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IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE  
COUNTY, FLORIDA

THOMAS J. BONILLA and  
ANA BONILLA, his wife,

GENERAL JURISDICTION  
CASE NO.: 02-21139 CA 42

Plaintiff,

vs.

AMERICAN OPTICAL CORP., et. al.

Defendants.

**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS**

THIS CAUSE came before this Court on July 14, 2006 on motions to dismiss filed by defendants Flowserve Corporation, Certainteed Corporation and Union Carbide Corporation. The Court having reviewed the memoranda and having considered the arguments of counsel finds as follows:

1. Defendants' motions seek dismissal of plaintiffs' claims for failure to meet the requirements of the Asbestos and Silica Compensation Fairness Act ("The Act"), Florida Statutes, Chapter 774.201 et. seq. (2005). The Act, whose effective date was July 1, 2005, provides that all plaintiffs who file or maintain suits based on asbestos injury must submit specific medical records to defendants establishing that the plaintiff meets certain prima facie medical criteria of the statute. Because the Bonillas have not and, by their own admission, cannot submit medical documentation that satisfies the Act's criteria, the defendants assert that the plaintiffs' claims should be dismissed. The plaintiffs counter by arguing that the Act is unconstitutional since its retroactive application violates the due process clauses of the both the Florida and U.S. Constitutions.

2. This Court must determine whether the retroactive application of the Act unconstitutionally impairs the plaintiffs' vested rights. This is done by performing a two-part analysis: first, this Court must determine whether there is clear evidence that the legislature intended to apply the statute retroactively. *See Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999). Second, if this Court determines that retroactive application was intended, then the Court must determine whether retroactive application is constitutionally permissible. *Id.*

3. As to the first prong – which requires an analysis of the legislative intent – the language of the Act itself demonstrates that the legislature intended it to be retroactive.

This is because it requires even those plaintiffs whose claims had accrued and were pending at the time of enactment to comply with the additional burden of supplying prima facie medical evidence of impairment. Fla. Stat. § 774.204 (2). But this type of language alone is not sufficient to definitively determine retroactivity. Florida law states that “a statute is not deemed to operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment.” *Metropolitan Dade County*, 737 So. 2d at 499 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994)). Thus, in addition to reviewing the language of the statute for evidence of retroactivity, the Court must also ask whether the Act attaches new legal consequences to events completed prior to enactment. *Id.*

4. Here, the Act does give pre-enactment conduct a different legal effect from post-enactment conduct. Specifically, pre-enactment, the plaintiffs’ – whose cause of action accrued and was filed prior to the Act’s effective date – had the right to maintain their cause of action. Now, post-enactment, they have no such case since, according to the Act, they cannot “file or maintain” their cause of action unless they provide specific prima facie evidence that exposure to asbestos was a “substantial contributing factor” to Mr. Bonilla’s medical condition. Fla. Stat. § 774.204(2). This type of retroactive divestiture of rights is improper and is the opposite of a permissible retroactive, remedial statute which does not take away vested rights but instead “operate[s] in furtherance. . .of rights already existing.” *Department of Agric. and Consumer Services v. Bonanno*, 568 So. 2d 24, 30 (Fla. 1990) (citing *Cunningham v. State Plant Bd.*, 112 So. 2d 905 (Fla. 2d DCA 1959)).

5. Since there exists evidence of the statute’s retroactive nature in the form of the language of the Act itself as well as the effect of that language, this Court must next turn to the second prong of the test which asks whether the Act’s retrospective application is constitutionally permissible. *Metropolitan Dade County*, 737 So. 2d at 499. Retrospective legislation is not per se invalid. *Id.* at 503. “The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively.” *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). But even if there is legislative intent for retroactive application, the Florida Supreme Court has refused to apply a statute retroactively if the statute “impairs vested rights, creates new obligations, or imposes new penalties.” *Id.*; *Metropolitan Dade County*, 737 So. 2d 499.

6. The defendants argue that this Court need not evaluate whether vested rights are affected or whether new obligations are created since the Act is remedial and was even expressly labeled as such by the legislature. Fla. Stat. § 774.007 (“This act shall be construed liberally to accomplish its remedial purpose.”) But the legislature’s express labeling of a statute as “remedial,” does not necessarily make it so. *See Laforet*, 658 So. 2d at 61. Remedial statutes are statutes that relate only to remedies or modes of procedure and which do not create new rights or take away ones previously vested. *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961). Contrastingly, matters of substantive law include those “rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.” *State v. Raymond*, 906

So. 2d 1045, 1049-50 (Fla. 2005). New legislation cannot affect vested, substantive rights. *Bitterman v. Bitterman*, 714 So. 2d 356, 363 (Fla. 1998). And the legislature is prohibited from increasing an existing obligation, burden or penalty as to a set of facts after those facts have occurred. *Id.*

7. Applying the foregoing law to the instant facts, this Court finds that the Act is not constitutionally permissible under prong two of the Florida Supreme Court's two-prong test for retroactive legislation. The Act indefinitely defers the plaintiffs' claim in the absence of a prima facie showing of physical impairment as defined by the Act. But these particular rules regarding prima facie medical showings did not exist at the time that the Bonillas' action accrued. As such, the Act adversely affects their vested rights. It requires the plaintiffs to meet a medical threshold the goes above and beyond that which existed at the time their cause of action accrued. This "impairs" the plaintiffs' "vested rights" and "creates new obligations" for them in a way that is proscribed by Florida courts. *Laforet*, 658 So. 2d at 61; *Alamo Rent A Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994).

8. The defendants urge this Court to perform an additional three-prong analysis introduced by the Florida Supreme Court in *State Dep't of Transp. v. Knowles*, 402 So. 2d 1155, 1158 (Fla. 1981). The plaintiffs, on the other hand, argue that the *Knowles* test is no longer appropriate and point to footnote 9 in the *Metropolitan Dade County v. Chase* case where the Court stated that "the *Knowles* analysis has not been used recently by [the Florida Supreme Court] when discussing retroactivity." 737 So. 2d at 500, n9. Since it is at least somewhat questionable whether the two-part test performed above is sufficient, this Court also will also perform the *Knowles* balancing test for retroactivity. The analysis involves weighing three factors: 1) the strength of the public interest served by the statute; 2) the extent to which the right affected is abrogated; and 3) the nature of the right affected. *Knowles*, 402 So. 2d at 1158; *Department of Agric. and Consumer Services v. Bonanno*, 568 So. 2d 24, 30 (Fla. 1990); *City of Winter Haven v. Allen*, 541 So. 2d 128, 135 (Fla. 2d DCA 1989).

9. Turning to the first factor – the strength of the public interest served by the Act – this Court finds that there is little public interest served in the complete and total abrogation of the Bonillas' cause of action. The crucial question is essentially whether the legislature can take away a private party's right to sue. This Court answers that question in the negative. *See City of Winter Haven*, 541 So. 2d at 135 (stating that the state legislature cannot retroactively "take away a private party's right to recover[y]" and that that type of abrogation of rights "clearly outweighs the public's interest" in the legislation.)

10. The second and third factors for this Court's consideration involve the extent to which the right affected is abrogated and the nature of that abrogated right. The Act affects the Bonillas in the most severe way – it completely removes their right to sue where they had such a right prior to the Act's enactment. There are few situations where an individual's rights are more seriously abrogated or affected than when those rights are completely destroyed altogether. This is particularly significant considering the crucial

importance of the constitutional right to access to Florida courts. Defendants argue that the Bonillas are not completely prohibited from suing since Mr. Bonilla could re-file in the future if his disease eventually progresses to a point where he is able to meet the prima facie medical criteria requirements of the Act. But such differentiations between the "sick" and the "sicker" did not exist when the Bonillas' cause of action accrued or even when it was filed. Thus, Mr. Bonilla should not be required to "wait out" his illness until he becomes sufficiently sick to maintain suit under the new Act.

11. A careful consideration of all the relevant factors leads this Court to conclude that the balancing of those factors favors the plaintiffs. As such, the Act is unconstitutionally retroactive as applied to the Bonillas.

**WHEREFORE** it is **ORDERED** and **ADJUDGED**:

The Defendants' motions are DENIED.

DONE and ORDERED in chambers this 7<sup>th</sup> day of August, 2006 at Miami-Dade County, Florida.

  
JOSEPH P. FARINA  
CIRCUIT COURT JUDGE

Copies furnished to:  
All counsel of record