alone obtained a final judgment that could potentially raise a constitutional retroactivity concern.

Id. at 472-73 (internal quotations and citations omitted).

Subsequent to the issuance of *Clausell* by the Florida Supreme Court, the Second District issued *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210 (Fla. 2d DCA 2004); the First District issued *Lakeland Regional Medical Center, Inc. v. Florida Agency for Health Care Administration*, 917 So.2d 1024 (Fla. 1st DCA 2006); the Third District issued *Flowserve Corp. v. Bonilla*, 952 So.2d 1239 (Fla. 3d DCA 2007), and *DaimlerChrysler*, 949 So.2d at 279; and the Fourth District issued *Raphael*, 18 So.3d at 1152, *Williams v. American Optical Corp.*, 985 So.2d 23 (Fla. 4th DCA 2008), and *Doe v. America Online, Inc.*, 718 So.2d 385 (Fla. 4th DCA 1998). In each instance (except

in *Williams*, which is currently before the Florida Supreme Court on certification of conflict with *DaimlerChrysler* and *Raphael*, the courts have concluded that the retrospective application of a statute was not unconstitutional because the statute did not abrogate or impair a vested right.

Although *R.A.M.* involved the enforceability of a contract, which is analyzed differently, Justice Canady, who was a member of the Second District Court at the time, and who authored the opinion, addressed the legal principles governing retrospective application of statutes, and provided an excellent analysis differentiating vested rights from expectant or contingent rights. Justice Canady noted and cited to a long list of cases, holding that:

> A vested right has been defined as an immediate, fixed right of present or future enjoyment and also as an immediate right of present enjoyment, or a present, fixed right of future enjoyment.... [T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.... Vested rights are distinguished not only from expectant rights but also from contingent rights.... They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.

R.A.M., 869 So.2d at 1218 (internal quotations and citations omitted).

Two years later, the First District in *Lakeland*, in reliance on *Clausell* and *Lamb*, determined that the retroactive application of the statute, while substantive, was constitutionally permissible because ***414** the legislative intent was clear and the statute did not abrogate a vested right. Lakeland Regional Medical Center challenged Winter Haven Hospital's license to perform open heart surgery in 2003 and filed a petition for a formal hearing. After Lakeland Regional filed its petition, the Legislature amended sections 408.036 and 408.0361, Florida Statutes, to create a new licensure scheme which effectively eliminated Lakeland Regional's right to challenge Winter Haven's application. Judge Polston (now Justice Polston), writing for the court, held that although Lakeland Regional had a right under the previous statute to challenge the application, and the amendment extinguished that right, because Lakeland Regional did not have a vested constitutionally protected right, the retroactive application of the statute did not violate due process. *Id.* at 1033.

In *Flowserve* and *DaimlerChrysler*, this Court concluded that the retroactive application of the Asbestos and Silica Compensation Fairness Act did not deprive the plaintiffs of a vested right, and specifically relied on *Clausell* and the cases cited to in *Clausell* in reaching that conclusion. Quoting from *Clausell*, this Court held that "[a] substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment. To be vested[,] a right must be **more than a mere expectation based on an anticipation of the continuance of an existing law.**" *DaimlerChrysler*, 949 So.2d at 285-86 (citations omitted). "Prior to the enactment of the Act, the plaintiff had, at most, a 'mere expectation' that the common law would not be altered by legislation. Thus, the plaintiff did not have a vested right in her common law asbestos claim." *Id.* at 287 (citations omitted). We additionally noted that an expectancy differs from a vested right, citing to *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 339, 42 S.Ct. 325, 66 L.Ed. 647 (1922) (holding that the "legislature [could not] take away from a private party a right to recover money that is due when the [legislative] act is passed").

The Fourth District has ruled inconsistently on this issue. In *Doe*, 718 So.2d at 385, the events leading to the filing of the lawsuit occurred in 1994. On February 8, 1996, Congress enacted section 230 of the Communications Decency Act, 47 U.S.C. § 230 et seq., prohibiting civil actions that treat the provider of an interactive computer service as the "publisher" or "speaker" of messages transmitted over its service by third parties. The Fourth District concluded that although the conduct giving rise to Doe's claims occurred prior to the Act's enactment, Doe did not file her complaint until

almost a year after the Act became effective, and Congress had clearly expressed its intent that the statute apply to any complaint filed after its effective date, regardless of when the relevant conduct allegedly occurred, the trial court did not unconstitutionally retroactively apply the Act to Doe's complaint. *Id.* at 388. In reaching this conclusion the Fourth District held that "[n]o person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim." *Id.* at 388.

Despite the Fourth District's holding in *Doe* in 1988, the court issued *Williams* in 2008 and *Raphael* in 2009, which conflict with but fail to recede from *Doe*. In *Williams*, the Fourth District found that a cause of action is a property right, 985 So.2d at 26, and determined that "[w]here a cause of action has accrued but [the] 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. In support of its position (which is contrary to the position it took in *Doe*), ***415** the Fourth District incorrectly states that the Florida Supreme Court found in *Clausell* that "[w]hen the cause of action accrues it becomes '[a] substantive vested right ... an immediate right of present enjoyment, or a present fixed right of future enjoyment.' " *Id.* at 27. The Florida Supreme Court said no such thing. In fact, the Florida Supreme Court said the opposite:

> While the instant Plaintiff correctly posits that a statute may not be retroactively applied to deprive a party of a vested right, such a situation simply does not exist here. "A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment." *In re Will of Martell*, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). "To be vested a right must be **more than a mere expectation based on an anticipation of the continuance of an existing law;** it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Div. of Workers' Comp. v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982). The Plaintiff in the instant case had no vested contract or property right prior to the *Pullum* decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages.... [P]laintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights."

Clausell, 515 So.2d at 1276. (emphasis added).

The Fourth District in *Williams* also improperly relied on *Mancusi*, which does not apply because the statute in question provided no legislative language providing that the statute be applied retrospectively, and where no legislative intent for retrospective application is provided, the statute may only be applied prospectively. It also incorrectly relies on *Rupp v. Bryant*, 417 So.2d 658 (Fla.1982), and *Florida Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla.1981). Unlike *Williams*, the plaintiff in *Knowles* had obtained a jury verdict and a judgment in his favor prior to the amendment of the statute. He, therefore, clearly possessed a vested property right precluding retrospective application of the amendment. Similarly, in *Rupp*, the plaintiff had already filed his complaint when the statute was enacted. Additionally, both *Knowles* and *Rupp* involved amendments to the statutes waiving sovereign immunity, not the enactment of statutes modifying common law torts. "A person has no property, no vested interest, in any rule of the common law." *Duke*, 438 U.S. at 88, 98 S.Ct. 2620. *See also Silver*, 280 U.S. at 122, 50 S.Ct. 57; *Lucas*, 807 F.2d at 422; *Ducharme*, 574 F.2d at 1309; *Lamb*, 631 F.Supp. at 1149; *Clausell*, 515 So.2d at 1276; *Martell*, 457 So.2d at 1067; *Brevda*, 420 So.2d at 891.

In *Raphael*, the Fourth District ignores the Florida Supreme Court's holdings in *Clausell*, equates the vesting of rights to when a cause of action accrues, and provides no analysis or authority for its conclusion that because the facts giving rise to Raphael's medical malpractice action occurred prior to the enactment of the statute, the statute could not be applied to him because his rights had already vested. 18 So.3d at 1154-58.

After performing a careful review of the opinions issued by the Florida Supreme Court and other courts, it appears that when determining whether a litigant has a vested right precluding retrospective application of a statute containing language indicating the Legislature's intent that it be applied retrospectively, the courts have drawn a distinction (1) between cases already ***416** filed or a judgment rendered prior to enactment of the statute,[3] and those when no complaint had been filed or judgment rendered;[4] and (2) where the right or cause of action was statutorily created rather than based on common law.[5] These distinctions, grounded in the constitutional separation of powers doctrine, reflect appropriate deference to legislative enactments. *See Askew v. Schuster*, 331 So.2d 297, 300 (Fla.1976) (holding that in Florida, it is well settled that "[a]bsent a violation of due process or a specific constitutional guarantee, courts

cannot substitute their judgment for that of the Legislature"); *In re Apportionment Law, Senate Joint Resolution No. 1305*, 263 So.2d 797, 806 (Fla.1972) (emphasizing that the Court would measure legislative acts only "with the yardstick of the Constitution" and that "[t]he propriety and wisdom of legislation are exclusively matters for legislative determination"). Intervening in the Legislature's discretionary decisions "would require the judicial branch to second guess the political and police power decisions of the other branches of government," thus violating the separation of powers doctrine. *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So.2d 912, 918 (Fla.1985).

3 *E.g., Rupp*, 417 So.2d at 658 (denying retrospective application where the plaintiff had filed suit by the time the statute was amended); *Knowles*, 402 So.2d at 1155 (where the plaintiff had obtained a judgment prior to statutory amendment); *City of Winter Haven v. Allen*, 541 So.2d 128, 131 (Fla. 2d DCA 1989) (where the Legislature amended statute at issue after plaintiff filed and amended her wrongful death action but prior to trial).

4 Retrospective application has been consistently upheld in state and federal courts. *E.g., Lucas*, 807 F.2d at 414; Wilson, 375 F.Supp.2d at 467; *Johnson v. Virgin Islands Port Auth.*, 236 F.Supp.2d 503 (D.Vi.2002); *Lamb*, 631 F.Supp. at 1144; *Doe*, 783 So.2d at 1018; *Clausell*, 515 So.2d at 1276; *Flowserve*, 952 So.2d at 1239; *DaimlerChrysler*, 949 So.2d at 279; *Lakeland*, 917 So.2d at 1024; *R.A.M.*, 869 So.2d at 1210; *In re Will of Martell*, 457 So.2d at 1064; *Brevda*, 420 So.2d at 887.

5 Retrospective application found unconstitutional in *Laforet*, 658 So.2d at 55 (the right for a first-party action by an insured for bad faith was statutorily created; only third-party actions by an insured for bad faith existed at common law); *Kaisner v. Kolb*, 543 So.2d 732, 739 (Fla.1989) (waiver of sovereign immunity was statutory); *L. Ross, Inc. v. R.W. Roberts Const. Co.*, 481 So.2d 484 (Fla.1986) (right to attorney's fees was statutory); *Young v. Altenhaus*, 472 So.2d 1152 (Fla.1985) (attorney's fees); *Knowles*, 402 So.2d at 1155 (sovereign immunity); *see also R.A.M.*, 869 So.2d 1210 (Fla. 2d DCA 2004) (Canady, J., used a different analysis because the case dealt with the enforceability of a contract); *Galbreath v. Shortle*, 416 So.2d 37 (Fla. 4th DCA 1982) (sovereign immunity).

[6] Although the injury in the present case occurred in 2003, prior to the effective date of the amendment of section 766.118, because Appellees did not file their notice of intent to initiate litigation, file their complaint, or obtain a judgment prior to the enactment of the statute, they had at most a "mere expectation" or a prospect that they might recover damages of an indeterminate amount at an unspecified date in the future. The Appellees had no vested right to a particular damage award and thus suffer no due process violation with the application of the caps statute to their cause of action. We therefore reverse the trial court's order denying Dr. Weingrad's motion to apply the statutory cap to the Appellees' noneconomic damages.

Reversed and remanded.

SCHWARTZ, Senior Judge, concurs.

COPE, J. (dissenting).

I respectfully dissent. We should affirm the judgment on authority of *Raphael v. Shecter*, 18 So.3d 1152 (Fla. 4th DCA 2009), and *Menendez v. Progressive Express* ***417** *Ins. Co.*, --- So.3d ----, 2010 WL 375080 (Fla.2010).

The *Raphael* decision concluded, correctly in my view, that the statute is substantive and that retroactive application is prohibited. The *Menendez* decision addressed Florida's standards for determining whether a statute can be applied retroactively. Both opinions support the trial court's determination of unconstitutionality in this case.

The majority opinion relies on *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla.1987), but that case is inapplicable. *Clausell* involved the retroactive application of a judicial decision, not the retroactive application of a statute. 515 So.2d at 1276. By contrast, *Menendez* and *Raphael* do address the issue now before us and under both cases, the statute cannot constitutionally be applied retroactively.

There is a seeming inconsistency between more recent appellate pronouncements regarding retroactive legislation, *see Menendez, Raphael*, and cases cited therein, and an older Florida Supreme Court decision, *State Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla.1981). The more recent decisions prohibit retroactive legislation which modifies substantive rights or obligations. By contrast, the *Knowles* decision states:

> As a matter of principle, it is indisputable that a retroactive application of the 1980 law has taken from Knowles something of value, and that nothing of value has been substituted or otherwise provided.

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. That analysis is helpful here. Without discoursing unduly on the point, we readily conclude that the balancing of these factors favors Knowles. The statute effects an abrogation of Knowles' right to his full tort recovery, not merely a procedural adjustment of his remedies. That abrogation clearly outweighs the public's interest in the 1980 legislation.

Quoting Mr. Justice Holmes in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 339, 42 S.Ct. 325, 66 L.Ed. 647 (1922):

> Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed.
>
> We hold, as in *Forbes*, that it cannot.

402 So.2d at 1158-59 (citations and footnotes omitted).* It is not clear whether *Knowles* has been abandoned by the Florida Supreme Court, and clarification by that Court would be helpful.

* In *Knowles*, the Court considered a statute which granted public employees immunity from suit and made the immunity applicable to pending suits. *Id.* at 1156.

Assuming that *Knowles* continues to have vitality, the result in this case would be the same: retroactive application of the statute is impermissible.

We should affirm the judgment.

Parallel Citations

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End of Document

73 So.3d 120
Supreme Court of Florida.

AMERICAN OPTICAL CORPORATION, et al., Appellants–Petitioners,
v.
Walter R. SPIEWAK, et al., Appellees–Respondents.
American Optical Corporation, et al., Appellants–Petitioners,
v.
Daniel N. Williams, et al., Appellees–Respondents.

Nos. SC08–1616, SC08–1640, SC08–1617, SC08–1639. | July 8, 2011.

Synopsis

Background: Plaintiffs in several cases brought claims against various defendants, alleging damages resulting from exposure to asbestos. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Elizabeth T. Maass, J., granted defendants' motions to dismiss. Plaintiffs appealed. Appeals were consolidated. The District Court of Appeal, Farmer, J., 985 So.2d 23, reversed, remanded, and certified a conflict with another district.

Holdings: The Supreme Court, Lewis, J., held that:

[1] plaintiffs had an accrued, and thus vested, right to sue for damages prior to enactment of Asbestos and Silica Compensation Fairness Act;

[2] asbestos fibers inhaled by plaintiffs without their knowledge or consent was an actual injury as required for claims;

[3] Act could not be retroactively applied to plaintiffs' claims consistent with due process clause of State Constitution, disapproving of *DaimlerChrysler Corporation v. Hurst*, 949 So.2d 279; and

[4] unconstitutional portions of Act could not be severed from remainder of Act.

Affirmed.

Canady, C.J., dissented and filed opinion in which Polston, J., concurred.

West Headnotes (11)

[1] **Constitutional Law**
Property in General
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4070 In general
Citizens have personal rights under the Florida Constitution to acquire, defend, and keep property free from claims of government and to vindicate those rights in courts of law. West's F.S.A. Const. Art. 1, § 9.

[2] **Statutes**
Statutes affecting vested rights
Statutes
Statutes imposing liabilities, penalties, duties, obligations, or disabilities
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.9 Statutes affecting vested rights
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.10 Statutes imposing liabilities, penalties, duties, obligations, or disabilities
Retroactive legislation that impacts property rights is constitutionally invalid where vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated. West's F.S.A. Const. Art. 1, § 9.

[3] **Statutes**
Statutes affecting vested rights
361 Statutes
361VI Construction and Operation

361VI(D) Retroactivity
361k278.9 Statutes affecting vested rights
Whether legislation may affect a vested right to a particular cause of action is dependent on the stage the right has attained when the legislation is enacted.

[4] **Appeal and Error**
Cases Triable in Appellate Court
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
A district court decision declaring a statute unconstitutional is subject to de novo review by the Supreme Court.

[5] **Constitutional Law**
Rights of action and defenses
Negligence
Constitutional, statutory and regulatory provisions
Products Liability
Retroactivity
Products Liability
Asbestos
92 Constitutional Law
92XXI Vested Rights
92k2648 Rights of action and defenses
272 Negligence
272I In General
272k203 Constitutional, statutory and regulatory provisions
313A Products Liability
313AI In General
313Ak101 Constitutional and Statutory Provisions
313Ak104 Retroactivity
313A Products Liability
313AIII Particular Products
313Ak201 Asbestos
Plaintiffs had an accrued, and thus vested, right to sue for damages prior to enactment of the Asbestos and Silica Compensation Fairness Act, arising from their alleged exposure to asbestos resulting in asbestos-related disease, even if plaintiffs lacked accompanying malignancy or physical impairment; prior to Act, a diagnosis of asbestos-related disease triggered the accrual of a cause of action, and the development of particular impairment symptoms as described in Act had never been the legal factor in determining "manifestation" or accrual. West's F.S.A. § 774.201 et seq.

1 Cases that cite this headnote

[6] **Negligence**
Necessity and Existence of Injury
272 Negligence
272XIV Necessity and Existence of Injury
272k460 In general
The "some actual harm" element of negligence action does not require a precise technical level or particular threshold of injury or impairment symptom.

[7] **Negligence**
Necessity and Existence of Injury
Negligence
Grounds and Conditions Precedent
272 Negligence
272XIV Necessity and Existence of Injury
272k460 In general
272 Negligence
272XVIII Actions
272XVIII(A) In General
272k1503 Grounds and Conditions Precedent
272k1504 In general
Florida common law does not and has never required an impairment or a particular manifestation of injury according to some arbitrarily adopted level before a negligence cause of action accrues.

1 Cases that cite this headnote

[8] **Negligence**
Particular cases
Products Liability
Nature of Injury or Damage
Products Liability
Asbestos

272 Negligence
272XIV Necessity and Existence of Injury
272k462 Particular cases
313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak155 In general
313A Products Liability
313AIII Particular Products
313Ak201 Asbestos

Asbestos fibers which were inhaled by, and which became embedded in lungs of, plaintiffs without their knowledge or consent was an actual injury that was inflicted upon their bodies, as required to recover for damages resulting from exposure to asbestos against various defendants; common law of Florida did not require individuals who had suffered an injury to meet an arbitrarily drawn threshold of physical impairment for a cause of action to accrue.

[9] **Statutes**
⇐ Prospective Construction

Statutes
⇐ Express retroactive provisions

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 In general
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 Express retroactive provisions

To determine if a statute may be applied retroactively, the court must ascertain whether the legislature intended for the statute to apply retroactively; if such an intent is clearly expressed, the court must determine whether retroactive application would violate any constitutional principles.

[10] **Constitutional Law**
⇐ Torts and Personal Injuries

Negligence
⇐ Constitutional, statutory and regulatory provisions

Products Liability
⇐ Retroactivity

Products Liability
⇐ Asbestos

Statutes
⇐ Personal injuries

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4418 Torts and Personal Injuries
92k4419 In general
272 Negligence
272I In General
272k203 Constitutional, statutory and regulatory provisions
313A Products Liability
313AI In General
313Ak101 Constitutional and Statutory Provisions
313Ak104 Retroactivity
313A Products Liability
313AIII Particular Products
313Ak201 Asbestos
361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.24 Validity of Particular Retroactive Statutes
361k278.35 Personal injuries

Asbestos and Silica Compensation Fairness Act section providing that particular physical impairment symptoms were an essential new element of asbestos cause of action, a requirement that never existed before Act's enactment, could not be retroactively applied to plaintiffs' asbestos-related claims for damages consistent with due process clause of State Constitution; retroactive application destroyed plaintiffs' vested property interest to pursue an action based on asbestos-related injuries, there was no alternative remedy, and plaintiffs' rights simply vanished; disapproving of *DaimlerChrysler Corporation v. Hurst*, 949 So.2d 279. West's F.S.A. Const. Art. 1, §§ 2, 9; West's F.S.A. § 774.204(1, 2).

1 Cases that cite this headnote

[11] **Statutes**
⇐ Civil remedies and procedure

361 Statutes

361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(7) Civil remedies and procedure
Portions of Asbestos and Silica Compensation Fairness Act that violated due process clause of State Constitution when retroactively applied to plaintiffs who had a vested right to sue for damages for asbestos-related disease under the common law could not be severed from the remainder of Act, and therefore the Act as a whole failed as applied to plaintiffs. West's F.S.A. Const. Art. 1, §§ 2, 9; West's F.S.A. § 774.204.

1 Cases that cite this headnote

West Codenotes

Unconstitutional as Applied
West's F.S.A. § 774.204

Held Unconstitutional as Not Severable
West's F.S.A. §§ 774.201, 774.202, 774.203, 774.205, 774.206, 774.207, 774.208, 774.209.

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Opinion

LEWIS, J.

This case is before the Court on appeal from *Williams v. American Optical Corporation*, 985 So.2d 23 (Fla. 4th DCA 2008), in which the Fourth District Court of Appeal held that the Asbestos and Silica Compensation Fairness Act (the Act) is unconstitutional as applied to the Appellees. In its decision, the Fourth District also certified conflict with the decision of the Third District Court of Appeal in *DaimlerChrysler Corporation v. Hurst*, 949 So.2d 279 (Fla. 3d DCA 2007). *See Williams*, 985 So.2d at 32. This Court has jurisdiction pursuant to article V, sections 3(b)(1) and 3(b)(4) of the Florida Constitution.

BACKGROUND

Procedural History

In the decision below, the Fourth District Court of Appeal "cobbled" together multiple asbestosis-litigation cases and summarized the relevant facts as follows:

> ***123** Litigation in Florida state courts involving asbestos contamination has been considerable and persistent for a number of years. Prompted by that, the Florida Legislature decided to enact the Florida Asbestos and Silica Compensation Fairness Act, which became effective in 2005.[n.1] The Act made significant changes to the cause of action for damages resulting from an exposure to asbestos. The issue we confront involves the nature of those changes.

N.1 *See* Ch.2005–274, § 10, Laws of Fla. The Act is codified at Chapter 774, Part II, Florida Statutes (2007).

> Before the Act was adopted, all of the plaintiffs in these cases [collectively Appellees] had filed actions for damages based on various degrees of asbestosis—that is, interstitial lung disease resulting from asbestos exposure and pleural thickening. According to plaintiffs, when they filed their lawsuits before the Act's adoption it was not necessary to establish that any malignancy or physical impairment had already resulted from their contraction of the disease asbestosis. Instead, they claim, it was merely necessary for them to show that they had suffered an injury from an asbestos-related disease.
>
> > 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. Plaintiffs' asbestosis claims were dismissed for failing to meet the requirements of the Act. They challenge the Act on the grounds that by this legislation the government of Florida has taken from them a personal right in a cause of action for money damages arising from the exposure to asbestos even if the injury has not yet become malignant or caused any physical impairment.
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> *Williams*, 985 So.2d at 25–26 (footnote omitted). The Fourth District framed the dispositive issue presented as: "Can [the Act] be retroactively applied to prejudice or defeat causes of action already accrued and in litigation?" *Id.* at 25.

[1] **[2]** The Fourth District properly noted that citizens have personal rights under the Florida Constitution to acquire, defend, and keep property free from the claims of government and to vindicate those rights in courts of law. *See id.* at 26. The district court explained that a cause of action constitutes an intangible property right that is grounded in tort. *See id.* Retroactive legislation that impacts property rights is constitutionally invalid where "vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated." *Id.* at 27 (quoting *McCord v. Smith*, 43 So.2d 704, 709 (Fla.1949)).

[3] The district court stated that when a cause of action accrues, it becomes a substantive vested right. *See id.* at 27. However, whether legislation may affect a vested right to a particular cause of action is dependent on "the stage the right has attained when the legislation is enacted." *Id.* The Fourth District concluded that where a right of action has already accrued, new legislation enacted after that accrual which substantively affects the cause of action may not be retroactively applied to that cause of action. *See id.* at 28.

Based upon this conclusion, the Fourth District next considered whether prior to the Act, Florida law recognized a cause of ***124** action for damages arising from asbestosis without any physical impairment or the presence of cancer. See *id.* at 28. The Fourth District concluded that case law from this Court and the Third District Court of Appeal clearly established that prior to the Act, emotional effects from contracting asbestosis were actionable under Florida law even though no physical impairment or cancer had resulted. *See id.* The district court recognized this Court's prior precedent that in cases where an alleged injury is a "creeping-disease," such as asbestosis, the action accrues when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of a causal relationship to the product. *See id.* at 29 (quoting *Celotex Corp. v. Copeland*, 471 So.2d 533, 539 (Fla.1985)). The district court rejected the asbestos industry's contention that the causes of action of those manifesting injury were a mere expectancy and not a vested cause of action. *See id.* at 30. Instead, the Fourth District explained that the Appellees had alleged a previous exposure to asbestos which resulted in the disease of asbestosis, and that the disease had manifested itself in some way. *See id.* at 30–31. As a result, the Fourth District concluded that for each of the Appellees, the cause of action had "passed from an expectation to the accrual of the right to sue for damages." *Id.* at 31.

The Fourth District held that the Act could not be constitutionally applied to eliminate any existing vested property rights in the asbestos-related actions that were pending when the Act became effective. *See id.* at 32. The district court certified conflict with the decision of the Third District Court of Appeal in *DaimlerChrysler Corporation v. Hurst*, 949 So.2d 279 (Fla. 3d DCA 2007), "to the extent that it ... stand[s] 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 malignancy." *Williams*, 985 So.2d at 32.

The decision of the Fourth District is now before this Court for review.

The Asbestos and Silica Compensation Fairness Act

The Act was created by chapter 2005–274, Laws of Florida. The preamble to the legislation provides multiple statements with regard to asbestos litigation, and section 774.202, Florida Statutes (2010), provides that the Act serves four purposes: (1) to give priority to "true" victims of asbestos (i.e., those claimants who can demonstrate "actual physical impairment" caused by asbestos exposure); (2) to preserve the rights of any individuals who have been exposed to asbestos to pursue compensation should they become "impaired" in the future; (3) to enhance the ability of the judicial system to supervise and control asbestos litigation; and (4) to conserve the resources of defendants to permit compensation to cancer victims and individuals who are currently "physically impaired," while securing the right to similar compensation to individuals who may suffer "physical impairment" in the future. *See* § 774.202, Fla. Stat. (2010).

Section 774.204(1), Florida Statutes (2010), provides that "[p]hysical impairment of the exposed person, to which asbestos ... exposure was a substantial contributing factor" is an essential element of an asbestos claim. Subsection (2) provides that "[a] person may not file or maintain a civil action alleging a nonmalignant 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." The subsection details the highly technical elements of a prima facie claim ***125** for impairment. For example, one element is:

> 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:
>
> 1. Total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;
>
> 2. Forced vital capacity below the lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal; or
>
> 3. A chest X ray showing small, irregular opacities (s, t, u) graded by a certified B-reader as at least 2/1 on the ILO scale.

§ 774.204(2)(f), Fla. Stat. (2010).

Section 774.205(2), Florida Statutes (2010), provides that a plaintiff in a civil action alleging an asbestos claim must "include with the complaint or other initial pleading a written report and supporting test results constituting prima facie evidence of the exposed person's asbestos-related ... physical impairment." The Act states that "[a] diagnosis that states that the medical findings and impairment are 'consistent with' or 'compatible with' exposure to asbestos does not meet the requirements of this subsection." § 774.204(2)(h), Fla. Stat. (2010). Section 774.205(2) also provides that for any plaintiff who had a claim pending on the effective date of the Act (which includes all of the Appellees), the report and test results must be filed at least thirty days before a trial date may be set.

Section 774.206(1), Florida Statutes (2010), provides that the statute of limitations does not begin to run on an asbestos claim arising out of a nonmalignant condition "until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that he or she is physically impaired by an asbestos-related ... condition."

Finally, the portion of the session law that provides the effective date of the Act states:

> This act shall take effect July 1, 2005. Because the act expressly preserves the right of all injured persons to recover full compensatory damages for their loss, it does not impair vested rights. In addition, because it enhances the ability of the most seriously ill to receive a prompt recovery, it is remedial in nature. Therefore, the act shall apply to any civil action asserting an asbestos claim in which trial has not commenced as of the effective date of this act.

Ch.2005–274, § 10, at 2579, Laws of Fla. As previously noted, "[b]efore the Act was adopted, all of the plaintiffs in these cases had filed actions for damages based on various degrees of asbestosis...." *Williams*, 985 So.2d at 26. The parties do not dispute that, as of the effective date of the Act, trial had not commenced in any of the Appellees' cases.

ANALYSIS

[4] A district court decision declaring a statute unconstitutional is subject to de novo review by this Court. *See Fla. Dep't of Children & Families v. F.L.*, 880 So.2d 602, 607 (Fla.2004). Article I, section 2 of the Florida Constitution guarantees to all persons the right to acquire, possess, and protect property. Section 9 of the same article provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The United States Supreme Court has clearly held that a cause of action is "a ***126** species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Similarly, this Court has explained that "[o]nce the defense of the statute of limitations has accrued, it is protected as a property interest just as *the plaintiff's right to commence an action is a valid and protected property interest.*" *Wiley v. Roof*, 641 So.2d 66, 68 (Fla.1994) (emphasis supplied) (citing *Starnes v. Cayouette*, 244 Va. 202, 419 S.E.2d 669 (1992)); *see also R.A.M. of South Fla., Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1220 (Fla. 2d DCA 2004) ("[O]nce a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right."), *review denied*, 895 So.2d 406 (Fla.2005).

Vested Rights

[5] The parties strenuously debate whether the Appellees have a vested property interest in their right to pursue an action based on asbestos-related injuries. Having reviewed the parties' arguments and Florida common law, we conclude that the Appellees do indeed possess such a vested right. According to the United States District Court for the Southern District of Florida:

> It is axiomatic that a cause of action for negligence, or products liability, or breach of warranty does not accrue until the complaining party sustains some type of damage. A cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred. *Colhoun v. Greyhound Lines, Inc.*, 265 So.2d 18 (Fla.1972). In Florida, the "last act" is discovery of the damage.

Wildenberg v. Eagle–Picher Industries, 645 F.Supp. 29, 30 (S.D.Fla.1986); *see also F.D.I.C. v. Stahl*, 89 F.3d 1510, 1522 (11th Cir.1996) ("Florida courts have found that the limitations period does not begin to run until a plaintiff knew or should have known of the injury.").

Prior to the Act, claimants with an asbestos-related disease unquestionably had a right under the common law to seek redress against the persons or entities that allegedly caused injury to them. *See, e.g., Owens–Corning Fiberglass Corp. v. Corcoran*, 679 So.2d 291, 291–92 (Fla. 3d DCA 1996) (affirming judgment in favor of plaintiff for "injury because of his exposure to asbestos"); *W.R. Grace & Company–Conn. v. Pyke*, 661 So.2d 1301, 1304 (Fla. 3d DCA 1995) (affirming judgment in favor of plaintiff in asbestos personal injury action, but reversing award for loss of future earning capacity); *Eagle–Picher Industries, Inc. v. Cox*, 481 So.2d 517, 519, 530 (Fla. 3d DCA 1985) (affirming "substantial" money judgment against manufacturer of asbestos products); *Brown v. Armstrong World Industries, Inc.*, 441 So.2d 1098, 1099 (Fla. 3d DCA 1983) (reversing summary judgment because whether plaintiff should have known that he had a cause of action against manufacturer for asbestos-related injuries was a genuine issue of material fact).

With regard to asbestos-related diseases, we have held that an action accrues when the accumulated effects of the substance manifest in a way which supplies some evidence of the causal relationship to the manufactured product. *See Celotex Corp. v. Copeland*, 471 So.2d 533, 539 (Fla.1985). The parties diverge in their interpretation as to what constitutes a "manifestation" of the disease. The Appellants contend that ultimate physical impairment symptoms as set forth in the statutory restrictions, such as reduced lung capacity and difficulty breathing, must be present before a disease is considered manifested. Conversely, the Appellees contend that actual ***127** changes in the lung constitute injury and manifestation for accrual purposes.

Prior to the Act, the common law did not require any particular symptoms to constitute "manifestation" in connection with asbestos injuries. Case law clearly demonstrates that particular physical symptoms were not required, and changes in the lung evidencing asbestos-related disease were sufficient to trigger a cause of action. In *Celotex Corp. v. Meehan*, 523 So.2d 141 (Fla.1988), this Court explained:

> Under Florida's discovery standard, the cause of action does not accrue, for limitations purposes, until the injured party discovers or has a "duty to discover the act constituting an invasion of his legal rights." *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla.1969). Consequently, *a medical diagnosis which revealed that the party was suffering from asbestos-related diseases would be the event that triggered Florida's statute of limitations* unless it was shown that the party should have been aware of a cause of action before that time. In Florida, the statute does not begin to run until such a discovery occurs.

Id. at 145 (emphasis supplied). Thus, prior to the Act, a *diagnosis of asbestos-related disease* triggered the accrual of a cause of action. Contrary to the assertion of the asbestos industry and the dissent, the development of particular impairment symptoms as described in the Act has *never* been the legal factor in determining "manifestation" or accrual under Florida law. Accordingly, the claim of the asbestos industry that the Act is merely a codification of the common law and physical impairment symptoms have always been required for an asbestos-related disease to have "manifested"—a position that the dissent adopts—is patently incorrect.

[6] Moreover, the assertion that a minimum level of injury or damage is required to "open the courthouse doors" for a plaintiff to seek redress against a tortfeasor for negligence is in direct contravention of the common law. As recently as 2007, this Court explained the common law elements of a negligence cause of action:

> The claimant must first demonstrate that the defendant owed a "duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003) (quoting *Prosser and Keeton on the Law of Torts* § 30, at 164 (W. Page Keeton et al. eds., 5th ed. 1984)). Second, the claimant must establish that the defendant failed to conform to that duty. *Id.* Third, there must be "[a] reasonably close causal connection between the [nonconforming] conduct and the resulting injury" to the claimant. *Id.* Fourth, the claimant must demonstrate *some actual harm*. *Id.*

Williams v. Davis, 974 So.2d 1052, 1056 (Fla.2007) (alterations in original) (emphasis supplied). The phrase "some actual harm" does not require a precise technical level or particular threshold of injury or impairment symptom that a plaintiff must satisfy to file an action. *Id.*; *see also Kneeland v. Tampa Northern R. Co.*, 94 Fla. 702, 116 So. 48, 48 (1927) ("In actions where negligence is the basis of recovery, it is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing *the injury*, coupled with an averment that they were negligently done, will be sufficient." (emphasis supplied)).

Further, the contention of the Appellants, also advanced by the dissent, that a plaintiff must exhibit particular physical ***128** impairment symptoms of illness or injury for a cause of action to have vested is belied by our early case law. In *Lyng v. Rao*, 72 So.2d 53, 54 (Fla.1954), lightning struck a building in which the plaintiff worked. Although she could not recall if she was struck by the lightning, after the incident she experienced pain in her chest and "was stricken" to the extent that she was hospitalized. *Id.* at 55. Initially, her request for Workmen's Compensation benefits was denied because the only evidence of traumatic injury was based on the plaintiff's own statements. *See id.* at 55–56. This Court reversed the denial of benefits and stated;

> [T]he Deputy Commissioner fell into error because the effect of his construction of the word "trauma" limited it to an outwardly visible bodily injury; a wound visible to the eye such as a cut, abrasion or the sort. Trauma is defined in Black's Law Dictionary (4th ed. 1951) as, "In medical jurisprudence. A wound; any injury to the body caused by external violence." In Webster's Collegiate Dictionary, (5th ed. 1943) the word is defined as, "An injury, wound, shock or *the resulting condition or neurosis*." (Emphasis added.) *We find no definition which limits the word to a visible injury. Many serious accidental injuries—especially those affecting internal organs—are not visible to the eye,* and yet we know that such constitute a great part of compensable injuries.

Id. at 56 (emphasis supplied). The Court later relied upon *Lyng* in *Clark v. Choctawhatchee Electric Cooperative*, 107 So.2d 609, 611–12 (Fla.1958), when it held that a plaintiff who suffered an electric shock could recover for *both* bodily injury and emotional trauma even though the plaintiff exhibited no signs of burns. In reaching its determination, this Court opined that "too much emphasis has been placed on the absence from the appellant's body of trauma such as burns, bruises or scars." *Id.* at 612.

[7] Moreover, Florida common law does not and has never required an impairment or a particular manifestation of injury

according to some arbitrarily adopted level before a cause of action accrues. In *Hagan v. Coca–Cola Bottling Company*, 804 So.2d 1234, 1241 (Fla.2001), this Court held that an action for emotional distress could be maintained by plaintiffs who drank from a bottle that appeared to contain a used condom even though there was no accompanying discernable, particular physical injury or some level of impairment. Similarly, in *Way v. Tampa Coca Cola Bottling Co.*, 260 So.2d 288, 289 (Fla. 2d DCA 1972), a man drank from a soda bottle and, after finding what appeared to be a rat inside, felt nauseous and vomited. The Second District Court of Appeal held that the man could maintain an action against the manufacturer even though he suffered no lingering physical injury or particular continuing impairment, but only a mental reaction, to the foreign object in the bottle. *Id.* at 290.

The dissent evinces a principle totally foreign to Florida common law when it asserts that there has never been a right of recovery in Florida for an asbestos-related injury unless a certain level of physical impairment has been demonstrated. First, this Court in *Meehan* specifically held that a cause of action accrued upon the *diagnosis* of an asbestos-related disease. There was absolutely no mention of any requirement that plaintiffs meet and surpass a baseline level of impairment. *See Meehan*, 523 So.2d at 145. Further, it is not necessary for this Court to have previously addressed the specific concept of how asbestos invades and damages the body. Legal precedent and the common law principles clearly demonstrate and cover that an individual who sustains an ***129** injury due to the wrongful conduct of another —regardless of the particular level of physical symptoms or impairment—may maintain a cause of action against the person or entity that allegedly inflicted the injury if injury has occurred. *See Clark*, 107 So.2d at 611–12; *Hagan*, 804 So.2d at 1241. If there is no injury, there is simply no action; however, if there is proof of injury, there is no requirement of any particular level of impairment.

[8] Here, a foreign substance—asbestos fibers—were inhaled and became embedded in the lungs of the plaintiffs without their knowledge or consent. This, like the electric shock suffered by the plaintiff in *Clark*, constitutes an actual injury that has been inflicted upon the bodies of the plaintiffs. To contend, as the dissent does here, that a certain level of impairment is absolutely necessary for a cause of action to accrue is incorrect and contrary to longstanding Florida common law. Instead of stating that our decision today adopts an unsupported, "expansive concept" of harm, *see* dissenting op. at 134, the dissent should simply state the truth—that it disagrees with our prior precedent and believes the rights of Floridians to recover for negligently inflicted injuries should be significantly restricted based not upon injury but upon a schedule of impairments adopted by the legislative branch.

When taken to its logical extreme, how broadly would the dissent interpret this elevated requirement to preclude the ordinary citizen from maintaining an action for an injury that has been suffered? If a person swallows a hypodermic needle that was concealed in a soda can, would that person be precluded from filing an action until he or she exhibits visible symptoms of major internal injuries, such as vomiting blood, or a debilitating virus? If a person is exposed to noxious fumes or toxic chemicals and develops a potentially fatal, but slowly progressing disease, and that person knows he or she is suffering from a degenerative disease and is slowly dying, must that person wait until a certain type of symptom or a specific level of impairment is demonstrated before seeking legal redress against the person or entity who allegedly caused this injury?

The dissent mistakes and confuses the well-established concept of *injury* under Florida common law for a more strenuous concept of a legislative schedule of *impairment*. Contrary to the assertion of the dissent, the common law of Florida has *never* required individuals who have suffered an injury to meet an arbitrarily drawn threshold of physical impairment for a cause of action to accrue. Were the opposite the case, and if the common law did operate on the basis of impairment rather than injury, cruel and arbitrary distinctions could be drawn to preclude severely injured citizens from maintaining actions against those who are responsible.

Although both the Appellants and the dissent contend that the Appellees' injuries are negligible or minor and that they should be required to meet an elevated threshold (defined as "permanent impairment" under the Act) to pursue a claim, this has never been required under the common law. Instead, if a defendant challenges the severity or even the existence of damages, the common law prescribes that it is a matter for the jury to decide whether there has in fact been an injury and damage. For example, in *McIntyre v. McCloud*, 334 So.2d 171 (Fla. 3d DCA 1976), the Third District Court of Appeal stated:

> In this personal injury action, the jury found from the evidence that the plaintiff-appellant did not sustain the injuries alleged, *which determination is unquestionably within the jury's*

> *province*. Even assuming arguendo, that a ***130** "wrong" (in the form of negligence) was perpetrated by the defendants on the plaintiff, it is, nonetheless, well-established in the common law that there is no valid cause of action where there is shown to exist, at the very most, a "wrong" without "damage."

Id. at 171–72 (emphasis supplied); *see also Braddock v. Seaboard Air Line R.R. Co.*, 80 So.2d 662, 667 (Fla.1955) (quoting relevant jury instruction on pain and damages as providing, in relevant part, "It would be your duty to determine from the evidence what sort of injuries the plaintiff received, *if any*, their character as producing or not producing pain, the mildness or the intensity of the pain, its possible duration, and allow such sum as would fairly compensate her for her pain and suffering, *if any* ..." (emphasis supplied) (quoting *Toll v. Waters*, 138 Fla. 349, 189 So. 393, 395 (1939))); *Leister v. Jablonski*, 629 So.2d 981, 981 n. 1 (Fla. 5th DCA 1993) ("While common experience tells us that there was some initial pain involved in this BB gun shooting, *whether it was sufficient to justify compensable damages seems properly to be a jury question*." (emphasis supplied)).

In the present case, it is clear that the main purpose of the Act is to alter the common law elements for an action arising from asbestos-related disease. The preamble to the Act notes that "the vast majority of asbestos claims are filed by individuals who allege that they have been exposed to asbestos and who may have some physical sign of exposure but who suffer no present asbestos-related impairment." Ch.2005–274, preamble, at 2564, Laws of Fla. Further, one of the stated purposes of the Act is to give priority to the "true" victims of asbestos. *See* § 774.202(1), Fla. Stat. (2010). These statements demonstrate that the Act is intended to reverse years of common law precedent—precedent that the dissent fails to consider and address—holding that a diagnosis of asbestos-related disease and injury, without regard to any particular threshold level of impairment suffered, constitutes an accrued cause of action that provides citizens vested rights to file actions based on the injuries.

Here, medical and X-ray reports which are included in the appendix of the Appellants' initial brief confirm that each of the Appellees suffers from actual lung injuries that are consistent with asbestos-related disease. Based upon well-established common law precedent, we hold that the Appellees here had an accrued cause of action for the injuries they allegedly sustained due to asbestos exposure, and these causes of action constituted a property interest in which the Appellees had a vested right under article I, section 2 of the Florida Constitution. *See Wiley*, 641 So.2d at 68; *Meehan*, 523 So.2d at 145.

Retroactivity

[9] **[10]** Having determined that the Appellees have vested causes of action, we must next consider whether the Act may be applied retroactively to those causes of action. A two-part test is utilized to determine whether a statute may be applied retroactively:

> First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles. *See Metro. Dade County v.Chase Fed. Hous. Corp.*, 737 So.2d 494, 499 (Fla.1999).

Menendez v. Progressive Exp. Ins. Co., Inc., 35 So.3d 873, 877 (Fla.2010); *see also Chase Fed. Hous. Corp.*, 737 So.2d at 499 ("[T]he retroactive operation of statutes can be harsh and implicate due process concerns."). The Act specifically provides that it is to apply to "any civil action ***131** asserting an asbestos claim in which trial has not commenced as of the effective date of this act." Ch.2005–274, § 10, at 2579, Laws of Fla. Thus, express language in the chapter law creating the Act demonstrates that the Legislature intended that the Act apply retroactively. Accordingly, the main issue we must determine is whether retroactive application of the Act violates the Florida Constitution. As previously discussed this Court will not apply a statute retroactively if it "impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla.1995); *see also McCord v. Smith*, 43 So.2d 704, 708–09 (Fla.1949) (noting that a retroactive provision of legislation is invalid where it adversely affects or destroys vested rights).

The session law creating the Act announces that its provisions are remedial in nature, and do not impact vested rights. *See* Ch.2005–274, § 10, at 2579, Laws of Fla. However, we have previously explained that "[j]ust because the Legislature labels something as being remedial ... does not make it

so." *Laforet*, 658 So.2d at 61. Here, the Act provides that particular physical impairment symptoms are now an essential new element of an asbestos cause of action, a requirement that never existed before. *See* § 774.204(1), Fla. Stat. (2010). Further, to establish impairment, the statute would require a claimant to demonstrate "a medical condition to which asbestos was a *substantial* contributing factor." *Id.* § 774.204(2) (emphasis supplied).

***Group A*: Claim has not accrued**	***Group B*: Claim has accrued**
Individuals who have not yet been diagnosed with an asbestos-related disease.	Individuals who have been diagnosed with an asbestos-related disease.

Pursuant to this Court's decision in *Meehan*, those individuals who had been diagnosed with asbestos-related disease (Group B) had accrued causes of action for damages that they allegedly suffered due to asbestos exposure. *See Meehan*, 523 So.2d at 145. On the other hand, claimants under Group A did not have an accrued cause of action.

Subsequent to the Act, the prior members of Group B are now split into two separate categories:

***Group A*: Claim has not accrued**	***Group B–1*: Claim has accrued**	***Group B–2*: Claim has accrued**
Individuals who have not yet been diagnosed with an asbestos-related disease.	Individuals who have been diagnosed with an asbestos-related disease but cannot satisfy the standard for impairment under the Act.	Individuals who have been diagnosed with an asbestos-related disease and can satisfy the standard for impairment under the Act.

The Appellees concede that they fall under Group B–1 and cannot satisfy the restrictive standards for symptoms of impairment required by the Act to maintain an action for an asbestos-related disease. While claimants in Group B–1 previously had an accrued cause of action, which is a form of constitutionally protected property, *see Wiley*, 641 So.2d at 68; *Logan*, 455 U.S. at 428, 102 S.Ct. 1148, subsequent to the Act, their causes of action simply no longer exist.

Additionally, many of the claimants who fall under Group B–1 *do* manifest symptoms ***132** of their asbestos-related disease and *are* "impaired" as that term is commonly understood. However, because these claimants cannot demonstrate the *specific* physical impairment symptoms that are mandated by the Act, their vested causes of action would be extinguished, and no redress would exist for their injuries. It is truly ironic that many of the injured persons in the cases relied upon by the dissent in support of its incorrect assertion that a certain level of physical impairment has always been required under the common law for a cause of action to accrue might not be able to satisfy the rigorous requirements of the new Act if they attempted to file their claims today. For example, in *Brown v. Armstrong World Industries, Inc.*, 441 So.2d 1098, 1099 (Fla. 3d DCA 1983), the plaintiff complained of shortness of breath and was diagnosed with an asbestos-related disease. In *Meehan*, one of the plaintiffs experienced "bronchial problems," which resulted from asbestosis. 523 So.2d at 147. The dissent fails to consider or accommodate the reality that probably neither of these injured persons could demonstrate the highly technical and elevated level of "physical impairment" that is required under the new Act. *See* § 774.204, Fla. Stat. (2010). If not, these previously existing rights to file actions for recovery based upon an asbestos-related disease and injury would have been extinguished. In this manner, the Act indubitably operates to destroy vested rights for all claimants who are members of Group B–1. Thus, even though the preamble to the Act contends that it does not impair vested rights, the contrary is actually true as a matter of law. [1]

Application of the Act to the Appellees does not merely impair their vested rights—it destroys them. There is no alternative remedy. The vested rights simply vanish. Prior to the July 1, 2005, effective date of the Act, potential asbestos claimants fell into one of two categories:

1 Moreover, the Act substantively impacts even those claimants whose causes of action accrued prior to the Act

> that *can* satisfy the heightened impairment requirement (i.e., claimants who fall under group B–2). Prior to the Act, these injured persons were not burdened with establishing a minimum level of particular impairment. Now, they too must meet the new standard of impairment articulated in the Act to avoid dismissal of their cases. We have held that "a statute that achieves a 'remedial purpose by creating substantive new rights or *imposing new legal burdens* ' is treated as a substantive change in the law." *Smiley v. State*, 966 So.2d 330, 334 (Fla.2007) (emphasis supplied) (quoting *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla.1994)).

This Court has invalidated retroactive applications of statutes that have attempted to substantively alter the existing law. As recently as February 2010, this Court held that a statutory amendment that required the filing of a notice of intent to litigate as a condition precedent to the initiation of an action for overdue insurance benefits constituted a substantive change in the law which could not be retroactively applied to insureds who had received an insurance contract before the effective date of the statute. *See Menendez*, 35 So.3d at 879–80. We explained the statute as it existed before and after the amendment as follows:

> Before the addition of the statutory presuit notice provision, section 627.736 did not require an insured to provide notice to an insurer before filing an action for overdue benefits. PIP benefits became overdue if the insurer failed to pay within thirty days after receiving notice from the insured of the fact of a covered loss and the amount of such loss. § 627.736(4)(b), Fla. Stat. (2000). Any overdue payment was subject to a ten percent simple interest rate per year. § 627.736(4)(c), Fla. Stat. (2000). However, if the insurer had reasonable proof to establish that it was not responsible for the payment, the payment was not overdue. § 627.736(4)(b), Fla. Stat. (2000).
>
> In contrast, the statute as amended in 2001 requires an insured to provide a ***133** presuit notice of intent to initiate litigation and provides an insurer additional time to pay an overdue claim. § 627.736(11)(a), (d), Fla. Stat. (2001). Second, the amendment mandates that the payment from the insurer must include interest and penalties not exceeding $250. § 627.736(11)(d), Fla. Stat. (2001). Third, if the insurer pays within the additional time provided by the statute, the payment precludes the insured from bringing suit for late payment or nonpayment and shields the insurer from a claim for attorneys' fees. *Id.* Finally, the amendment tolls the statute of limitations. § 627.736(11)(e), Fla. Stat. (2001).

Id. at 878. We concluded that the amended statute was substantive in nature because it (1) potentially relieved an insurer of an obligation to pay attorneys' fees; (2) created a "safe harbor" that allowed an additional period of time for an insurer to pay a claim; and (3) postponed the ability of an insured to bring suit for overdue benefits. *See id.* at 879. Based upon this conclusion, this Court held that retroactive application of the statute was impermissible. *See id.* at 880.

Moreover, this Court has held that statutes that operate to abolish or abrogate a preexisting right, defense, or cause of action cannot be applied retroactively. *See, e.g., Wiley*, 641 So.2d at 68–69 (statutory amendment which allowed victim to commence an action for damages which was previously barred by statute of limitations violated due process clause of Florida Constitution; "[o]nce an action is barred, a property right to be free from a claim has accrued"); *Agency for Health Care Admin. v. Assoc. Industries of Fla., Inc.*, 678 So.2d 1239, 1254 (Fla.1996) (portion of legislative act that abolished statute of repose for claims that were already barred was unconstitutional in violation of due process (citing *Wiley*, 641 So.2d at 68)); *Rupp v. Bryant*, 417 So.2d 658, 665–66 (Fla.1982) (statutory amendment that would abolish plaintiff's right to recover against state officers, employees, and agents for negligent acts could not be retroactively applied).

[11] Retroactive application of the Act here would operate to completely abolish the Appellees' vested rights in accrued causes of action for asbestos-related injury. For this reason, we conclude that the Act cannot be constitutionally applied to them.[2] In reaching this conclusion, we note that allowing the Appellees to proceed with their causes of action will not automatically result in millions of dollars in judgments against the Appellants. The Appellees must demonstrate that the Appellants caused whatever injuries the Appellees are alleged to have suffered, the extent of the injury must be determined, and a jury must determine the amount of damages, if any, as compensation for loss.

2 Although not argued by the parties, we agree with the analysis of the Fourth District Court of Appeal that the unconstitutional portions of the Act cannot be severed from the remainder, and the Act as a whole must fail as applied to the Appellees. *See Williams*, 985 So.2d at 32.

CONCLUSION

Based on the foregoing, we affirm the holding of the Fourth District in *Williams v. American Optical Corp.*, 985 So.2d 23 (Fla. 4th DCA 2008), that retroactive application of the Act to the Appellees, and other claimants who had accrued causes of action for asbestos-related disease pending on the effective date of the Act, is impermissible because it violates the due process clause of the Florida Constitution. We disapprove the decision of the Third District in *DaimlerChrysler Corporation v.* ***134** *Hurst*, 949 So.2d 279 (Fla. 3d DCA 2007), to the extent it is inconsistent with this opinion.

It is so ordered.

PARIENTE, QUINCE, LABARGA, and PERRY, JJ., concur.

CANADY, C.J., dissents with an opinion, in which POLSTON, J., concurs.

CANADY, C.J., dissenting.

Because there was no settled law in Florida establishing a right of recovery on asbestos-related claims without a showing of impairment of health, the application of the Asbestos and Silica Compensation Fairness Act (the Act) in the plaintiff appellees' cases does not abrogate any vested rights. No case decided in Florida prior to the adoption of the Act recognized a right of recovery for a plaintiff asserting an asbestos-related claim whose health had not been adversely affected. The common law did not establish that a cognizable injury based on asbestos exposure occurs without the impairment of the plaintiff's health. I therefore dissent from the majority's holding that the Act interferes with vested causes of action.

None of the cases relied on by the majority recognize any asbestos-related claim by a plaintiff whose health was unimpaired. In certain of the cases relied on by the majority, the nature of the asbestos-related injury claimed by the plaintiff is simply not discussed. *See Owens–Corning Fiberglass Corp. v. Corcoran*, 679 So.2d 291 (Fla. 3d DCA 1996); *W.R. Grace & Co.-Conn. v. Pyke*, 661 So.2d 1301 (Fla. 3d DCA 1995). In other cases relied on by the majority, however, it is clear that the plaintiff claimed to be *suffering* from the effects of asbestos exposure and relied on symptoms of disease to establish the tort claim. In *Brown v. Armstrong World Industries, Inc.*, 441 So.2d 1098, 1099 (Fla. 3d DCA 1983), the court states that the plaintiff testified at trial to visiting physicians and "complaining of shortness of breath." The *Brown* court makes further reference to the plaintiff's "physical disability." *Id.* In *Eagle–Picher Industries, Inc. v. Cox*, 481 So.2d 517, 529 (Fla. 3d DCA 1985), the court's lengthy analysis is punctuated by the observation that the plaintiff's "asbestosis certainly provided him with a chronic, painful and concrete reminder that he has been *injuriously* exposed to a substantial amount of asbestos." The plaintiff in *Celotex Corp. v. Copeland*, 471 So.2d 533, 534 (Fla.1985), had "asbestos-related cancer." Similarly, two of the plaintiffs in *Celotex Corp. v. Meehan*, 523 So.2d 141, 147 (Fla.1988), had been diagnosed with mesothelioma; the third plaintiff was diagnosed with "bronchial problems." In all these cases, there is not a hint of any plaintiff recovering for mere "changes in the lung." Majority op. at 127. The case law provides no basis for concluding that prior to enactment of the Act it was settled in Florida law that a cause of action existed for an asbestos exposure plaintiff whose health had not suffered as a consequence of the exposure.

The majority errs in adopting an expansive concept of cognizable harm that is unsupported not only by the Florida case law but also by general principles of tort law. The majority's divergence from general principles of tort law is illustrated by the definition of physical harm in the Third Restatement of Torts, which requires showing more than mere "changes in the lungs" to establish a cognizable injury. The restatement contains the following definition: " 'Physical harm' means the physical impairment of the human body ('bodily harm')... Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death." Restatement (Third) of Torts: Liability for ***135** Physical and Emotional Harm § 4 (2005). This definition limits physical harm to circumstances in which some ill effect exists. "[A]ny level of physical impairment is sufficient for liability," *id.* cmt. c, but changes in the body that have no ill effect are not sufficient to establish a legally cognizable bodily harm. A "change in the physical condition of a person's body" "counts as a harmful impairment" only if that change is "detrimental." *Id.* The Restatement Third definition is in line with the definition of "harm" in the Restatement Second. *See* Restatement (Second) of Torts § 7 cmt. b. (1965) ("Physical changes or alterations may be either beneficial, detrimental, or of no consequence to a person. In so far as physical changes have a detrimental effect on a person, that person suffers harm.").

This understanding of bodily harm has been applied in the context of asbestos litigation to deny recovery to

plaintiffs presenting claims similar to those at issue here. *See In re Hawaii Fed. Asbestos Cases*, 734 F.Supp. 1563, 1567 (D.Haw.1990) ("Plaintiffs must show a compensable harm by adducing objective testimony of a *functional impairment* due to asbestos exposure.... [T]he mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functional impairment is not enough."); *Owens–Illinois v. Armstrong*, 87 Md.App. 699, 591 A.2d 544, 561 (1991) ("[M]ere alteration of the pleura is [not] a legally compensable injury."), *aff'd in part and rev'd in part on other grounds*, 326 Md. 107, 604 A.2d 47 (1992); *Simmons v. Pacor, Inc.* 543 Pa. 664, 674 A.2d 232, 237 (1996) ("[A]symptomatic pleural thickening is not a compensable injury which gives rise to a cause of action.").

Recently, the Supreme Court of Ohio relied on this understanding of cognizable harm in rejecting a challenge to an Ohio statute similar to the Act. The court concluded that the plaintiff "has not established that the settled common law in Ohio permitted tort recovery for asymptomatic pleural thickening in asbestos exposure cases prior to the enactment of [the challenged statute]" and that the statute therefore did not interfere with vested rights. *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 897 N.E.2d 1118, 1126 (2008).

The United States Supreme Court has likewise recognized that asbestos-exposure claims are not cognizable where the plaintiff is not suffering from disease symptoms. In *Metro–North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 427, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997), the court held that a worker making a claim under the Federal Employers' Liability Act (FELA) based on asbestos exposure "cannot recover unless, and until, he manifests symptoms of a disease." The court's analysis of the statutory claim was based in significant part on "common-law precedent." *Id.* at 432, 117 S.Ct. 2113. Subsequently, in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 141, 123 S.Ct. 1210, 155 L.Ed.2d 261 (2003) (emphasis added), the court, applying the rule laid down in *Buckley*, recognized "*actionable injury* asbestosis caused by work-related exposure to asbestos" as a proper basis for a FELA claim. The court stated that asbestosis is a "chronic disease" with "symptoms includ [ing] shortness of breath, coughing, and fatigue." *Id.* at 141, 142 n. 2, 123 S.Ct. 1210. The court recognized that "[a]sbestosis is 'a chronic, painful and concrete reminder that [a plaintiff] has been *injuriously* exposed to a substantial amount of asbestos.' " *Id.* at 155–56, 123 S.Ct. 1210 (alteration in original) (quoting *Eagle–Picher*, 481 So.2d at 529). The court went on to note the distinction between "asymptomatic asbestos plaintiffs" and plaintiffs who have "suffered real physical harm," and specifically cited commentary ***136** "classifying plaintiffs with pleural thickening as asymptomatic." *Id.* at 156, 123 S.Ct. 1210. *Ayers* and *Buckley*—which rely on the common law—support the conclusion that there is no settled common law right for an asbestos-exposure plaintiff to recover for "changes in the lung" without accompanying impairment of health.

The decision of the Fourth District Court should be reversed.

POLSTON, J., concurs.

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