STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

Yasmine Clark a Minor, by her Guardian ad litem, Susan M. Gramling,

Plaintiff-Respondent,

v.

American Cyanamid Company, Armstrong Containers. Inc., E.I. Dupont De Nemours and Company, Atlantic Richfield Company and The Sherwin-Williams Company,

Defendant-Appellants,

Milwaukee County Department of Health and Human Services and NL Industries, Inc.,

Defendants.

Appeal No. 2014-AP-775

On Appeal from the Milwaukee County Circuit Court
The Honorable David A. Hansher, Presiding
Circuit Court Case No. 06-CV-12653

OPENING BRIEF OF DEFENDANT-APPELLANTS

Dated: January 26, 2015

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ISSUES PRESENTED

(1) Did the trial court err in holding that Plaintiff Yasmine Clark gained a "vested right" to pursue a personal injury claim under the expansive risk-contribution rule that was enunciated in *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, at least two years after her alleged injury?

(2) Did the trial court err in holding that the Wisconsin Legislature did not have a rational basis to amend Section 895.046 in order to clarify and restore Wisconsin's common law to the standard that existed before *Thomas*?

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument would help this Court to understand and address the background and issues presented, as well as the statewide public policy implications of the Court's decision. As such, this case does not meet the statutory criteria for cases to be submitted solely on briefs, Wis. Stat. § 809.22. Therefore, Defendant-Appellants request oral argument.

The Court's opinion should be published because of the importance of the issues presented. The Court's resolution of this appeal is likely to affect at least 171 white lead carbonate cases currently pending in Wisconsin. This Court's decision regarding the important due process and separation of powers issues also will have broad impact on the development of Wisconsin's tort law generally. Consequently, publication is appropriate pursuant to Wis. Stat. § 809.23(1)(a)(5).

INTRODUCTION

The Wisconsin Constitution permits the Legislature to set public policy by defining the law applicable to pending tort cases so long as legislation does not disturb a party's settled expectations at the time of injury. At the time of Yasmine Clark's alleged injury in 2003, she admittedly had no viable claim against the manufacturing defendants because she could not identify the manufacturer of the product that allegedly injured her and she could not meet the risk-contribution theory's criteria as set forth in *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

In 2005, two years after Clark's alleged injury, the Wisconsin Supreme Court expanded the risk-contribution theory beyond *Collins* to enable a plaintiff to sue former white lead carbonate manufacturers, if the plaintiff carries the burden to prove that the theory applies factually and if the expanded theory can pass muster under constitutional and public policy principles. *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523. The Wisconsin Legislature disagreed with that expansion and, in 2011, re-set the risk-contribution theory to the *Collins* criteria. Plaintiff does not challenge the 2011 Legislation.

In 2013, the Legislature applied its 2011 law to pending cases, whenever filed. Although Clark has the *same* right under the *Collins* risk-contribution theory as she had when her claim arose, she argues that the 2013 law is impermissibly retroactive because she cannot invoke *Thomas*.

The 2013 Legislation is constitutionally permissible. Clark has no vested right entitling her to invoke *Thomas*'s risk-contribution theory. Because the Legislation does not deprive Clark of any vested right, it has no retroactive effect here. There is nothing unfair about requiring a plaintiff to proceed under the law in effect at the time of alleged injury.

The trial court erroneously treated this case like prior cases involving retroactive legislation. In those prior cases, however, the legislation impaired a vested right that indisputably existed when the claim arose. None involved legislation that *restored* rights to how they existed at the time of the injury. This case thus differs from prior Wisconsin cases.

The Legislature provided a rational purpose for applying the 2011 law to pending cases. The Legislature determined that it is in "the public interest" to preserve tort law according to its "historical, common law roots." Accordingly, it restored the law to how it stood at the time of Clark's alleged injury in 2003. While the trial court disagreed with the Legislature's policy and findings, they provide a rational basis for the Legislature's actions, and Wisconsin courts have found the same legislative reasons sufficient to uphold other laws. Therefore, the Court should reverse and enter judgment for the manufacturer defendants.

BACKGROUND

Plaintiff Yasmine Clark alleges that she was injured in 2003 from exposure to decades-old paint containing white lead carbonate ("WLC") pigments. *See* R. 476; A-App. 017, 027. Clark claims exposure to WLC at two former residences,

which were built in 1891 and 1907. Consequently, the WLC pigments at issue may have been over 100 years old when she allegedly was exposed. WLC pigments have not been used in interior residential paints for at least 60 years.

At the time the rental properties were built, paint containing WLC was the gold standard. *Thomas*, 2005 WI 129, ¶ 37. Property owners then typically did not paint their properties, but hired master painters who mixed various ingredients on site to make paint. *Id.* ¶ 187 (Wilcox, J., dissenting) (referring to undisputed facts in trial affidavit). The type and amount of WLC and other ingredients within a particular paint batch varied greatly depending on the formula used by a master painter. *Id.* ¶ 188.

Master painters prized WLC pigments for their adhesive strength, opacity, and durability, among other desirable characteristics. *Id.* ¶¶ 183-184. The market for WLC pigments was well-developed by the early twentieth century. *Id.* ¶¶ 183, 186, 188. Hundreds of different companies produced or sold WLC or paint with WLC in Wisconsin. *Id*. ¶¶ 185-190 (over 200 paint manufacturers in the Milwaukee area alone between 1910 and 1971). WLC, which is a processed raw material, also was used in products other than paint, such as ceramics. *Id.* ¶ 186.

Paints containing WLC remained prominent throughout the early decades of the 1900s. *Id.* ¶¶ 13, 183, 186, 188. Their use, however, diminished as alternative products became available. *Id.* ¶ 13. In 1978, as a result of evolving medical knowledge, the federal government banned lead paint from residential

use. 16 C.F.R. § 1303.1. Paint manufacturers already voluntarily had stopped using WLC in interior residential paints by at least 1955.

Subsequent federal, state, and local laws imposed legal responsibility on property owners and landlords to prevent lead-based paint hazards. For example, the federal government enacted the Residential Lead-Based Paint Hazard Reduction Act, which requires landlords to provide a federally approved lead warning to all prospective tenants of pre-1978 housing. *See* 42 U.S.C. § 4852d. Pursuant to this law, a landlord must disclose any known lead-based paint or lead-based paint hazard within the property. *Id*. The Act creates a statutory cause of action against property owners who knowingly fail to comply with the notification provisions. *Id*. Environmental Protection Agency and Department of Housing and Urban Development regulations reinforce these statutory requirements. *See* 24 C.F.R. § 35.88.

Landlords of pre-1978 residential rental property have a common-law duty to test for lead-based paint if they know or should have known of deteriorating paint. *See Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 228 Wis. 2d 44, 596 N.W.2d 456 (1999). Under this duty, a landlord may be held liable for a tenant's lead injury. *Id*. Additionally, the City of Milwaukee requires landlords and other property owners to redress "lead-based nuisances" present on their property, on threat of criminal penalty. *See* Milwaukee, Wis. Code of Ordinances §§ 66-20 to 66-29. Milwaukee's city ordinances prohibit a landlord from "knowingly allow[ing] to exist in or on their property a lead-based nuisance." *Id*.

§ 66-22. This ordinance imposes criminal penalties upon property owners violating the prohibition. Clark also sued the landlords responsible for the properties where she lived.

Clark's alleged injuries occurred in 2003. *See* R. 476; A-App. 017, 027 ("March of 2003 constitutes the operative time period for this Court's analysis."). Clark chose not to sue any manufacturer of paint that she allegedly ingested. Rather, she decided to sue former manufacturers of WLC, one of many types of lead ingredients historically used in residential paints. WLC had different formulations, properties, and characteristics, depending on its manufacture. *See Thomas*, 2005 WI 129, ¶¶ 37-39, 183-84 (Wilcox, J., dissenting). Each WLC manufacturer labeled its WLC distinctly with its brand name and logo. *Id.* ¶ 185. The pigment maker did not decide the paint formula; the paint manufacturer or mixer did. *See id.* ¶¶ 182, 187. WLC had many non-residential uses and was "not a material used exclusively by the paint industry." *Id.* ¶ 186.

In 2003, when Clark claims injury, Wisconsin law would not have permitted her to recover from any WLC manufacturer without proving that it made the pigment she ingested. Two years later, in 2005, the Wisconsin Supreme Court unexpectedly changed Wisconsin law. In *Thomas*, the Court potentially extended the risk-contribution theory of liability adopted for DES plaintiffs in *Collins*. *Thomas* held that plaintiffs alleging injury from WLC ingestion could rely on that theory if they proved certain new fact-based criteria and their claims passed tests of constitutionality and public policy that *Thomas* deferred for future decision.

Thomas, 2005 WI 129. The *Thomas* majority acknowledged that it was making new law by extending the risk-contribution theory, *id*. ¶¶ 134, 149; the dissents called that extension "an unwarranted and unprecedented relaxation of the traditional rules governing tort liability," *id*. ¶ 178, and a "drastic expansion of the risk-contribution theory [that] clearly distorts the original rationale behind the *Collins* decision." *Id*. ¶ 259.

Collins itself had "deviate[d] from traditional notions of tort law" to allow recovery without identification of a specific product manufacturer in cases involving the generic drug diethylstilbestrol ("DES"). 116 Wis. 2d at 181. Central to the *Collins* court's holding was the factual situation that DES presented: DES had one identical formula across all makers; DES manufacturers controlled end product risks; DES plaintiffs presented a unique, signature injury; the relevant time period for claims was limited to the nine-month window of DES mothers' pregnancy; and the geographic scope was confined to a neighborhood pharmacy. *Id*. None of these circumstances fits WLC.

Despite acknowledging that WLC claims were "not identical to *Collins*" and several "dissimilarities between [the two cases]" existed, including lack of a generic product, wide window of harm, and many other causes of harm and lead sources, the bare majority in *Thomas* expanded the risk-contribution theory to WLC. 2005 WI 129, ¶¶ 147, 150, 152, 154. The Court recognized that it was changing the common law and that this change would create legal uncertainty. *Id*. ¶ 130. Indeed, under *Collins*, each DES manufacturer was proportionally liable

for the harm it caused. In contrast, under *Thomas*'s *expansion of* the risk-contribution theory, each defendant can be held liable for harms that were not caused by it or any WLC manufacturer and for damages that are grossly and disproportionally excessive when compared to the defendant's individual conduct. The *Thomas* majority recognized that its opinion posed "difficult problems," including exposing manufacturers to "possible liability for white lead carbonate they may not have produced or marketed." *Id.* ¶ 132.

Thomas left many issues unresolved. Because *Thomas* reached the Wisconsin Supreme Court on summary judgment in defendants' favor, the Court assumed all facts alleged by plaintiff to be true and made no factual findings. 2005 WI 129, ¶¶ 4, 140 n. 47. It also did not decide the constitutional and public policy issues raised by defendants. *Id.* ¶ 166 ("These constitutional issues are not ripe.").

Thomas's monumental shift in tort law triggered immediate criticism. One commentator noted:

> *Thomas* threatens to change this long-standing practice [the need to prove causation], opening the door to the expense and injustices of lawsuit abuse .... Every manufacturer in Wisconsin, and indeed every manufacturer located anywhere in the world, should worry about the precedent set by *Thomas* and by the state government's failure to correct it .... [E]very consumer has a stake in the outcome of this debate as well.[1]

Similarly, former Wisconsin Supreme Court Justice and current U.S. Court of Appeals Judge Diane Sykes concluded that *Thomas* "basically operates as a

[1] R. 471, Ex. M; A-App. 209-11.

form of collective tort liability untethered to any actual responsibility for the specific harm asserted, imposed by the judiciary as a matter of loss-distribution policy…."[2]

The *Thomas* decision led the *Wall Street Journal* to label Wisconsin "Alabama North" and to predict, "now bidding to take their place as a favorite trial lawyer destination is the previously sensible state of Wisconsin, led by its Supreme Court."[3] Others just as vigorously defended the *Thomas* majority. Public debate and criticism over *Thomas* and the expansion of Wisconsin tort law boiled during the election campaign of the decision's author years later.[4]

As predicted, *Thomas*'s virtual elimination of the requirement to prove causation spawned numerous lawsuits. Plaintiff's attorneys filed at least 171 risk-contribution claims against former WLC manufacturers alone. Suits have not been limited to WLC. *See* R. 471; A-App. 097-98, ¶¶ 3-6 (risk-contribution claims filed for alleged exposure to asbestos, solvents, and other non-WLC products).

In response to the public debate, the Legislature enacted Wis. Stat. § 895.046 ("2011 Act"), overturning *Thomas* and restoring the common law to *Collins* criteria. The law became effective on February 1, 2011, prospectively eliminating *Thomas*'s risk-contribution theory in WLC cases. Just over two years later, the Legislature amended Section 895.046 ("2013 Act") to apply to "all

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[2] R. 471, Ex. N; A-App. 213-16.

[3] R. 471, Ex. O; A-App. 218-19.

[4] *See, e.g.*, R. 471, Ex. P; A-App. 221-22.

actions in law or equity, whenever filed or accrued." This amended law became effective July 2, 2013.

The Legislature explained its reasoning for applying Wis. Stat. § 895.046 to pending cases in its Legislative Findings and Intent. First, the Legislature found that "it is in the public interest" to preserve well-settled Wisconsin tort law and limit the risk-contribution theory to *Collins*. Wis. Stat. § 895.046(1g).

Second, the Legislature balanced the "rights of citizens to pursue legitimate and timely claims," while ensuring that "businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago." *Id.*

Third, the Legislature expressed its disapproval of *Thomas*'s expansion of risk-contribution theory as well as its concerns that *Thomas* "raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions." *Id.*

STATEMENT OF CASE

In 2006, after *Thomas* changed the law, Clark sued several former WLC manufacturers ("Manufacturers") and the landlords and owners of her properties for injuries she allegedly sustained in 2003. She could not identify the manufacturers of the WLC that she allegedly ingested. R. 1; A-App. 001, 005, ¶ 23. Additionally, after contending that the deteriorated properties had "peeling and chipping paint," R. 1; A-App. 001, 009, ¶ 40, 011, ¶ 46, she alleged that the

landlords' negligent maintenance caused her injuries. Clark further averred that the landlords were cited for violations of City of Milwaukee Code of Ordinances §§ 66-20, 66-22, and 66-29. R. 1; A-App. 001, 010-12, ¶¶ 42, 48.

This case proceeded with discovery until 2010. Then, a federal district court held that retroactive application of *Thomas*'s risk-contribution theory to the former WLC manufacturers' long-ago conduct violated the U.S. Constitution's due process guarantees. *Gibson v. American Cyanamid Co.*, 719 F. Supp. 2d 1031, 1052 (E.D. Wis. 2010), *rev'd*, 760 F.3d 600 (7th Cir. 2014), *cert. pending*. Pending the appeal in *Gibson*, the trial court stayed this case.

After the enactment and amendment of Section 895.046, the Manufacturers moved for dismissal (later converted into a motion for summary judgment) of Clark's claims against them. R. 451-52. Clark opposed dismissal and concurrently filed a Motion for Partial Summary Judgment to declare Section 895.046 unconstitutional as applied to Clark. R. 462-68. The Manufacturers opposed Clark's Motion. R. 470-71.

On March 25, 2014, the trial court granted Clark's motion and denied the Manufacturers' motion for summary judgment. R. 476; A-App. 017, 041. It held that Section 895.046 unconstitutionally deprived Clark of a vested right to sue the Manufacturers. The trial court assumed (without analysis) that the 2005 *Thomas* decision applied to Clark's 2003 claim retroactively and gave Clark a "vested right" to proceed under *Thomas*'s expanded risk-contribution theory. *Id.* at A-App. 030. The trial court then determined that Plaintiff's private interest in

pursuing a claim under *Thomas* outweighed the public interests that the Legislature articulated. *Id.* at A-App. 041. The Manufacturers timely appealed the trial court's decision. R. 482. Wis. Stat. § 809.10.

After the trial court's decision, the U.S. Circuit Court of Appeals for the Seventh Circuit ruled that the Wisconsin state constitution's due-process guarantee prohibits "retroactive application" of Wis. Stat. § 895.046. *Gibson v. American Cyanamid Co.*, 760 F.3d 600 (7th Cir. 2014). Key to the Seventh Circuit's ruling was its mistaken belief that Section 895.046, if applied to pending cases, would likely extinguish *any* remedy for Clark and other plaintiffs. *Id.* at 610. The federal appellate court further ruled that *Thomas*'s risk-contribution theory was constitutional because it was foreshadowed by *Collins*—even though defendants had stopped manufacturing WLC for residential use decades before that 1984 decision. In sum, the court ruled that the plaintiff had a vested right in a one-year-old judicial decision that dramatically changed the common law, while the Manufacturers had no vested right in the common law rule that had existed both at the time of their alleged wrongful conduct and at the time of the plaintiff's alleged injury. The court found it permissible for the Wisconsin Supreme Court in *Thomas* to retroactively change the legal consequences of the Manufacturers' conduct that had ended decades earlier, but it was impermissibly retroactive for the Wisconsin Legislature, a co-equal branch, to restore the law as it had always existed to apply to recently-filed, currently pending cases. This appeal seeks to

correct that anomaly, while upholding the constitutionality of the Wisconsin's Legislature's actions.

STANDARD OF REVIEW

Whether legislation violates due process is a question of law reviewed *de novo*. *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 2010 WI 68, ¶ 13, 326 Wis. 2d 444, 786 N.W.2d 385. Accordingly, the trial court's holding of unconstitutionality is given no weight on appeal. *Chappy v. Labor & Indus. Review Comm'n*, 136 Wis. 2d 172, 184, 401 N.W.2d 568 (1987).

ARGUMENT

Legislation enjoys a "strong presumption in favor of its validity." *See State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973) (quoting *ABC Auto Sales, Inc. v. Marcus*, 255 Wis. 325, 38 N.W.2d 708 (1949)). For as-applied challenges to legislation, as here, the challenger has the burden of proving the legislation is unconstitutional "beyond a reasonable doubt." *Soc'y Ins.*, 2010 WI 68, ¶ 27.

A two-part legal test evaluates the constitutionality of allegedly retroactive statutes. First, the court must ascertain whether the legislation impairs a vested right and therefore has a retroactive effect. *Soc'y Ins.*, 2010 WI 68, ¶ 29. If the statute is found to impair a vested right, the court then must determine whether the statute has a rational basis. *Id.* ¶ 30. The court considers the statute's fairness and balances the "public interest served by retroactively applying the statute against

the private interest that retroactive application of the statute would affect." *Id.* (internal citation omitted). "[T]he duties of the court are limited to considering whether or not the act of the legislature contravenes the provisions of the constitution . . . [The court is] not concerned with the wisdom of what the legislature has done." *Hammermill*, 58 Wis. 2d at 47. "If any doubt exists, it must be resolved in favor of the constitutionality of a statute." *Id.* Under this stringent test limiting judicial review, Section 895.046, as applied to Clark's pending claim, does not impair a vested right, has a rational basis, and is constitutional.

I. WIS. STAT. § 895.046 HAS NO RETROACTIVE EFFECT BECAUSE IT DOES NOT IMPAIR A "VESTED" RIGHT.

A statute has retroactive effect only if it impairs or eliminates a "vested" right. *In re Paternity of John R.B.*, 2005 WI 6, ¶ 20, 277 Wis. 2d 378, 690 N.W.2d 849. For two, independently dispositive reasons, Clark does not have a vested right to assert a claim under *Thomas*, and Section 895.046, therefore, has no retroactive effect.

First, at the time of Clark's alleged injury in 2003, Wisconsin tort law did not permit her to recover from a WLC manufacturer without proving that it made the pigment she ingested, which she could not prove then and admits she cannot prove now. R. 476; A-App. 017, 019. Clark's potential claim against the Manufacturers arose only after *Thomas*—two years after her alleged injury. In 2003 when her claim accrued, Clark had no right—let alone a vested one—to a

new risk-contribution theory claim.[5] And while Clark may try to argue that a second injury arose in 2006 and gives her a later accrual date, that conflicts with black-letter Wisconsin law. For all claims based on a tortfeasor's single course of conduct, as here, a plaintiff's claim accrues, and the statute of limitations begins to run, with the manifestation of a plaintiff's first compensable injury. *See Nierengarten v. Lutheran Soc. Servs. of Wis.*, 219 Wis. 2d 686, 580 N.W.2d 320 (1998); *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 533 N.W.2d 780 (1995).

Second, a "vested" right implies at least a right that is so perfected that parties can set their legal expectations on it. It is "absolute" and "free from contingencies." *See* BLACK'S LAW DICTIONARY (9th ed.). In contrast here, even after *Thomas*, numerous contingencies still cast doubt on the viability of a risk-contribution claim applying to WLC: whether *Thomas* violates due process; whether *Thomas* comports with Wisconsin public policy; and whether the risk-contribution theory factually applies to WLC. These contingencies are not the stuff of vested rights.

A. At The Time Of Clark's Injury, She Had No Vested Right In *Thomas*'s Risk-Contribution Criteria.

For this Court to hold Section 895.046 unconstitutional, Clark first must demonstrate that the legislation has an unconstitutionally retroactive effect.

[5] Even if the *Thomas* decision in 2005 were to apply to Clark's claim, this would not retroactively vest a previously non-existent right years after the fact. Retroactive application of a judicial decision and retroactive vesting of rights are two separate inquiries, which the trial court improperly collapsed into one. *See* pages 25-31, *infra*.

Wisconsin law examines "whether the challenging party has a 'vested' right." *Soc'y Ins.*, 2010 WI 68, ¶ 29. "Vested right" is a mere label. It draws its meaning from when a party has legitimately fixed its legal expectations. It is settled that the relevant point in time, for purposes of tort claims, is the time of injury.[6] Thus, Section 895.046 has no retroactive effect as to Plaintiff, because the legislation is consistent with the law at the time of Plaintiff's alleged injury in 2003—Plaintiff could not have had a vested right in *Thomas*, which was decided in 2005, at the time of Plaintiff's alleged injury in 2003.

Holifield v. Setco Industries, Inc. establishes that, for tort claims, a party's rights are settled at the time of injury. 42 Wis. 2d 750, 168 N.W.2d 177 (1969). According to the Supreme Court, at this point, "there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." *Id.* at 754. Although the Court did not use the term "vested rights," it acknowledged that the time of injury is the determinative moment for establishing a party's expectations and rights. *Id.* at 755.

Eleven years after *Holifield*, the Supreme Court linked vested rights to the time of injury. In *Hunter v. School District*, a statute of limitations, newly enacted after the plaintiff's injury, precluded her claim. 97 Wis. 2d 435, 438-40, 293

[6] Wisconsin law is unwavering that a tort claim arises at the time of injury or when the injury is discovered, as the trial court recognized. *See* R. 476; A-App. 017, 026 (citing *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986)) ("In tort actions for personal injuries, a cause of action accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, 'not only the fact of injury but also that the injury was probably caused by the defendant's conduct.'").

N.W.2d 515 (1980). On the basis of vested property rights, the Court held that the statute violated due process. It reasoned that the plaintiff had a "distinct vested property right in a cause of action for negligence *at the time of her injury*." *Id.* at 445 (emphasis added). The key factors for a cause of action—a claim capable of enforcement, the "suable party," and the party with the right to enforce—vested at the time of the injury. Accordingly, rights vest when the parties' legal expectations are set: at the time of injury. *Hunter*, 97 Wis. 2d at 438-40; *see also Neiman v. American Nat'l Prop. & Cas. Co.*, 2000 WI 83, ¶ 13, 236 Wis. 2d 411, 613 N.W.2d 160 (identifying "a substantive right fixed on the date that the auto accident occurred"); *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 22, 244 Wis. 2d 720, 628 N.W.2d 842 (finding the plaintiff's "negligence claim accrued on the date of his accident and injury").

As Wisconsin courts continue to hold, later changes in the law do not alter preexisting legal rights after the fact. For example, in *Society Insurance v. Labor & Industry Review Commission*, the Supreme Court rejected the retroactive application of a statute of limitations amendment. 2010 WI 68. The Court held that defendants had "a substantive, vested property right because [the defendant]'s statute of limitations defense translates into a vested right of *fixed exposure to liability*." *Id.* ¶ 42 (emphasis added). Both plaintiff and defendant reasonably relied on the law as set forth when the claim accrued, and defendant's "right to fixed liability was unsettled suddenly and without individualized consideration" by the subsequent change in the law. *Id.* ¶ 47 (internal quotation marks and

citation omitted). *See also Neiman*, 2000 WI 83, ¶¶ 13-31 (barring recovery under a statutory damages cap that the Legislature increased *after* the plaintiff's injury; to conclude otherwise would "unfairly overturn[] settled expectations," that "accrued at the time of the accident"). *Id.*

In developing its interpretation of vested rights, the Supreme Court cited the rationale in *Adams Nursing Home, Inc. v. Mathews*. *See Martin ex rel. Scoptur v. Richards*, 192 Wis. 2d 156, 201, 531 N.W.2d 70 (1995) (citing 548 F.2d 1077 (1st Cir. 1977)). There, a Medicare regulation sought to "recapture" differences in accelerated and straight-line depreciation methods from providers when they left the program. *See Adams*, 548 F.2d at 1078. The challengers argued that the recapture regulation overturned vested rights. The First Circuit did not "attempt to tailor the conclusory label 'vested right' to fit [the challenger's circumstances]," but focused on the challenger's "actual expectations and the reasonableness of those expectations." *Id*. at 1081. "In any retroactivity challenge, a central question is how the challenger's conduct…would have differed if the law in issue had applied from the start." *Id.* The court determined that, because "the regulation is designed to leave [the challenger] no better and no worse off," it had a minimal impact on the challenger's legal expectations and did not affect any vested right. *Id.*

This Court also has upheld retroactive legislation as constitutional where there was no effect on the parties' rights. In *Rock Tenn Co. v. Labor & Industry Review Commission*, the challengers claimed that retroactive application of a

workers' compensation statute denied them a vested property right without due process. 2011 WI App 93, ¶ 17, 334 Wis. 2d 750, 799 N.W.2d 904. This Court disagreed and adopted the "correct[]" reasoning of the lower court: "The change imposes no new obligations on the plaintiffs and does not impair their vested rights because the defendant's right to compensation, and the plaintiffs' obligation to pay that compensation, existed at the time of the injury." *Id.* ¶ 22. Although this Court recognized that the retroactive statute *did* change the timing and procedure for compensation, this change was irrelevant to the vested rights analysis, because the challenger's "liability [that existed at the time of injury] is not being renewed, it is not being increased." *Id.* ¶ 21.

Thus, the question is whether Clark had a vested right—a legitimate, settled expectation—to pursue a *Thomas*-based risk-contribution claim at the time of her alleged injury in 2003. That question answers itself: Clark had no such vested right. The expanded theory was not even recognized for a case like hers until more than two years after her claim allegedly accrued. Section 895.046 restores the law to what existed at the time of her injury and does not deprive her of any right that she had when her claim arose.

In 2003, when Clark was allegedly injured, she could not have recovered against any WLC manufacturer without identifying it as the manufacturer of the product that injured her. In line with foundational principles of Anglo-American jurisprudence, Wisconsin law required Clark to prove causation. *See, e.g.*, *Rockweit ex rel. Donohue v. Senecal*, 197 Wis. 2d 409, 418, 541 N.W.2d 742

(1995) ("a causal connection between the conduct and the injury" is a necessary element of a negligence cause of action); *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55 (1967) (plaintiff alleging strict products liability must prove, *inter alia*, "the defect was a cause (a substantial factor) of the plaintiff's injuries or damages"); *see also* William Prosser, HANDBOOK OF THE LAW OF TORTS § 41 at 237 (4th ed. 1971) (causation is "simplest and most obvious aspect of determining tort liability"). For 150 years before *Thomas*, Wisconsin tort law required every personal injury plaintiff outside the circumstances of *Collins* to prove that a defendant caused plaintiff's injury. *Collins*, 116 Wis. 2d at 181-182. Justifiably, the parties' expectations in 2003 reflected that well-engrained causation principle, and Clark did not sue the Manufacturers then. Because Clark could not prove that any manufacturer caused her injury, she did not have a viable claim against former WLC manufacturers at the time of her injury and had no vested right to such a claim.

The trial court erroneously held, however, that *Thomas* created a vested right for Clark two years later in 2005 and that legislation could not impair that right. R. 476; A-App. 017, 029. But, there is no support for the trial court's conclusion that a judicial decision can *retroactively* vest a new right. The fundamental assumption of a vested right is that a party, at the time of injury, can base its expectations on that right; a party's expectations cannot reflect a then-nonexistent right. "The presumption against retroactivity reflects a concern about upsetting the expectations that the parties harbored when they engaged in the

conduct *giving rise* to the suit, as opposed to their expectations at the time the suit *was filed*." *Kopec v. City of Elmhurst*, 193 F.3d 894, 903 (7th Cir. 1999) (emphasis in original; internal citation omitted). For this reason, courts discuss vested rights only in the context of existing law, not a novel change in the law. *See, e.g.*, *Boykin v. Boeing Co.*, 128 F.3d 1279, 1283 (9th Cir. 1997) ("A vested right is an immediate, fixed right of present or future enjoyment" (internal quotation marks omitted)).

That a *judicial decision* applies to a named plaintiff in a pending case (Steven Thomas) and potentially could apply to others does not mean that a (previously nonexistent) *right vests* retroactively in others. The trial court made a legally unsupported leap in logic—it concluded that its decision to apply *Thomas* to Clark (even before determining any of the outstanding questions of constitutionality, public policy, and factual applicability) automatically bestows Clark with an unconditional, vested right. This is not the law; they are two separate inquiries. A new judicial decision does not automatically create a vested right in a previously accrued claim, and no Wisconsin case has held otherwise.

The trial court erred by treating this case like those in which a right existed at the time of injury. This case is actually more like the Ninth Circuit's decision in *Boykin*. There, Boeing employees asserted entitlement to overtime pay for work performed between 1992 and 1994. During those years, their positions were statutorily exempted from overtime pay. *Boykin*, 128 F.3d at 1281. In 1995, however, the Washington Court of Appeals determined that the employees were

entitled to payment of overtime under state law standards. *Id.* at 1282 (discussing *Tift v. Prof'l Nursing Servs., Inc.*, 886 P.2d 1158 (Wash. Ct. App. 1995)). Soon thereafter, the Washington Legislature amended the statute to restore the law to pre-*Tift* standards and expressly stated that the amendment was to apply retroactively. *Id.* The employees argued that "the retroactive application of the [amendment] impair[ed] their vested rights under the Washington Constitution" to receive overtime for work done in 1992-1994. *Id.* at 1283. The Ninth Circuit disagreed: "[A]t issue in this case are primarily the 1992-1994 compensation practices at Boeing; *Tift* was not announced until 1995. . . . The Boeing employees never performed work with the expectation that they would be paid [overtime] until the Court of Appeals announced its decision in *Tift*." *Id.* The *Tift* decision "thus, did not create vested rights for the employees," because "there is no injustice in retroactively depriving a person of a right that was created *contrary to his expectations* at the time he entered into the transaction from which the right arose." *Id.* (emphasis in original).

No Wisconsin court has held that a party can be vested with new rights, retroactive to claim accrual, years after time of injury. Nor would such a rule make sense. Rights are vested based on the parties' expectations at the time of the injury. *See Hunter*, 97 Wis. 2d at 445. Section 895.046 does not upset a settled expectation of any party at the time the claim accrued. Upholding Section 895.046 places both Clark and Defendants exactly as they were at the time of the alleged injury. As in *Adams*, where the statute is designed to leave the parties "no

better and no worse off" than when Clark's claim accrued in 2003, it does not impair any vested right. 548 F.2d at 1081; *see also Rock Tenn Co.*, 2011 WI App 93, ¶¶ 21-22. In sum, the parties' settled expectations of the law as it existed in 2003, when Clark's claim accrued at the time of her alleged injury, must govern this Court's retroactivity analysis.

B. Any Right Associated With *Thomas* Has Too Many Contingencies To Qualify As "Vested."

A right vests when it is "not contingent; unconditional; absolute." BLACK'S LAW DICTIONARY (9th ed.). Although the definition itself is circular, its intent is manifest: "vesting" is reserved only for a right that is "so far perfected that it cannot be taken away by statute." *Neiman*, 2000 WI 83, ¶ 14 (internal citation omitted).

When substantial contingencies exist, a "right" cannot vest. *See Soc'y Ins.*, 2010 WI 68, ¶ 39. In *Society Insurance*, for example, the Wisconsin Supreme Court reasoned that the defendant did not have a vested right to his statute of limitations defense until the limitation period had run and the defense no longer depended on any uncertain contingencies. *Id*. ¶ 43 (citing *State v. Haines*, 2003 WI 39, ¶ 13, 261 Wis. 2d 139, 661 N.W.2d 72). Until then, the statute's application to the defendant was not unconditional, absolute, and dispositive.

Here, serious issues remain unanswered regarding the *Thomas* decision. Three of the most significant—whether its expansion of risk-contribution theory comports with due process; whether it could pass muster under Wisconsin's public

policy analysis; and whether the facts would support the product fungibility and other findings necessary to justify extending risk-contribution to WLC—question the very basis of the decision and Clark's *Thomas*-based risk-contribution claim. In light of the unsettled nature of each issue, it is impossible—and thus error—to characterize as vested the right of Clark or any other plaintiff who relies on Thomas as a basis for recovery.

First, the *Thomas* decision did not grant a vested right, because the Supreme Court itself declined to decide whether its new rule was even constitutional, and expressly left that substantial question for later decision. *Thomas*, 2005 WI 129, ¶ 166. The bases for challenging constitutionality included the risk-contribution theory's "new, severe, and unanticipated legal consequences;" the establishment of "evidentiary presumptions that are irrational;" and a lack of "meaningful opportunity to present a defense." *Id*. ¶¶ 165-66. By dispensing with plaintiff's burden to prove causation, the risk-contribution theory guarantees that a defendant can be held liable for harm it did not cause. What is relevant here is not so much the substance of these constitutional protections, but that there was, and still is, real doubt as to whether *Thomas* can be constitutionally applied. Consequently, Clark has no "unconditional and absolute" right to proceed under *Thomas*.

That *Thomas* raises constitutional concerns is not mere rhetoric. Here, when the Legislature passed Section 895.046 in 2013, *Thomas*'s application to the former WLC Manufacturers already had been ruled to violate federal due process,

because it took away settled expectations in a centuries-old common law rule requiring proof of causation. *Gibson*, 719 F. Supp. 2d at 1052. At the time the Legislature passed Section 895.046, according to at least one court, Clark had no right to a claim. There could be no absolute, unconditional right to pursue a risk-contribution theory against the Manufacturers when a court already had declared such a theory to be unconstitutional. Although the Seventh Circuit overruled the district court, this only highlights the disparity amongst courts regarding the constitutionality of *Thomas*. And, state constitutional issues never have been resolved by a Wisconsin court. There is no consensus, now and certainly not at the time of the legislation, that *Thomas* created an "absolute," vested right for anyone.

Second, the *Thomas* Court itself questioned whether a risk-contribution claim against former WLC manufacturers could survive under Wisconsin's public policy analysis. *Thomas*, 2005 WI 129, ¶ 130 n. 41 (whereas "courts deal with individual cases," the Legislature "deals with broad issues of social policy"). As the *Thomas* dissent identified, that public policy analysis includes consideration, for example, of whether the injury is too remote from the alleged negligence (*e.g.*, an injury that occurs 100 years or more after the alleged malfeasance), and whether the damages are wholly out of proportion to the alleged tortfeasor's culpability (a tiny WLC manufacturer could be held 100% liable for a multitude of alleged harms that its product did not cause). *See id.* ¶¶ 306-314 (Prosser, J., dissenting). Additional public policy factors include the number of subsequent

actors that contributed to the alleged WLC exposure after its manufacture, a landlord's violations of his statutory and common law duties to maintain lead paint, and Wisconsin law providing that intact lead paint is not a hazard. Wis. Admin. Code, DHS § 163.42. It is difficult to imagine a purported right *less* absolute, less settled, and less appropriate for vesting, where the issuing court itself acknowledges that its holding might not comport with public policy.

The Legislature then answered the question that *Thomas* left open—it confirmed that *Thomas*'s expansive risk-contribution criteria are not consistent with Wisconsin law or public policy. And, unlike *Thomas*, the Legislature's actions did not articulate a new concept of law or public policy. Instead, the Legislature simply stated that tort plaintiffs would have their rights as they existed under the common law in 2003 and for 150 years before then. Public policy cannot be violated by legislation that ensures both plaintiffs and defendants have the same rights they had at the time of the alleged injury.

Third, still today, no court has fully analyzed whether *Thomas* should apply to injuries that occurred before the decision. Although the trial court assumed that *Thomas* would apply to Clark's injuries, it failed to conduct the appropriate analysis. Wisconsin law favors exclusively prospective application of a judicial decision when it "relieves some pressure against departure from precedent and serves the same societal interest in stability that is the root of *stare decisis*." *Harmann ex rel. Bertz v. Hadley*, 128 Wis. 2d 371, 378-79, 382 N.W.2d 673 (1986). Accordingly, Wisconsin courts are required to examine three factors

before retroactively applying a judicial decision: "(1) whether the decision 'establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;' (2) whether retroactive application would further or retard the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 71, 274 Wis. 2d 220, 682 N.W.2d 405 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)).

Whether *Thomas* can be applied retroactively under *Wenke*'s rule remains unsettled. By expanding the risk-contribution theory, which was formerly limited to cases akin to the uniformly formulated drug DES, *Thomas* disrupted the Manufacturers' reliance interests. As the trial court admitted, it is "undeniable" that *Thomas* "represents a significant departure from the traditional notions of tort law." *See* R. 476; A-App. 017, 039.

In explaining the importance of reliance interests, the Supreme Court's concerns implicate the exact scenario here: "When tort law is changed, the court is concerned about exposing many individuals and institutions to liability who would have obtained liability insurance had they known they would no longer enjoy immunity." *Wenke*, 2004 WI 103, ¶ 72 (internal citation omitted). Had the Manufacturers been able to anticipate *Thomas*, they could have made numerous business decisions (decades ago) to better protect against their potential liability exposure. For example, the Manufacturers could have supplemented their liability

insurance policies to include claims arising under the risk-contribution theory. Moreover, they could have raised the prices for products containing WLC, or created a separate corporate entity to manufacture, market, and sell products in Wisconsin, or foregone an acquisition, or decided not to sell products in Wisconsin at all. There was thus no opportunity for the Manufacturers to protect themselves against new liability first created decades after their conduct ended. *See Chappy*, 136 Wis. 2d at 194 (retroactive application of a statute was unconstitutional when insurer could not increase premiums to recover for statutorily-imposed payment increase for past events); *see also* R. 471, Ex. N; A-App. 213-16 (manufacturer has a "near impossible" burden of exculpation).

Irrespective of this case's outcome, the Legislature in 2011 has already prospectively limited risk-contribution to facts similar to *Collins*; the constitutionality of that 2011 statute is not questioned. And, retroactive application of *Thomas* results in substantial inequity for numerous parties, including the Defendants and manufacturers across the country.[7] These companies must now address the specter of liability, arising from harm they may not have caused and from conduct completed decades ago. Because of these facts and others under the *Wenke* inquiry, it is far from certain that *Thomas* even

[7] Justice Prosser's dissent, for example, recognized that *Thomas* unfairly divests potential defendants of "the opportunity to present a defense under well-settled tort theory: the defense that their products did not cause the plaintiff's injur[ies]." *Thomas*, 2005 WI 129, ¶ 285. As another dissenting justice acknowledged, the retroactive application of *Thomas* is inequitable for thousands of companies in industries outside paint and pigment manufacture, too. *See id.* ¶ 259 (Wilcox, J. dissenting); *see also* R. 471, Ex. M; A-App. 209-11 ("Every manufacturer in Wisconsin, and indeed every manufacturer located anywhere in the world, should worry about the precedent set by *Thomas* ….").

properly applies retroactively to other cases. That *Thomas*'s applicability to plaintiffs such as Clark remains in doubt demonstrates the inherent contingency of her claim based on *Thomas* and undermines the notion that Clark had an absolute, unconditional "vested" right in the application of *Thomas*.

Finally, because *Thomas* arose on a summary judgment record, it remains undecided whether WLC pigments were fungible. The Supreme Court recognized that fungibility was a necessary pre-requisite for the risk-contribution theory to apply but left the question open to be decided later with an evidentiary record. *Thomas*, 2005 WI 129, ¶ 140 & n. 47. When Section 895.046 clarified Wisconsin law, the viability of the risk-contribution doctrine as potentially expanded by *Thomas* was very much an open question, as it still is today.

Each factor independently demonstrates that Clark never has had a fixed or absolute right to a claim under the *Thomas* risk-contribution theory, and, thus, has never had a vested right to bring a claim based on *Thomas*. The trial court dismissed these contingencies as typical and inconsequential. *See* R. 476; A-App. 017, 029. It held that contingencies "always . . . stand in the way of a plaintiff's ultimate recovery" and "[i]f [co-defendant's view] were the case, it is difficult to imagine a situation where a plaintiff would have a vested right to any cause of action…." *Id.*

However, the severe contingencies here are *not* those that typically impede a "plaintiff's ultimate recovery." R. 476; A-App. 017, 029. These contingencies are not run-of-the-mill, case-specific factual inquiries that exist with every tort

claim. Rather, they address the foundations of Clark's right to assert a claim, including the risk-contribution theory's constitutionality, applicability, and feasibility. Accordingly, Section 895.046 does not impair a vested right and cannot have a retroactive effect.

II. THE PUBLIC INTEREST IN SECTION 895.046 OUTWEIGHS CLARK'S PRIVATE INTEREST.

A. The Legislature May Apply A Law Retroactively.

Like the judiciary, the Legislature may apply a new law retroactively. Such legislation enjoys the "strong presumption in favor of its validity" widely recognized in Wisconsin law. *See Hammermill*, 58 Wis. 2d at 46. This stems from the Wisconsin Supreme Court's recognition that the Legislature has "the power to define and limit causes of action and to abrogate common law on policy grounds." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 51, 237 Wis. 2d 99, 613 N.W.2d 849; *Kohn v. Darlington Cmty. Sch.*, 2005 WI 99, ¶ 42, 283 Wis. 2d 1, 698 N.W.2d 794.

For as-applied challenges to legislation, as here, the challenger must demonstrate that the legislation is unconstitutional "*beyond a reasonable doubt*." *Soc'y Ins.*, 2010 WI 68, ¶ 27 (internal citation omitted). A challenger thus must do far more than "establish the unconstitutionality of the act as a probability." *Hammermill*, 58 Wis. 2d at 46. "If there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. The court cannot try the

legislature and reverse its decision as to the facts. All facts necessary to sustain the act must be taken as conclusively found by the legislature." *Id.* (quoting *State ex rel. Carnation Milk Prods. Co. v. Emery*, 178 Wis. 147, 160, 189 N.W. 564 (1922)); *see also Chappy*, 136 Wis. 2d at 184-85.

The court's role is limited to considering whether the legislation "contravenes some constitutional provision." *Hammermill*, 58 Wis. 2d at 47. The court is "not concerned with the merits of the legislation under attack [nor] … the wisdom of what the legislature has done." *Id.* (quoting *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633 (1967)); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976). Deference to the Legislature's chosen means "is due even if the court believes that the same goal could be achieved in a more effective manner." *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 76, 284 Wis. 2d 573, 701 N.W.2d 440. Such "great restraint" is necessary if the courts are "to maintain the public's confidence in the integrity and independence of the judiciary." *Flynn v. DOA*, 216 Wis. 2d. 521, 528, 576 N.W.2d 245 (1998).

To determine constitutionality, courts examine whether there is a rational basis for the retroactive application of the legislation. *Soc'y Ins.*, 2010 WI 68, ¶ 30 (internal citation omitted). Under Wisconsin law, this inquiry often involves a balancing test: "weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect." *Id.* (citing *Matthies*, 2001 WI 82, ¶ 27). On grounds that it would "improperly subject[] the retroactive legislation to a heightened level of scrutiny,"

the Court recently rejected any suggestion that a public purpose needed to be "substantial" or "intended to remedy a general economic or social issue." *Soc'y Ins.*, 2010 WI 68, ¶ 30 n. 12. Therefore, retroactive legislation is constitutional so long as it is "justified by a rational legislative purpose." *Id.*

B. Section 895.046 Has A Rational Purpose And Must Be Upheld.

The Legislature explained its rational purpose for amending Section 895.046 in 2013. The Legislature scrutinized the harm from the expansion of *Collins* and resolved the balance in favor of public interests, concluding that *Thomas* jeopardized Wisconsin's economic infrastructure and fair system of tort law. The Court may not second-guess these Legislative findings. If there is ***any*** doubt regarding the statute's invalidity, this Court is required to respect the Legislature's determination of that balance of interests and hold that Section 895.046 is constitutional. *See Soc'y Ins.*, 2010 WI 68, ¶¶ 26-27.

1. Section 895.046 Serves A Reasonable Public Purpose.

The public has an interest in a fair system of tort law that deters misconduct and requires tortfeasors to compensate persons whom they have injured, but which does not arbitrarily or unfairly deprive a person of his or her property. For 150 years, Wisconsin tort law has held that a person's property cannot be taken away unless that person engaged in tortious conduct that caused another person's harm. The Supreme Court created a narrow carve-out to this fundamental precept for exceptional situations akin to DES and invented the "risk-contribution" theory. *Collins*, 116 Wis. 2d 166.

In 2005, in *Thomas*, the Supreme Court further departed from long-settled tort law to greatly extend Wisconsin's unique "risk-contribution" theory and create new potential liability for manufacturers of myriad products, component parts, and raw materials. The *Thomas* court acknowledged that its expansive scheme "is not perfect and could result in drawing in some defendants who are actually innocent." *Id*. ¶ 164.

Following immediate public outcry, the Legislature and Governor perceived a need to reaffirm fundamental principles of Wisconsin tort law and restore the balance disrupted by *Thomas*.[8] The statute articulates a rational public purpose to make sure that any risk-contribution claim is consistent with long-standing principles of Wisconsin law and a fair framework for product liability. Regardless of one's views, the extent of public debate demonstrates that the Legislature addressed a public concern.

The Wisconsin Legislature's rationale for Section 895.046 is manifestly reasonable and weighs in favor of the statute's constitutionality. The Legislature explained its reasoning for both promulgating and amending Section 895.046 in its Legislative Findings and Intent.

First, the Legislature found that the public good is best served by preserving well-settled Wisconsin tort law and limiting risk-contribution theory to its historical criteria in *Collins*:

[8] Governor Walker described the impetus behind Act 2, "Improving our state's legal climate is important to creating an environment that allows the private sector to create jobs." R. 471, Ex. Q; A-App. 224-25.

> The Legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk-contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots.
>
> …
>
> The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk-contribution theory of liability announced in *Collins*.

Wis. Stat. § 895.046(1g). The Legislature understood the pervasive public interest in settled expectations under the law, and Section 895.046 was passed to protect that public interest. Even the trial court agreed that "[i]t is undeniable that the adoption of the risk contribution theory in any context represents a significant departure from the traditional notions of tort law that persons in this country have come to rely upon." R. 476; A-App. 017, 039. A public policy determination such as this is the rightful and exclusive province of the Legislature: "When acting within constitutional limitations, the Legislature settles and declares the public policy of a state, and not the court. . . . A constitutional statute cannot be *contrary* to public policy,—it *is* public policy." *Borgnis v. Falk Co.*, 147 Wis. 327, 351, 133 N.W. 209 (1911) (emphasis in original). Courts must defer to this legislative process. *See Soc'y Ins.*, 2010 WI 68, ¶ 26.

Second, the Legislature explained its balance of the strong public interests versus the weaker private rights and provided a rational basis for restoring risk-contribution theory to its limits that existed when Clark's claim accrued:

> This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago.

Wis. Stat. § 895.046(1g). In short, the Legislature was not silent, and it took rational steps within its recognized constitutional authority to address a public interest in fair tort law rules. It recognized the comparatively weaker private interest in using an unanticipated, new, and constitutionally suspect expansion of a legal theory, itself an exception to traditional causation rules. The Legislature was also rationally concerned about the business climate, employment, tax revenue, and community contributions made by manufacturers. States and cities compete for manufacturing plants and jobs. Product liability affects plant location, research and development, insurance costs, and product innovation and availability. The Legislature is in the unique position to hear from the entire community and to weigh all public policy factors. The Supreme Court has upheld strict "judicial deference to the stated policy of the legislature." *Kohn*, 2005 WI 99, ¶ 42.

The Legislature's concerns are valid bases to uphold Section 895.046, no different than those rational bases justifying other constitutional legislation. On numerous occasions, Wisconsin courts have upheld legislation on grounds that the law would protect or facilitate economic development. For example, the Supreme Court in *Northwest Airlines, Inc. v. Wisconsin Department of Revenue* rejected an equal protection challenge and held an airline tax exemption to be constitutional

on grounds it protected Wisconsin's "transportation infrastructure and economy." 2006 WI 88, ¶ 59, 293 Wis. 2d 202, 717 N.W.2d 280. After reviewing newspaper articles discussing the economic benefits of the exemption, the Court "conclude[d] that the legislature could have reasonably determined that creating the hub exemption would … bolster economic development in Wisconsin, a legitimate governmental purpose." *Id.* ¶ 61.

Likewise, in *Tomczak ex rel. Castellani v. Bailey*, the Supreme Court reversed the lower court and held that a statute of repose for injuries resulting from property improvements was constitutional. 218 Wis. 2d 245, 271, 578 N.W.2d 166 (1998). Absent such a limitation, "there is a distinct possibility that a surveyor could be held liable to a remote and unforeseeable purchaser thirty, forty, or even fifty years after completion of the original survey. In our assessment, this legislation is amply justified by the legislature's implicit conclusion that no duty so broad, and no liability so immeasurable should be imposed upon *any* party to a commercial transaction such as that involved here." *Id.* at 270 (emphasis in original). The Court agreed with the Legislature that "ensur[ing] prompt litigation of claims and … protect[ing] defendants from fraudulent or stale claims brought after memories have faded or evidence has been lost" was a valid rational basis and an "important policy concern." *Id.* at 272. The Legislature's express goals here are no different: protection of citizens' rights to pursue permissible claims of injury and assurance to businesses of a fair legal system.

Third, the Legislature expressed its disapproval of *Thomas*'s expansion of risk-contribution theory and its concerns about the constitutional implications of *Thomas*'s unprecedented expansion of liability:

> The legislature finds that the application of risk-contribution to former white lead carbonate manufacturers in *Thomas v. Mallett*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk-contribution theory of liability announced in *Collins*, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions.

Wis. Stat. § 895.046(1g). *Collins* pressed constitutional boundaries; *Thomas* crossed the line, while brushing aside the constitutional issues for later. The Legislature stepped in to safeguard the Constitution when the Supreme Court demurred. The presumption of constitutionality for legislation stems from "[the court's] respect for a co-equal branch of government and is meant to promote due deference to legislative acts." *Soc'y Ins.*, 2010 WI 68, ¶ 26.

Here, the Court does not need to speculate about the Legislature's reasons for enacting Section 895.046; the public purpose is set forth right in the legislation. *Cf. Metropolitan Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 63, 332 Wis. 2d 85, 796 N.W.2d 717 (if the Legislature has not expressly articulated the law's basis, the court is "obligated to construct a rationale if at all possible"). The argument for constitutionality is strongest where, as here, the Legislature has identified a law's public purpose. *See Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 60, 281 Wis. 2d 300, 697 N.W.2d 417.

The trial court, however, decided that the Legislature's articulated purposes had no weight. It dismissed the legislative process and set out to "fix[] a broken system." R. 476; A-App. 017, 038.

But, "when the legislature has acted, 'the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy choices.'" *Progressive N. Ins. Co.*, 2005 WI 67, ¶ 60 (internal citation omitted); *see also Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633 ("Under our tripartite system of government, it is the duty of this court to apply the policy the legislature has codified in the statutes, not impose our own policy choices."). A court is not able to substitute its judgment for that of the legislature when a rational basis for the statute exists: "Such arguments, pro and con, as to what limitations on bringing to court actions based on products liability and negligent manufacture will best serve the public interest are for the legislature, not the courts, to consider. We have sought to interpret and apply the law as it now is, not the law as we might want it to be. It is not the judicial role to draft statutes." *Holifield*, 42 Wis. 2d at 758.

Wisconsin law is well-established on this point. In *Doering v. WEA Ins. Group*, the Supreme Court affirmed the constitutionality of a statute granting immunity from civil liability to alcoholic beverage providers. 193 Wis. 2d 118, 532 N.W.2d 432 (1995). The lower court had previously held that the statute was unconstitutional. Examining the statute under the rational basis test, the Supreme Court noted that, even in the absence of a stated public purpose, its obligation was

to "locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination." *Id.* at 140 (internal citation omitted). The Court acknowledged that "it is the constitutionality of the statute, not its wisdom, which the court must address." *Id.* at 129; *see also id.* at 149; *Columbus Park Hous. Corp.*, 2003 WI 143, ¶ 34 (benefits of a statute are "irrelevant . . . we must apply the statute as written, not interpret it as we think it should have been written.").

Here, as in *Doering*, the trial court impermissibly swept aside the Legislature's expressed public policy and ignored the evidence of widespread concern over *Thomas*. Unlike the Supreme Court, which has looked to newspaper articles to identify a possible rational basis, *Northwest Airlines*, 2006 WI 88, ¶ 61, the trial court improperly dismissed such evidence as "opinion polling." R. 476; A-App. 017, 034. By trivializing the Legislature's stated basis for Section 895.046, the trial court erred and failed to resolve any doubt in favor of constitutionality.

2. Clark's Limited Private Interests Do Not Outweigh The Legislature's Articulated Public Interests.

It was further error for the trial court to hold, contrary to the Legislature, that Clark's private interest outweighed the public interests supporting Section 895.046. In 2003, when Clark claims her injury occurred, she had no expectation of a claim against those WLC manufacturers which she could not identify as injuring her, and she did not sue them then. She had no expectation of recovery

under risk-contribution theory; she could not reasonably expect at that time that risk-contribution theory would expand to include WLC used in a multitude of different kinds of paints—products substantially different in formulation, labeling, marketing, distribution and use, unlike the identically formulated drug DES. Nor could she reasonably rely on a theory of recovery that had yet to be announced two years later. Instead, she expected that she could pursue a negligence claim against the landlords of her residences and the former WLC manufacturers pursuant to Wisconsin tort law as it existed at the time of her injury.

Section 895.046 reinstates the common law that existed at the time of Clark's injury. It left Clark no better and no worse off than she was when her claims arose. Accordingly, her private interest is comparatively weak, as the Legislature concluded.

The trial court erroneously substituted its view in place of legislative policy and compounded its error by claiming that Clark "did not have meaningful notice of the statutory impairment." R. 476; A-App. 017, 036. However, this is not a case where Clark was caught in a trap for the unwary. Wisconsin courts value notice to prevent the possibility that a party may be unexpectedly deprived of rights that existed at *the time of injury*. For example, in *Matthies*, the Court ruled that the plaintiff's private interest outweighed the public interest, because, at the time he was injured, the plaintiff was entitled to a full recovery of his damages. Retroactive application impaired the "right to recover all of his damages . . . without any real notice." *Matthies*, 2001 WI 82, ¶ 46. That did not occur here.

Section 895.046 did not deprive Clark, without notice, of any right that existed at the time of her injury. Because Section 895.046 was merely restoring the common law to its pre-*Thomas* roots, there was nothing for Clark to have done differently; she received the same rights and benefits after Section 895.046 as she had at the time her alleged injury occurred.

If anything, the policy reasons against retroactivity support the former WLC manufacturers. Allowing Clark to continue under *Thomas*'s risk-contribution theory "creates new obligations [for each WLC manufacturer] with respect to past transactions," *Chappy*, 136 Wis. 2d at 194, and ignores that their liability was "fixed on the date of injury." *Neiman*, 2000 WI 83, ¶ 13. There is no inequity in upholding the constitutionality of Section 895.046.

C. The Court May Not Use The Rational Basis Test To Upset The Legislature's Balance of Public And Private Interests.

As the Wisconsin Supreme Court has instructed, once the Legislature has spoken, the court's role is limited to determining whether a rational basis exists. Allowing Wisconsin's courts to balance public against private interests, when the Legislature already has determined that balance, necessarily would trigger an improper re-weighing of the Legislature's rationale. Permitting the judiciary to second-guess the Legislature's determinations would violate separation of powers principles. *See, e.g., Keene v. Consolidation Coal Co.*, 645 F.3d 844, 850 (7th Cir. 2011) ("[I]t could very well be that . . . some undeserving claimants are awarded benefits. But the flip-side is also true: without the presumption, some deserving

claimants are not awarded benefits. *It is up to Congress to decide which is the lesser evil*.") (emphasis added).

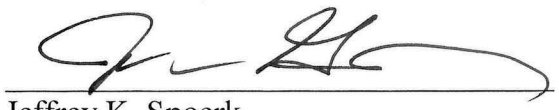
Indeed, "this sort of searching inquiry [could] create[] precedent for this Court and lower courts to … step back toward the days of *Lochner v. New York*." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part). *Lochner*, of course, "has long since been discarded. . . . [C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). A similar rationale, along with fear of introducing a heightened level of judicial scrutiny, prompted the Wisconsin Supreme Court to reject the suggestion that a public purpose must be substantial. *Soc'y Ins.*, 2010 WI 68, ¶ 30 n. 12.

Here, the Legislature identified the rational bases for amending Section 895.046. They are rational—in fact, two Supreme Court Justices in *Thomas* raised the same reasons for adhering to traditional requirements to prove causation. *See Thomas*, 2005 WI 129, ¶¶ 177-318 (dissents of Justices Prosser and Wilcox). This Court's role is limited to concluding only whether those bases are, in fact, rational, not to undertake its own balance of public versus private interests and not to brush aside the importance of the public interests found by the Legislature.

CONCLUSION

This Court should reverse the Circuit Court's decision and hold that Section 895.046 as amended in 2013 is constitutional as applied to Plaintiff's claims.

Dated: January 26, 2015



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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19 (8) (b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief is 10,694 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the Brief of Defendant-Appellants, the corresponding Appendix, and this Certificate of Service were sent via U.S. mail this 26th day of January, 2015, to the following:

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APPENDIX AND ELECTRONIC APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19 (2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23 (3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that the electronic appendix filed with this brief complies with the requirements of Wis. Stat. § 809.19(13) and that the content of the electronic appendix is identical to the content of the paper copy of the appendix.

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