COURT OF APPEALS OF WISCONSIN
DISTRICT 1

YASMINE CLARK, a Minor,
by her Guardian ad Litem,
SUSAN M. GRAMLING;

Plaintiff-Respondent,

Appeal No. 2014-AP-775

v.

AMERICAN CYANAMID CO.,
ARMSTRONG CONTAINERS, INC.,
E.I. DUPONT DE NEMOURS AND
COMPANY, ATLANTIC RICHFIELD
COMPANY, THE SHERWIN-WILLIAMS
COMPANY,

Defendants-Appellants,

MILWAUKEE COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Defendant.

On Appeal of a Non-Final Order of Milwaukee County Circuit Court
The Honorable David A. Hansher, Presiding
Circuit Court Case No. 06-CV-12653,

BRIEF OF THE PLAINTIFF-RESPONDENT

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1). Whether §895.046, Wis. Stats., violates Yasmine Clark's substantive due process rights in violation of Article I, § 1, of the Wisconsin Constitution by retroactively abrogating her vested rights;

The trial court answered YES[1].

(2). Whether §895.046, Wis. Stats., trespasses on the separation of powers in violation of Article VII, § 2, of the Wisconsin Constitution by abrogating the Wisconsin Supreme Court's interpretation of the state constitution's right to a remedy clause contained in Article I, §9;

The trial court did not reach this issue[2].

(3). Whether §895.046, Wis. Stats., constitutes private legislation smuggled into the State's biennial budget in violation of Article IV, §18, Wisconsin Constitution;

The trial court did not reach this issue.

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[1] Inexplicably, the Defendants-Appellants, repeatedly refer to this case as one in which the constitutionality of the statute is challenged "as-applied" to Ms. Clark, despite the fact that Court below very clearly ruled that the statute was unconstitutional on its face and that Ms. Clark's "as applied" challenge is not ripe because the statute has not been enforced against her. *See* A-App. 032 (Decision below at page 16).

[2] Notwithstanding the trial court's decision not to reach the separation of powers issue below, the Defendants-Appellants nevertheless raise that issue in their opening brief at pages 42 and 43 in support of the argument that separation of powers considerations foreclose the courts from balancing public and private interests under Wisconsin's well established substantive due process test for retroactive legislation described in *Matthies v. Positive Safety Mfg.*, 2001 WI 82, ¶¶ 15-18, 244 Wis.2d 720. The Plaintiff-Respondent disagrees that separation of powers considerations preclude Wisconsin's courts from weighing public and private interests in the course of determining the constitutionality of retroactive state statutes, but agrees that separation of powers considerations are germane to an analysis of whether the statutory abrogation of the *Thomas* decision is constitutional as discussed *infra* at 22.

II. STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent respectfully disagrees with the Defendants-Appellants' assertion that oral argument would be helpful to this Court. The issues presented by this appeal are simple and require a straightforward application of well-settled law. Therefore, under §809.22(2)(a)(1), Wis. Stats., the appeal may be submitted on briefs without oral argument.

The Plaintiff-Respondent asserts that as a result of a subsequent published opinion directly on point in the case of *Gibson v. American Cyanamid,* 760 F.3d 600, 608-09 (7th Cir. 2014)(en banc review denied), permissive review of the non-final order in this case was improvidently granted. Accordingly, Plaintiff-Respondent respectfully requests that this appeal be dismissed on that basis as further set forth *infra*, and therefore publication should not be a consideration. In the event this Court reaches the merits of this appeal, notwithstanding the argument set forth *infra,* at pages 7 to 10 of this brief, the Plaintiff-Respondent agrees that publication of the decision would be appropriate pursuant to §809.23(1)(a)(5), Wis. Stats.

III. INTRODUCTION

On July 15, 2005, the Wisconsin Supreme Court determined that childhood lead poisoning cases caused by residential lead paint were factually similar to cases of adenocarcinoma of the vagina caused by in utero exposure to diethylstilbestrol (DES) and therefore applied the Wisconsin common-law

doctrine of risk contribution to the manufacturers of white lead carbonate pigments for the plaintiff's lead poisoning injuries that had occurred in 1991 and 1993 at two different apartments in Milwaukee. *Thomas v. Mallett, et al,* 2005 WI 129, ¶¶ 5-10, 119-122, 285 Wis.2d 236, 298-99 (2005). In so doing, the Wisconsin Supreme Court acted pursuant to its interpretation of the mandate of Article I, § 9 of the Wisconsin Constitution which is both "substantive in nature" and "guarantees access to Wisconsin courts to proceed on rights and remedies created by constitution, statute or common law." *Kroner v. Oneida Seven Generations Corp.*, 2012 WI 88, ¶90, 342 Wis.2d 626, 665, (2012).

In *Kroner*, a plurality decision, Justice Roggensack, joined by Justices Ziegler and Gableman, held, in concurrence, that the statute at issue in that case "was retrospectively applied in violation of a [a litigant's] vested substantive, constitutional rights, including, but not limited to, his right of access to Wisconsin courts granted by Article I, Section 9 of the Wisconsin Constitution." *Kroner,* at ¶70, page 659. In so holding, the *Kroner* Court relied specifically on the *Thomas* decision to emphasize the substantive nature of Wisconsin's constitutional right to a remedy clause. *Kroner,* at ¶90, page 665. This is understandable because the Wisconsin Supreme Court relied heavily on Art. I, § 9, in the course of crafting the risk contribution doctrine in the first place in *Collins v. Eli Lilly, Co.,* 116 Wis.2d 166, 182 (1984), and then

again in applying that doctrine to the factually similar circumstances of lead poisoning cases against lead pigment manufacturers in *Thomas*.

In the wake of the *Thomas* decision, on December 27, 2006, Yasmine Clark filed a complaint in Milwaukee County Circuit Court asserting causes of action pursuant to the risk contribution doctrine. The factual record indicates that Yasmine, like the *Thomas* plaintiff, was lead poisoned on two separate and distinct occasions; the first occurring during the summer of 2003 while she lived at 3738 West Galena Street in Milwaukee, and the second occurring three years later in 2006 while she lived at 1940 North 26th Street, also in the City of Milwaukee. *See* Complaint, ¶¶ 17-19, 38-45. Thus, Yasmine's first lead poisoning injury in 2003 occurred well after the common-law of Wisconsin was modified in 1984 to include causes of action based on the risk contribution doctrine that were factually similar to DES cases. The second lead poisoning injury three years later at a separate and distinct house and the resulting hospitalization occurred *after* the Wisconsin Supreme Court had confirmed that lead poisoning cases were factually similar to DES cases, and that lead poisoned children therefore had a constitutionally guaranteed substantive right to a remedy against the wrongs committed by the lead pigment manufacturers[3].

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[3] Citing *Nierengarten v. Lutheran Soc. Serv. Of Wis.*, 219 Wis.2d 686 (1998), and *Pritzlaff v. Archdiocese of Milwaukee,* 194 Wis.2d 302(1995), Defendants-Appellants erroneously argue at page 16 of their opening brief that for purposes of determining when Yasmine's rights to a cause of action under risk contribution vested, only the 2003 poisoning at 3738 West Galena counts under the single cause of action rule and the second 2006 poisoning at 1940 North 26th Street is irrelevant. However, the single course of conduct rule does not preclude the accrual of a second vested right to a cause of action when a second

On November 15, 2010, the federal trial court in *Gibson v. American Cyanamid Co., et al.*, 750 F.Supp. 998 (ED Wis. 2010)), granted summary judgment in that case on the grounds that the risk contribution doctrine as defined in *Thomas* violated the federal substantive due process rights of the lead pigment manufacturers[4]. On December 7, 2010, the *Gibson* case was appealed to the United States Court of Appeals for the Seventh Circuit. On February 3, 2011, the Court in this case granted the lead pigment defendants' motion for a stay pending the outcome of the appeal in *Gibson.* Yasmine Clark vigorously opposed the motion for the stay on the grounds that her case had been pending, at that point for more than four years, and since trial was eminent, having been scheduled for May 2, 2011, she would be severely prejudiced by the delay. *See* Plaintiff-Respondent's Supp. Appendix at Supp. App. 001-061; (Transcript of Hearing on Motion for Stay, January 13, 2011). Further, as pointed out in Yasmine Clark's brief in opposition to the stay, as of that point in time, almost $300,000.00 had been spent in preparing her case for

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injury occurs at a later date as a result of separate events at a separate location. While not directly on point, *Sopha v. Owens-Corning Fiberglass Corp.*, 230 Wis.2d212, 225-232 (1999), does clarify that "[t]he single cause of action rule also seeks to deter vexatious and multiple lawsuits *arising out of the same tortious incident.*" (emphasis added). Here Clark has alleged in her complaint two separate tortious incidents at two separate addresses on two separate occasions separated by three years.

[4] On April 5, 2011, U.S. District Judge Lynn Adelman issued summary judgment decisions in four other lead poisoning cases coming to the opposite conclusion of Judge Randa in *Gibson* holding that the risk contribution doctrine was not unconstitutional on substantive due process grounds. *Burton v. American Cyanamid, et al,* 775 F.Supp.2d 1093 (ED Wis. 2011); *Owens v. American Cyanamid, et al,* 787 F.Supp.2d 823 (ED Wis. 2011); *Stokes v. American Cyanamid, et al,* 787 F.Supp.2d 836 (ED Wis. 2011); *Sifuentes v. American Cyanamid, et al,* 787 F.Supp.2d 843 (ED Wis. 2011).

trial. Supp. App. at 069. Indeed, Yasmine Clark had retained ten experts, all of whom issued reports, and had conducted the depositions of the eighteen experts disclosed by the lead pigment manufacturer defendants. *Id.*

On January 27, 2011, Wisconsin enacted §895.046, Wis. Stats., which abrogated the risk contribution doctrine as applied to lead pigment manufacturers in all cases filed prospectively, after February 1, 2011. As of the point in time that the statute went into effect, there were already a total of eight lead poisoning cases involving 171 children that had been pending in state and federal court[5].

Two and a half years later, on June 30, 2013, the Governor of Wisconsin signed the state's biennial budget into law, which contained within it, an obscure amendment to §895.046, Wis. Stats., retroactively abrogating those lead poisoning cases relying on risk contribution that had been filed before February 1, 2011. Decision below at p. 4. The first paragraph of the amendment, created a new provision, §895.046(1g), Wis. Stats., which declared that it was the intent of the legislature to abrogate risk contribution only as applied by the *Thomas* Court to lead pigment manufacturers while preserving its "limited" application as defined by the *Collins* Court. *Id.* The second paragraph of the amendment to §895.046, Wis. Stats., made the statute

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[5] After the enactment of §895.046, Wis. Stats., on May 3, 2011, two additional plaintiffs filed lead poisoning claims pursuant to the risk contribution doctrine in federal court alleging lead pigment ingestion that occurred prior to the effective date of the statute. *Valoe, et al, v. American Cyanamid, et al;* Case No. 2011-CV-425-LA. With the filing of the *Valoe* case the total number of lead poisoning cases relying on risk contribution numbers 173.

retroactively applicable to the limited universe of cases that had been filed prior to February 1, 2011. *Id.*

The statutory abrogation of the Supreme Court's holding in *Thomas* was added to the omnibus biennial budget as part of a multi-purpose amendment during the final session of the Joint Finance Committee in the early morning hours of June 5, 2013, without notice, sponsors, or public hearings. *See,* Decision below at p. 20; Supp. App. at pp. 076, 079, 094 at ¶¶ 13, 17. On June 21, 2013, just sixteen days after being "smuggled" into the budget, the legislation was presented to the Senate for a final passage as part of the biennial budget. Supp. App., p. 094, at ¶12. The statutory abrogation was never separately voted on because it was always buried in multi-purpose legislation. It was signed by the Governor on June 30, 2013, and became law on July 1, 2013. *See* Decision below at p. 20.

IV. THE COURT OF APPEALS SHOULD RECONSIDER WHETHER LEAVE TO APPEAL A NON-FINAL ORDER WAS IMPROVIDENTLY GRANTED AND DISMISS THIS APPEAL

The trial court below issued its Order on March 25, 2014, and the Defendants-Appellants filed their petition for leave to appeal a non-final order a few days later on April 8, 2014. The petition was fully briefed by April 22, 2014, when the Plaintiff-Respondent filed her response to the petition. The Defendants-Appellants argued that leave to appeal should be granted because immediate review purportedly would serve the goals set forth in §809.50, Wis.

Stats., in that "scores of pending cases may have to be litigated, rather than dismissed as a matter of law, with the constitutionality of §895.046 to be determined in a post-judgment appeal;" and "[a]n interlocutory appeal can avoid 'substantial or irreparable' injury to everyone associated with the current case. Multiplied by at least 170 other claims, the urgency of an interlocutory appeal becomes overwhelming." Defendants-Appellants' Petition at pp. 9-10, 12.

Then on July 24, 2014, the United States Court of Appeals for the Seventh Circuit issued a published decision in the case of *Gibson v. American Cyanamid,* 760 F.3d 600, 608-610 (7th Cir. 2014)(*en banc* review denied)(petition for certiorari pending), in which the Court directly decided the precise issue on this appeal by holding[6]:

> "We agree with *Clark* (Judge Hansher's decision) that Wisconsin Supreme Court precedent demands holding that Section 895.046 violates state due-process principles by trying to extinguish Gibson's vested right in his negligence and strict liability causes of action."

Id., at 609.

While published opinions of the federal courts on matters of state law are not binding on Wisconsin's intermediate appellate courts, *LeClair v. Natural Resources Board,* 168 Wis.2d 227, 238-39 (Wis. App. 1992), the Seventh

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[6] The Seventh Circuit requested briefing on the issue of whether §895.046, Wis. Stats., extinguished *Gibson*'s risk contribution claims by operation of state law in fulfillment of its duty to avoid federal constitutional adjudication of claims that can be resolved on state law grounds. In connection with that briefing, the Seventh Circuit granted *Gibson's* Request for Judicial Notice of various filings before Judge Hansher regarding the constitutionality of the statute. *Gibson*, 760 F.3d at fn3. The Defendants-Appellants have not appealed the 7th Circuit's *Gibson* holding on the constitutionality of §895.046, Wis. Stats.

Circuit's opinion in *Gibson,* certainly is binding on the 171 lead poisoning cases pending in the U.S. District Court for the Eastern District of Wisconsin[7]. Therefore, a decision by this Court will only be binding precedent for the two lead poisoning cases pending in Wisconsin's state courts[8]. Accordingly, the publication of the *Gibson* decision has greatly reduced the extent to which interlocutory review of the decision by Judge Hansher will serve the factors set forth in §809.50, Wis. Stats. This is because the *Gibson* decision is binding precedent governing the 171 risk contribution claims pending in federal court and none of those cases are stayed pending this appeal. See e.g. *United States ex rel. Schnitzler v. Follette,* 406 F.2d 319, 322 (2d Cir. 1969)("In this case, as in all others, the district court is required to follow a binding precedent of a superior court, and it abused its discretion in declining to do so.").

Further, the factors related to clarifying the proceedings associated with this case and protecting parties from substantial or irreparable injury are also

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[7] Of the 173 lead poisoning plaintiffs pursuing risk contribution claims in Wisconsin, 171 of the plaintiffs have their claims pending in federal court, therefore, the Seventh Circuit's opinion in *Gibson* is binding authority in all of those cases. See *Burton v. American Cyanamid, et al,* Case No. 2007-CV-0303-LA, (1 plaintiff); *Owens v. Conley, et al,* Case No. 2007-CV-0441-LA, (1 plaintiff); *Gibson v. American Cyanamid, et al,* Case No. 2007-CV-0864-RTR, (1 plaintiff); *Stokes v. American Cyanamid, et al,* Case No. 2007-CV-0865-LA (1 plaintiff); *Sifuentes v. American Cyanamid, et al;* Case No. 2010-CV-0075-LA; (1 plaintiff); *Allen, et al, v. American Cyanamid, et a,* Case No. 2011-CV-0055-LA, *(161 plaintiffs); Valoe, et al, v. American Cyanamid, et al;* Case No. 2011-CV-425-LA, (2 plaintiffs); *Trammell v. American Cyanamid, et. al.,* Case No. 2014-CV-1423 (3 plaintiffs).

[8] In addition to this case, the only other lead poisoning plaintiff pursuing a risk contribution claim in Wisconsin's state courts is *Williams, et al v. Goodwin, et al.,* 2011-CV-1045, which is the only other case stayed pending the outcome of this appeal. *See* Milwaukee County Circuit Court, Case No. 2011-CV-1045, CCAP docket entry dated 12/13/13, Hon. Van Grunsven, presiding.

affirmatively served by dismissal of this appeal. This is because Yasmine's cause of action has lingered for more than half of her life, very much to her prejudice. As of the point in time that this brief has been filed with the Court of Appeals on February 26, 2015, Yasmine's case will have been pending in Wisconsin's courts for 8 years, 1 month, and 30 days. Giving stark meaning to the old refrain that justice delayed is justice denied, the Court should note that as of the point in time that her law suit was filed on December 27, 2006, Yasmine Clark had been alive for 5 years, 9 months, and 22 days. In other words, Yasmine Clark has spent approximately 60% of her almost 14 years of life in litigation, while the powerful corporations who negligently manufactured the toxic pigment that poisoned her are indulged with delay after delay. This latest delay is incurred as a result of this transparently unconstitutional legislation which was extra-judicially and secretively obtained by the Defendants-Appellants themselves for their own exclusive private benefit in this and the other pending cases. Any "substantial or irreparable injury" alleged to be suffered by the Defendants-Appellants as a result of not being able to further exploit the delay that has been created by their extra-judicial and self-serving attempts to change the rules of decision in this case is far outweighed by the continuing and seemingly endless delay and prejudice to Yasmine's ability to get her case to trial.

Given the extraordinary delay in getting her case to trial, and the recent intervening event of the Seventh Circuit issuing its published opinion in

Gibson on the precise legal issue in this appeal, Yasmine respectfully requests that this Court consider whether leave to file this permissive appeal was, in hindsight, improvidently granted. This is because in light of the publication of the *Gibson* decision, this permissive appeal no longer implicates with the same force any of the factors identified in §809.50(1)(c), Wis. Stats. As such, justice would be best served by dismissing this permissive appeal and allowing Yasmine's case to finally go to trial. In the event Yasmine prevails at trial, the Defendants-Appellants will not be prejudiced because they will be able to pursue an appeal as a matter of right pursuant to §808.03(1), Wis. Stats.

V. THE TRIAL COURT PROPERLY DETERMINED THAT RETROACTIVE APPLICATION OF § 895.046, WIS. STATS., VIOLATES YASMINE CLARK'S SUBSTANTIVE DUE PROCESS RIGHTS

Retroactive legislation, like this, that deprives individuals of vested property rights, is viewed with suspicion and analyzed differently from prospective legislation. *Martin v. Richards*, 192 Wis. 2d 156, 200-01 (1995). The Wisconsin Supreme Court has adopted a two-part balancing test to determine whether retroactive statutes comport with due process. *Id.*; *Society Ins. v. Labor & Industry Review Com'n*, 2010 WI 68, ¶28, 326 Wis.2d 444, 465 (2010). The first step is to determine whether the statute actually has a retroactive effect on a vested right. *Id.* The second step is to weigh the public purpose of the legislation against the impaired private interest. *Id.*

A. **The First Step In Determining Whether Retroactive Application Is Unconstitutional Is To Determine Whether The Statute Actually Has A Retroactive Effect on a Vested Right.**

Under Wisconsin law, there is no serious question that Yasmine Clark has a vested property interest that would be eliminated by the retroactive nature of the legislation at issue. As noted in *Neiman v. American National Property & Casualty Co.*, 2000 WI 83 ¶14, 236 Wis.2d 411 (2000), "[t]he concept of vested rights is conclusory – a right is vested when it has been so far perfected that it cannot be taken away by statute." A statute has a retroactive effect where it modifies or eliminates a preexisting vested right. *Society Insurance*, ¶ 29, page 465-66; *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶22, 244 Wis. 2d 720, 738-9.

"It is the fact and date of injury that sets in force and operation the factors that create and establish the basis for a claim of damages." *Matthies,* at ¶22. As alleged in the complaint, Yasmine Clark's injuries occurred on two separate occasions, the first in 2003 and the second in 2006. As a result, she acquired a vested right in a cause of action against the manufacturers and sellers of lead paint based on the risk contribution doctrine which was the law at the time of each of her separate injuries in 2003 and 2006, as well as on the date she filed her complaint. *See Martin*, 192 Wis. 2d at 201, *Matthies,* 244 Wis. 2d at 720, *Society Insurance*, 326 Wis. 2d at 465, *Neiman*, 236 Wis. 2d 411.

The Defendants-Appellants erroneously argue that §809.046, Wis. Stats., is not retroactive as to Yasmine Clark because the *Thomas* decision was not the

law in Wisconsin during the summer of 2003 when she was first poisoned at 3738 West Galena Street. Therefore, the Defendants-Appellants reason that the retroactive statute does nothing more than return the law to what it was when her first claim accrued. *See* Defendants'-Appellants' brief, at pp. 15-24. However, this argument fails because, as noted by the trial court below, it is abundantly well established that Wisconsin adheres to the doctrine that retroactive application of judicial decisions is the rule, not the exception. *See* Decision below at p. 12 (citing *In re Commitment of Thiel*, 2001 WI App. 52 ¶ 7, 241 Wis.2d 439; *Fitzgerald v. Meissner & Hicks, Inc.,* 38 Wis.2d 571, 580 (1968); see also *Trinity v. Scott Oil,* 2007 WI 88, ¶76, 302 Wis.2d 299, 330-31 (2007)(Wisconsin adheres to the presumption of retroactivity for judicial holdings); *Wenke v. Gehl,* 2004 WI 103, ¶69, 274 Wis.2d 220, 267-68 (2004)("In civil cases, we presume retroactive application."). This is because, generally, judicial holdings are statements of what the law is, not what it will be.

Indeed, on July 15, 2005, the *Thomas* Court declared the meaning of Art. I, § 9, in the context of lead poisoning claims proceeding under risk contribution and made that holding applicable to the lead poisoning claims of Steven Thomas that had accrued in 1993. *Thomas,* at ¶¶ 5-10. The *Thomas* decision did not create one body of law retroactively applicable to Steven Thomas, separate and part from the body of law applicable to all other lead poisoned children whose causes of action accrued between 1993 and 2005.

Indeed, the *Thomas* Court itself noted that Steven Thomas' was not an isolated case, and there existed many other lead poisoning victims and the wide spread incidence of lead poisoning caused by lead paint was a factor that supported extension of the risk contribution doctrine to these types of cases. *Id.*, at ¶¶ 131, 133. There is simply no basis in fact or law for the Defendants-Appellants to avoid the indisputable fact that the *Thomas* Court intended its decision to be retrospective in application.

The Defendants-Appellants also make the meritless argument that Yasmine's right to a cause of action under risk contribution could not have vested because there are too many contingencies. At the trial court level, this argument was based on three alleged contingencies: "(1) it was unclear whether *Thomas'* expansion of risk contribution theory would comport with due process; (2) it was unclear whether such expansion would pass muster under Wisconsin's public policy analysis; and (3) it was unclear whether the facts would support a finding that white lead carbonate pigments were fungible, so as to render the risk contribution theory applicable." *See* Decision below at p. 13. On appeal, the Defendants-Appellants persist with those three alleged "contingencies" and improperly add a fourth, not asserted below.

The Defendants-Appellants begin this argument with a sleight of hand by changing the "vested right" at issue to suit their reasoning. Instead of discussing whether Yasmine has a vested right in her cause of action, they

substitute the question of whether she has a vested right to actual recovery. As Judge Hansher noted:

> "The WLC Defendants correctly assert that at the time the 2013 amendments were enacted, the Plaintiff had no vested right to *recover* damages. However, this fact is irrelevant, because the vested right at issue here is the Plaintiff's vested right to causes of action against the WLC Defendants under *Thomas.* The Plaintiff's vested right right to pursue claims against the WLC Defendants under *Thomas* is not rendered conditional by the fact that several legal and factual contingencies stand in the way of the Plaintiff's right to recover upon such claims. If that were the case, it is difficult to imagine a situation where a plaintiff would have a vested right to any cause of action, as there are always legal and factual contingencies that stand in the way of a plaintiff's ultimate recovery."

Id. (emphasis in original)

Not deterred by having the sleight of hand exposed below, the Defendants-Appellants nevertheless try the same argument without adjustment at the appellate court level. No one disputes that a right to actual recovery is contingent until perfected by judgment.[9] However, the relevant question is whether the retroactive amendment to §895.046, Wis. Stats., affects a substantive right to a *cause of action* that accrued before the passage of the legislation. *Hunter v. School District of Gale-Ettrick-Trempealeau,* 97 Wis.2d 435, 445 (1980) ("An existing right of action which has accrued under the rules of the common law or in accordance with its principles is a vested property right")(emphasis added); *Matthies v. Positive Safety Mfg., Co.,* 2001 WI 82, ¶22, 244 Wis.2d 720, 738-9.

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[9] Even so, it should be noted that in *Matthies v. Positive Safety Mfg. Co.,* 2001 WI 82, ¶46, 244 Wis.2d 720, the Court held that the alteration to the joint and several liability statute *had the potential to reduce Matthie's damages by 50%, possibly more.* Any such potential reduction would be contingent of a successful recovery, yet the *Matthies* Court did not conclude that the substantive right had not vested because of its contingent nature.

The first contingency asserted on appeal is simply put, absurd. The Defendants-Appellants persist in arguing that one of the contingencies that precludes Yasmine's vested right to a cause of action is the "real doubt as to whether *Thomas* can be constitutionally applied." Defendants-Appellants' Brief, at p.25. This argument is being reasserted on appeal notwithstanding the intervening event of the Seventh Circuit issuing its published opinion after Judge Hansher issued his opinion and after briefing was complete on the petition of leave to appeal a non-final order. Incredibly, the Defendants-Appellants dispose of the 7th Circuit's *Gibson* decision by declaring "[w]hat 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." *Id.* The doubt apparently referred to by the Defendants-Appellants is the disagreement between the trial court in *Gibson,* and the appeals court that reversed the trial court! There is no basis in fact or law for this argument now that the only court to have held the risk contribution doctrine unconstitutional has been reversed. And all other courts to have considered the matter agree. See also, e.g., *Burton v. American Cyanamid,* 775 F.Supp.2d 1093 (E.D. Wis. 2011)(risk contribution creates a constitutionally valid rebuttable presumption of causation).

The second contingency asserted on appeal is equally untenable. Defendants-Appellants argue that Wisconsin's public policy limitations on liability preclude the Yasmine's right to a cause of action under *Thomas* from

vesting because her injuries might be found too remote from the alleged negligence, or the damages might be wholly out of proportion to the Defendants-Appellants' culpability, or too many other tortfeasors may have contributed to her injuries. However, the Defendants-Appellants cite no cases whatsoever to support this proposition other than one of the dissents in the *Thomas* decision itself. Defendants-Appellants' Brief, at p.26. And they ignore the well established cases that hold that consideration of whether liability should be limited by public policy factors should be determined by the judge after trial. *Alvarado v. Sersch,* 2003 WI 55, 262 Wis.2d 74. It would be a novel doctrine to hold a right to a cause of action too contingent, and therefore, not vested, on the grounds that after trial, a finding of liability in a given set of circumstances might be later limited based on the application of public policy factors.

The third contingency is being asserted for the first time on appeal and is therefore waived and not properly before the Court. As noted by Judge Hansher, the Defendants-Appellants failed to address the factors set forth in *Kurtz v. City of Waukesha,* 91 Wis.2d 103, 108-110 (1979)(citing *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106 (1971), for challenging the presumptive retroactive application of a judicial holding. *See* Decision below at p. 13, A-App. 029. Having failed to raise this issue below, the Defendants-Appellants try to shift to the trial court the burden of applying the *Chevron* factors *sua sponte. See* Defendants-Appellants Brief at pp. 27-29. Citing *Harmann v.*

Hadley, 128 Wis.2d 371, 378-79 (1986), and *Wenke v. Gehl,* 2004 WI 103 ¶71, 274 Wis.2d 220, 270-71 (2004), the Defendants-Appellants ask this Court to reverse the trial court, in part, because the question of whether *Thomas* can be applied retroactively remains an open question because Judge Hansher "failed to conduct the appropriate analysis." Defendants-Appellants Brief at 27-28. However, as clearly established by the record on appeal, the Defendants-Appellants have waived this issue by having failed to raise it below. In the case of *In Re Rehab of Seg. Account of Ambac Assur. Corp.,* 2012 WI 22, ¶¶ 21-24, 339, Wis.2d 48, 66-68 (2012)(citations omitted), the Court reiterated the applicable and well established waiver rule:

> "The concept that an issue not raised in circuit court, is deemed waived is one of long standing. In a 1917 case, this court stated, "One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. The practice of this court is not to consider an issue raised for the first time on appeal."

The issue of whether the *Thomas* decision should not be given presumptive retrospective application pursuant to the three factors from *Kurtz/Chevron Oil* is entirely different than the issue of whether §895.046, Wis. Stats., "returned" the law of Wisconsin to what it was before the *Thomas* decision. And its also different from the issue of whether Wisconsin adheres to the presumption that judicial decisions regarding the common law are retroactive in scope. The failure to raise the issue below deprived the trial court of the opportunity to consider this distinct issue and therefore constituted a clear waiver under

controlling law[10].

The fourth contingency asserted on appeal is that supposedly "it remains undecided whether WLC pigments were fungible," and therefore, "the viability of the risk-contribution doctrine as potentially expanded by *Thomas* was very much an open question, as it still is today." Defendants-Appellants' Brief at p. 30. This argument is irrelevant to whether a substantive right to a cause of action accrued, and in any event it is also flat out wrong. The *Thomas* decision did not say that the fungibility of white lead carbonate was undecided, rather, it said the fact issue of whether formulary differences in white lead pigments affected the bioavailability of lead was undecided. *Thomas,* at ¶140 & fn 47. The *Thomas* Court then found white lead pigments nevertheless were fungible for the purposes of the risk contribution rule. Any doubt about this was resolved by the Wisconsin Supreme Court in *Baez Godoy v. E.I. DuPont de Nemours and Company,* 2009 WI 78, ¶23, 319 Wis.2d 91, 109, when it unambiguously declared that "[i]n *Thomas,* we concluded that for purposes of risk-contribution, white lead carbonate is fungible, and all manufacturers of white lead carbonate could be held jointly and severally liable for injuries

[10] Even if the issue had been raised, a rudimentary review of the *Thomas* decision illustrates that the *Thomas* Court itself addressed the three *Kurtz/Chevron* factors in the course its decision. As to the first factor the *Thomas* Court made clear that extending risk contribution to white lead carbonate pigments was "foreshadowed" by the *Collins* decision. *Thomas,* at ¶¶ 132, 133. As to the second factor, the *Thomas* Court cleaerly evaluated the merits of applying the risk contribution rule to lead pigment manuafcturers in the context of the rule's retrospective effect on those defendants as well as the many other lead poisoned children. *Id.*, ¶¶ 134-136. As to the third factor, the *Thomas* Court made it clear that applying the risk contribution doctrine to white lead pigment manufacturers was justified, in part, because there were so many lead poisoned children similarly situated to the *Thomas* plaintiff. *Id.,* at ¶¶ 132, 133.

cause by the product.[11]"

Additionally, it needs to be forcefully noted that separate and apart from the question of whether the *Thomas* decision was retrospective in application by operation of the stated intent of the *Thomas* Court, or as a result of the "Blackstonian" presumption, Yasmine nevertheless had a vested right to assert a cause of action under *Collins v. Eli Lilly Co.,* 116 Wis.2d 166 (1984), on the basis that her claims were factually similar to DES claims. This is because the *Collins* decision said so:

> "Accordingly, we have formulated a method of recovery for plaintiffs in DES cases in Wisconsin. We note that this method of recovery could apply in situations which are factually similar to the DES cases."

Id., at 192.

The *Collins* Court made clear that under the Wisconsin common law the risk contribution rule could apply in factually similar circumstances and by virtue of that mandate, created a right to a cause of action. And the *Thomas* Court very explicitly held that "[t]his court in *Collins* authorized the expansion of the [risk contribution] theory in other factually similar scenarios." *Thomas,* at ¶131.

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[11] Of significance to the constitutionality of the retroactive amendment to §895.046, Wis. Stats., is that the statute also retroactively vitiates joint and several liability in lead poisoning cases (see §895.046(6), Wis. Stats.) thereby going even further than the retroactive limitation of joint and several liability found unconstitutional in *Mathies v. Positive Safety Mfg.*, 2001 WI 82, 244 Wis.2d 720. The statute at issue also retroactively imposes a 25 year statute of repose (see §895.046(5), Wis. Stats.) completely extinguishing all lead poisoning claims because all production of residential lead paint ended as of 1978, which was 35 years ago. This surely runs afoul of well established binding precedent such as *Borello v. U.S. Oil Co.,* 130 Wis.2d 397, 416 (Wis. 1986)(new law changing a statute of limitations cannot be applied retroactively to extinguish a vested right to a cause of action).

Finally, even if the foregoing arguments all fail notwithstanding the weight of the above cited decisional law, none of the foregoing Defendants-Appellants' arguments support the proposition that Yasmine's right to a cause of action based on risk contribution did not vest in 2006 when Yasmine yet again suffered a second lead poisoning at 1940 North 26th Street. At that point in time, the *Thomas* decision had already been issued, so none of the Defendants' arguments would preclude affirmance of the decision below.

The bottom line is that the uncertainty regarding whether Yasmine Clark will ultimately "*recover*" after a trial, or whether public policy considerations will be deemed to limit any "*recovery*" that is obtained, or whether some other speculation about a future event helpful to tortious lead pigment manufacturers can be conjured by their lawyers, these are not contingencies that in any way limit the vesting of Yasmine's substantive right to her cause of action under risk contribution.

B. The Trial Court Properly Weighed the Public Purpose Against the Private Interest

The Defendants-Appellants erroneously assert that that the trial court erred because it "trivialized the Legislature's stated basis" for the retroactive statute, (Defendants-Appellants' brief at p. 40), and "second guessed" the Legislature's policy choices by weighing the public purpose served by the retroactivity of the statute against the private interested that are abrogated, (*Id.*, at p, 33). They go so far as to claim that state constitutional separation of

powers limitations on the judiciary prevent this Court from balancing public and private interests as mandated by *Martin, Matthies, Society Insurance,* and progeny, when the legislature has defined a legislative intent. Defendants-Appellants' brief at pp. 42-43. This convoluted argument is predicated on a distortion of the meaning of footnote 12 in *Society Insurance* complemented by a meandering litany of quotes about judicial deference to legislative policy choices from a variety of cases that have nothing to do with the constitutional balancing of public and private interests for purposes of determining whether the retroactive abrogation of vested right comports with state due process rights.

Relying on footnote 12 from *Society Insurance,* the Defendants-Appellants conclude their brief with the astounding declaration that "[t]his Court's role is limited to concluding only whether [the legislature's] bases [for the retroactive statute] are, in fact, rational, not to undertake its own balance of the public versus private interests and not to brush aside the importance of the public interests found by the Legislature." Defendants-Appellants' brief at p. 43. However, footnote 12 does not support such a proposition. Rather, it merely clarified that in the course of applying the well established test for the due process constitutionality of retroactive statutes, the courts should not require an *a priori* threshold showing of a "substantial" or "significant and legitimate" public purpose before balancing that purpose against the private interests that have been retroactively impaired. There is simply no way that *Society*

Insurance can be read as dispensing with the requirement that the Court *must* balance the public versus private interests at step two of the *Martin/Matthies* analysis. Indeed, the paragraph to which footnote 12 is attached, specifically affirmed the requirement of the *Martin/Nieman/Matthies* balancing test:

> "Whether there exists a rational basis involves weighing the public interest served by retroactively applying the statute against the private interests that the retroactive application of the statute would affect. The retroactive active legislation must have a 'rational purpose.'"

Society Insurance, at ¶30, (quoting *Mathies,* citations omitted).

The Defendants-Appellants supplement their distortion of footnote 12, with meandering and irrelevant quotes regarding the importance of judicial deference to legislative choices in a variety cases unrelated to retroactive statutory abrogation of vested rights[12]. Defendants-Appellants' brief at pp. 31-40. Such cavalier use of quotes from inapposite cases reduces the argument to meaningless platitudes. Of course, as a general matter, judicial deference is appropriate in the course of adjudicating the constitutionality of statutes. But that assertion adds nothing to argument that somehow that deference requires abandoning the time tested balancing of public and private interests as defined

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[12] See for example: *Ferdon v. Wis. Patients Comp. Fund,* 2005 WI 125, ¶76, 284 Wis.2d 573 (2005)(equal protection); *Flynn v. DOA,* 216 Wis.2d 521, 528 (1998)(private legislation); *Borgnis v. Falk,* 147 Wis. 327 (1911)(constitutionality of workers compensation statute); *Kohn v. Darlington Community Schools,* 2005 WI 99, ¶42, 283 Wis.2d 1 (2005)(right to a remedy clause); *Northwest Airlines v. Wisconsin Dept. of Rev.,* 2006 WI 88, ¶59, 293 Wis.2d 202(2006); *Tomczak ex rel Castellani v. Bailey,* 218 Wis.2d 245, 271 (1998)(equal protection); *Metropolitan Associates v. City of Milwaukee,* 2011 WI 20, ¶20, 332 Wis.2d 85 (2011)(equal protection property tax assessments); *Progressive Northern Insurance v. Romanshek,* 2005 WI 67, ¶60, 281 Wis.2d 300 (2005)(judicial interpretation of statutory language); *Columbus Park Housing Corp. v. City of Kenosha,* 2003 WI 143, ¶ 34, 267 Wis.2d 59 (2003)(statutory interpretation); *Doering v. WEA,* 193 Wis.2d 118, 129 (1995)(equal protection).

by every Wisconsin case that has considered the due process constitutionality of retroactive statutes that impair vested rights. Nothing in the *Society Insurance* decision or in the inapposite cases cited for judicial deference generally indicates that a court violates separation of powers considerations by balancing public and private interests as mandated by *Martin* and progeny.

Most importantly on the merits, the trial court below, carefully and thoughtfully adhered to the mandate of *Martin* and progeny, by carefully distinguishing between the public purposes served by the prospective application of the statute as opposed to the public purpose served by the retroactive active application of the statute. *See* Decision below at pp. 16-18, 24. Accordingly, the trial court determined that the public purpose served by the retroactive application of the statute was that "the legislature wanted to protect businesses from '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.*, at p. 18. However, the trial court also determined that as part of the mandated rational basis test, its inquiry didn't end there, and it was required to balance that purported public purpose against the private interests impaired by the retroactive application of the statute. *Id.*, at p. 23, fn. 9; *Society Insurance, at* ¶34. In the course of balancing the competing public and private interests, the trial court noted that it was difficult to place a value on the cited public purpose because there was no record evidence demonstrating the extent to which businesses in Wisconsin

have been unfairly prejudiced by the *Thomas* decision and it was "next to impossible" to discern how many innocent white lead carbonate defendants have been deprived of their property as a result of *Thomas.* Decision below at p. 23.

By contrast, the trial court properly found that the private interests of Yasmine and other lead poisoned children similarly situated would suffer a "substantial" takings of their vested rights under circumstances in which the "unfairness is palpable." *Id.,* at pp. 24-25. Thus, the trial court found that the deprivation of Yasmine's vested rights to her cause of action against the white lead carbonate manufacturers outweighed the public purpose served by the retroactive application of the statute. *Id.,* at 25.

Beyond the reasoning of the trial court, it should be noted that the social value of Yasmine's private interests in having access to the courts to pursue her accrued cause of action are further bolstered by the public policies enunciated by the Wisconsin Supreme Court in the *Thomas* decision itself: first, each of the pigment manufacturers tortiously contributed to the creation of the risk of injury of lead poisoning; second, compared to the innocent victims of lead poisoning, the pigment manufacturers are in a better position to absorb the costs of the injuries; and third, expanding the risk contribution doctrine will serve to deter knowingly wrongful conduct that causes harm. *Thomas,* at ¶¶134-136, pages 308-09, fn 44. Thus, not only are there very

limited and unsubstantiated public interests [13] served by the retroactive application of §895.046, Wis. Stats., but Ms. Clark's private interests are supported by the strong public policies enunciated by the Wisconsin Supreme Court in the *Thomas* decision which would be marginalized by the retroactive application of this statute. Therefore, under the *Martin* balancing test, the trial court below properly found Wis. Stat. § 895.046 unconstitutional on its face.

VI. ON ITS FACE, §895.046, WIS. STATS., VIOLATES ARTICLE VII, § 2, OF THE WISCONSIN CONSTITUTION

While the Legislature may modify the common law of Wisconsin, it is constitutionally constrained to do so within the bounds of Article I, § 9, of the Wisconsin Constitution as interpreted by the Wisconsin Supreme Court. *Thomas*, at ¶122, page 299, fn. 36. Although not explicitly stated in the Wisconsin Constitution, the concept of separation of powers is evident in both its structure and language:

> As a general rule, the legislative power of the State is vested in the senate and the assembly, Wis. Const. Art. II, § 1, while the judicial power is vested in the courts, Wis. Const. Art. VII, § 2. This separation of powers grants the courts of this state, and ultimately this court, the constitutional responsibility of interpreting the laws and, most fundamentally, of determining whether the laws pass constitutional muster.
>
> *Kroner,* at ¶105, page 670-671 (J. Roggensack concurring).

This fundamental notion of a constitutionally grounded separation of powers was emphasized by Justice Prosser in his concurrence in the case of *State v.*

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[13] The Defendants-Appellants seem to conflate their own private interests as active litigants in risk contribution cases with the unsubstantiated pro-business rhetoric that they extra-judicially lobbied the legislature to adopt.

Fitzgerald, 2011 WI 43, ¶ 42, 334 Wis.2d 70, 87-88:

> It must always be remembered that one of the fundamental principles of the American constitutional system is that governmental powers are divided among the three departments of government, the legislative, the executive, and judicial, and that each of these departments is separate and independent from the others except as otherwise provided by the constitution. The application of these principles operates in a general way to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary. . . . While the legislature in the exercise of its constitutional powers is supreme in its particular field, it may not exercise the power committed by the constitution to one of the other departments.

Thus, it is a fundamental predicate of our government in Wisconsin, that the power vested in one department may not be usurped by another. Just as the judicial department has no power to interfere with the legislative process, so too, the legislature has no power to usurp the functions committed to the judiciary.

Central to the constitutionality of the statute at issue is the nature and character of the amendment to §895.046, Wis. Stats., which explicitly declares the applicable findings and intent of the Legislature:

> 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 the right to a jury trial under the federal and Wisconsin constitutions. 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.* (emphasis added).

The language is unabashedly explicit - - the Legislature disagrees with how the Wisconsin Supreme Court interpreted Art. I, § 9, of the Wisconsin Constitution

in *Thomas,* but not in *Collins,* and has by legislative action sought to abrogate one while preserving the other. Further, the Legislature declares that the basis for this statute is its interpretation of "substantial questions" of constitutional law under the Wisconsin Constitution. Inherent in the language of the statute is an intent to abrogate the *Thomas* Court's interpretation of Art. I, § 9, of the Wisconsin Constitution.

By any reasonable reading, the explicit language of § 895.046(1g), Wis. Stats., demonstrates that it constitutes the exercise by the Legislature of a power vested in the Wisconsin Supreme Court. This statute does great violence to the separation of powers doctrine by potentially subjecting the Supreme Court's constitutional interpretations to legislative review. Such subordination of the judiciary by the legislature necessarily undermines the very essence of a tripartite government. It is incumbent on the judiciary to define and protect the line of tripartite demarcation between it and the legislature.

Least there be any doubt about the constitutional basis for the Supreme Court's decision in *Thomas,* one need only reference the Court's discussion of Art. I, § 9, wherein in the Court explicitly adopted the view previously expressed by Judge Brown:

> "However, as Judge Brown concluded in his concurring opinion below:
>
> > The plain meaning of this section [Art. I, § 9] is that every person is entitled to a certain remedy for "all injuries *or* wrongs which he may receive in his person." Notice that the wording is in the disjunctive. The way I read this clause, it means that even assuming only one

> injury, if that injury was brought about by separate wrongs against the person, that person is entitled to a remedy for each "wrong."
>
> *Thomas*, 275 Wis. 2d 377, ¶ 22 (Brown, J., concurring) (emphasis in original). Judge Brown went on to write:
>
> > I have never seen a case that insulates a wrongdoer from being exposed to a lawsuit just because there exists a remedy against another wrongdoer.
> >
> > We agree with Judge Brown's reading and sentiment. This court has previously explained that we examine three sources in determining a constitutional provision's meaning: "the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." As Judge Brown correctly noted, the fact that Thomas may have been "wronged" by (and received a remedy from) his landlord simply has no bearing on whether Thomas has been "wronged" by one or more Pigment Manufacturers."
>
> *Thomas,* at ¶¶ 121, 122, page 298-9 (citations omitted).

In adopting Judge Brown's reading of the constitution, the *Thomas* Court directly and explicitly determined that the word "or" in the first sentence of Art. I, §9, must be interpreted in the disjunctive:

> Art. I, §9: "Remedy for WRONGS" "**Every person is entitled to a certain remedy in the laws for all injuries, *or* wrongs** which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, comformably to the law." (emphasis added)

In other words, in *Thomas*, the Wisconsin Supreme Court interpreted for the very first time the scope of the Constitution's right to a remedy clause in the context of whether the word "or" must be read in the disjunctive and as a result of that interpretation, whether the clause must apply to ***all*** wrongs. *Thomas*, at ¶¶ 120-124. That was the key interpretation of the Thomas Court that set its holding apart from the prior holding of the *Collins* Court and it was

an act of constitutional interpretation.

This constitutional holding is significant because by its explicit terms, §895.046(3)(1), Wis. Stats., states that the newly limited version of risk contribution only applies if "no other lawful process exists for the claimant to seek any redress from any other person for the *INJURY* or *HARM.*" This explicitly limits the *Thomas's* Court's interpretation of the requirements and scope of the right to a remedy clause and instead represents a legislative act which choses to "protect 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.*" In other words, it is a legislative rejection of the *Thomas* Court's interpretation that Art. I, §9, guarantees a remedy for <u>all</u> wrongs, not just all injuries. The quoted language is directly from §895.046(3)(1), Wis. Stats. This is a legislative abrogation of a constitutional holding of the Wisconsin Supreme Court regarding its interpretation of the word "or" in the disjunctive, plain and simple. And it crosses the line of separation of powers.

The *Thomas* Court at ¶122, fn. 36 noted, perhaps presciently, that:

> Further, Article I, Section 9 of the Wisconsin Constitution is not a provision that would have been interpreted by the legislature. Article I, Section 9 is a substantive right to the extent that it entitles a litigant to a remedy as it existed at common law. It does not create rights. The legislature may change that common law, but those changes must be reasonable to pass scrutiny under Article I, Section 9.

By this ruling, the *Thomas* Court further emphasized the established constitutional principle grounded in Art. I, § 9, that "[w[hen an adequate

remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy." *Id.*, at ¶128, page 303. Whether the legislature can abrogate that remedy created by the Court prospectively is perhaps an open question not presented by the facts of this case, but surely, the legislature cannot retroactively abrogate a judicially created remedy grounded in a constitutional interpretation without crossing the line demarcating the separation of powers.

At bottom, it cannot be reasonably disputed that in *Thomas,* the Wisconsin Supreme Court interpreted Art. I, § 9, of the constitution and determined that the remedies available to lead poisoned children for the wrongs of the lead pigment manufacturers were inadequate, and therefore, pursuant to that constitutional mandate, the Supreme Court declared the risk contribution doctrine applicable to those cases. Plain and simple, this was an act of judicial power mandated by the Supreme Court's interpretation of the Wisconsin Constitution. Legislators surely have varying views about the wisdom of such a decision depending on personal ideological and political persuasions, as do judges in the subordinate courts. However, in a system of rule of law, such rulings by the Supreme Court require the respect of all the branches of government. The Legislature cannot abrogate the *Thomas* decision in the manner it did *based on its own interpretation* of the constitution without trampling on the structural integrity of our tripartite form of government in violation of Art. VII, § 2, of the Wisconsin Constitution. Accordingly, the

Court of Appeals should hold that §895.046, Wis. Stats. violates the separation of powers.

VII. THE AMENDMENT TO §895.046, WIS. STATS., CONSTITUTES PRIVATE LEGISLATION ADOPTED IN VIOLATION OF ARTICLE IV, § 18, OF THE WISCONSIN CONSTITUTION

The Court of Appeals should also determine whether the retroactive statutory abrogation of the Wisconsin Supreme Court's holding in *Thomas* is unconstitutional because it amounts to private legislation smuggled into the State's biennial budget. Article IV, § 18, of the Wisconsin Constitution prohibits private legislation unless it is passed as a stand alone bill embracing no more than one subject that is expressed in the title of the bill. The purpose of the constitutional provision is "guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature." *Lake Country Racquet and Athletic Club v. Morgan,* 2006 WI App 25, ¶9 289 Wis.2d 498, 511 (Wis. App. 2006)(quoting *Davis v. Grover,* 166 Wis.2d 501, 519 (Wis. App. 1992). In *Soo Line Railroad v. Department of Transportation,* 101 Wis.2d 64, 72 (1981), the Wisconsin Supreme Court invalidated a rail road crossing siting provision that had been inserted in the state's budget in 1977 with the admonishment that the constitutional prohibition was intended assure that the legislature and the people of the state are advised of the real nature and subject of the legislation being considered in order to avoid fraud or surprise.

Since a challenge to a statute under Art. IV, § 18, attacks the propriety of the process used to adopt the legislation, the challenged statute will not be

afforded a presumption of constitutionality unless the record shows that the legislation was adequately considered. *Lake Country,* at ¶11, page 511. The *Lake Country* Court ultimately determined that the legislature adequately considered the legislation at issue in that case, but in the course of its analysis it made clear that the court may take into account "many factors" and the analysis "depends on the unique circumstances" of the bill. *Id,* at ¶21.

The facts set forth in the record below are that the Sherwin-Williams Company filed a report with the Wisconsin Government Accountability Board on April 30, 2013, reporting that it had lobbied the legislature about "justice: general agency provisions" related to the biennial budget and had spent $37,500.00, and had expended 66.75 hours. *See* Supp. App. p. 091. During oral argument before the trial court below, counsel admitted that one of the Defendants helped draft the retroactive legislation. *See* Defendants'-Appellants' Appendix, at A.App. 69-70.

The record below indicates that the retroactive amendments to §895.046, Wis. Stats., were first made public when added to the omnibus biennial budget during the final session of the Joint Finance Committee in the early morning hours of June 5, 2013. *See* Supp. App. pp. 094-95, at ¶17. The amendment was not sponsored by any identified legislators and the bill had no title. Supp. App., pp. 093-095, at ¶¶ 3, 10, 17. No public hearings were held on the amendments. No notice was provided to the 173 lead poisoned children who constitute the universe of persons whose then pending causes of action

would be abrogated by the legislation. *See* Decision below at p. 20-21. Finally, it took a mere 25 days between the time the challenged provisions were inserted without notice into the biennial budget bill in the early morning hours of June 5, 2013, after an all night session of the Joint Finance Committee and June 30, 2013, the day the Governor signed biennial budget bill into law. *Id.*

In any event, the undisputed facts indicate that the legislative process by which the amendment to §895.046, Wis. Stats., was adopted clearly constituted the smuggling of private legislation for the exclusive benefit of specific defendants in a defined set of cases that were pending in the courts of the state. The averments of Senator Taylor are facts that have not been disputed by the Defendants-Appellants in their filings below. Thus, as far as the first prong is concerned, the unique circumstances by which this legislation was adopted should offend every citizen of the State of Wisconsin who has any respect for the transparent clean government traditions that have historically been the hallmark of Wisconsin state government. It is an understatement to say the legislative process was contaminated by the extra-judicial conduct of Sherwin-Williams and perhaps other Defendant-Appellants as well. Under these unique circumstances, there can be no presumption of constitutionality.

The second prong requires the Court to determine whether the amendment to §895.046, Wis. Stats., is in fact private legislation. The first question under the second prong is whether the legislation is "specific to any person, place or thing." *Lake Country,* at ¶23, page 516. Legislation will be

deemed "private" unless it relates to a "state responsibility of statewide dimension" in its general subject matter, and its "enactment has a direct and immediate effect on a specific statewide concern of interest." *Id;* Taylor Affidavit, ¶ 13. In *Soo Line Railroad*, 101 Wis.2d at 76-77, the Wisconsin Supreme Court found relevant that the legislation directly affected one railroad company and not others. Here, the retroactive application of §895.046, Wis. Stats., directly benefits only the six lead pigment manufacturer defendants. This is "legislation that is specific on its face as to particular people." *Davis,* at 524-25; *Soo Line R. Co. v. Transportation Department,* 101 Wis.2d 64 (1981). It may also be described as legislation that creates a closed classification based on existing criteria and the classification is not subject to being open, such that other persons could join in the classification. *Davis,* at 525-26; *Brookfield v. Milwaukee Sewerage,* 144 Wis.2d 895,907-09, 912 (1988). The statutory criteria by which the closed classification is created consists of those lead poisoned children whose causes of action accrued prior to February 1, 2011. The classification defines these affected children with particularity and specificity and no other people can ever join the classification because it is impossible for some one today to go back in time and ingest white lead pigment from residential paint before February 1, 2011. The entire universe of children afflicted with childhood lead poisoning *before* February 1, 2011, is defined and no new potential plaintiffs can be added to that classification.

It would strain credulity to characterize the retroactive application of

§895.046, Wis. Stats., as anything other than private legislation. Thus, the amendment to §895.046, Wis. Stats., is unconstitutional because it was passed as part of an omnibus biennial budget bill as opposed to stand alone legislation with a separate title. It is clearly a "legislative response to a unique problem" faced by Sherwin-Williams and its co-Defendants-Appellants seeking to nullify all potential liability from a closed classification of lead poisoned children whose causes of action accrued before February 1, 2011. *Soo Line Railroad*, 101 Wis.2d at 76-77.

V. CONCLUSION

While §895.046, Wis. Stats., is unconstitutional for each of the three grounds set forth above, those legal conclusions do not adequately tell the whole story here. In this case, large wealthy corporations have extra-judicially and secretively changed the law retroactively in this and seven other cases that have been pending for years for the exclusive benefit of themselves and their co-defendants. This type of retroactive change in the law cannot stand without destroying the notion that under our system of law, all people are equal without regard to wealth or power. It would be a truly dark and cruel reality if the poor inner city children who are the innocent victims of lead poisoning would have the rules governing the application of justice in their cases retroactively determined by the extra-judicial secretive lobbying of the rich and powerful corporations who knowingly and tortiously caused the single most catastrophic environmental public health epidemic in US history.

For the foregoing reasons, the Plaintiff-Respondent respectfully asks the Court of Appeals to re-consider whether the petition for permissive review was improvidently granted, given the subsequent published decision by the United States Court of Appeals for the Seventh Circuit in the *Gibson* case. Balancing all the equities of the procedural posture of this case, including the length of time since its filing, the interests of justice would be best served by dismissing this appeal and remanding this case for trial. In the event, the Court of Appeals disagrees and decides to reach the merits, the Plaintiff-Respondent requests affirmance of the decision below. In the event that the Court of Appeals disagrees that state substantive due process protections render §895.046, Wis. Stats., unconstitutional on its face, then the Plaintiff-Respondent respectfully requests that the constitutionality of the statute be reviewed under Article VII, §2 of the Wisconsin Constitution, or alternatively under Article IV, §18 of the Wisconsin Constitution.

Dated this 24th day of February, 2015.

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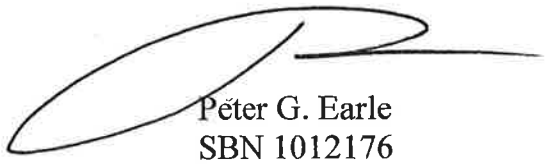
FORM AND LENGTH CERTIFICATION

I certify that this Brief of the Plaintiff-Respondent conforms to the requirements set forth in §809.19(8), Wis. Stats., using a proportional serif font (Times New Roman, size 13) and contains 9017 words.

I further certify that the Supplemental Appendix filed concurrently with the Brief of the Plaintiff-Respondent conforms to the requirements set forth in §809.19(8), Wis. Stats.

Dated this 24th day of February, 2015.



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CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief, including the supplemental appendix, which conforms to the requirements set forth in §809.19(12), Wis. Stats., and I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy filed with the Court and served on opposing counsel.

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CERTIFICATION REGARDING ELECTRONIC APPENDIX

I certify that I have submitted an electronic copy of the Supplemental Appendix which conforms to the requirements set forth in §809.19(12), Wis. Stats., and I further certify that the text of the electronic copy of this Supplemental Appendix is identical to the text of the paper copy filed with the Court and served on opposing counsel.

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CERTIFICATE OF SERVICE

I certify that I have sent via U.S. Mail this 24th day of February, 2015, three true and accurate copies of the Brief of the Plaintiff-Respondent, the corresponding Supplemental Appendix, along with this and the other attached Certifications to the following counsel:

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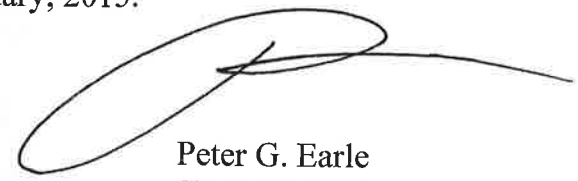
Milwaukee, WI 53202

Dated this 24th day of February, 2015.



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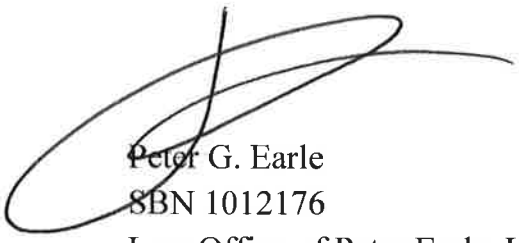
RESPONDENT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a separate document is a supplemental appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) 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. This supplemental appendix does not contain the findings and opinion of the non-final order for which review has been sought because a copy of that non-final order has already been included in the appendix filed by the defendants-appellants.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of February, 2015.



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