STATE OF WISCONSIN
IN SUPREME COURT

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,

Defendants-Appellants,

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

Defendants.

Appeal No. 2014AP000775

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

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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 expanded 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, two years after her alleged injury?

(2) Did the trial court err in holding that the Wisconsin Legislature lacked 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*?

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. Yasmine Clark claims that, in 2003, she ingested white lead carbonate pigments ("WLC") used in paint. At the time of her alleged exposure and injury, she admittedly had no viable claim against former manufacturers of WLC 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).

Two years after Clark's alleged injury, this Court considered whether to expand the risk-contribution theory beyond *Collins* to enable a plaintiff to sue former WLC manufacturers. Admittedly fashioning new law, the Court held that the plaintiff in that case, Steven Thomas, could potentially use the risk-contribution theory if he could carry his burden to prove that the theory applies factually and if the new theory could pass muster under constitutional and public

policy principles. *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶166, 285 Wis. 2d 236, 701 N.W.2d 523. This Court decided not to address those open questions at the time because the Court was merely reviewing a summary judgment in favor of Defendants. *Id.* ¶¶4, 140 n.47. On remand, the case went to trial and resulted in a defense verdict when the jury determined that Thomas was not injured by WLC. The Court of Appeals affirmed. *Thomas v. Mallett*, 2011 WI App 19, 331 Wis. 2d 486, 795 N.W.2d 62 (2010). Consequently, the open issues concerning the applicability, public policy, and constitutionality of the risk-contribution theory as extended to former WLC manufacturers remained unresolved.

In 2011, the Legislature stepped in. It disagreed with the potential expansion of the risk-contribution theory in *Thomas* and prospectively restored the theory to *Collins* criteria. Wis. Stat. § 895.046 ("2011 Act"). Plaintiff does not challenge the constitutionality of the 2011 Act.

In 2013, concerned by the unfairness of the large number of risk-contribution cases filed against manufacturers of WLC and other

products and by the risk to the State's manufacturing economy, the Legislature applied its 2011 Act to pending cases, whenever filed. Wis. Stat. § 895.046 ("2013 Act" or "Legislation"). Although Clark's rights, if any, against former WLC manufacturers are no different now from what they were when her claim arose, she argues that the 2013 Act is impermissibly retroactive because she cannot invoke *Thomas*.

The 2013 Act is constitutionally permissible for two reasons. *First*, Clark could not have had any "settled expectation" in a judicial decision that did not exist at the time of her injury in 2003. Even as of 2013 and today, the extension of the risk-contribution theory to WLC remains unsettled because of open questions. Because the 2013 Act does not deprive Clark of any vested right, it has no unconstitutionally retroactive effect here. As this Court has held many times, there is nothing unfair or unconstitutional about requiring a plaintiff to proceed under the law in effect at the time of alleged injury. *See, e.g.*, *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶23, 244 Wis. 2d 720, 628 N.W.2d 842.

This appeal presents unique circumstances for this Court. It has not addressed whether a previously non-existent right of action can be deemed to vest retroactively back in time to when a claim accrued. In the closest analogous decision, the Ninth Circuit ruled that no "injustice" occurs when legislation merely restores the law to the parties' expectations at the time that the claim accrued. *Boykin v. Boeing Co.*, 128 F.3d 1279, 1283 (9th Cir. 1997).

Second, the Legislature provided a rational purpose for applying the 2011 Act to pending cases. The Legislature determined that it is in "the public interest" to preserve tort law according to its "historical, common law roots." It acted to safeguard the fairness of the tort system as well as defendants' constitutional rights and to avoid jeopardizing economic development. This Court has found the same legislative reasons sufficient to uphold other economic legislation, and there is no question that the Legislature can prescribe rules of tort and product liability law. Accordingly, the Legislature acted within its constitutional authority when it restored the law to how it stood at the time that Clark's claim accrued in 2003. In

contrast, the trial court overstepped its constitutional bounds by not giving proper deference to the Legislature's policy and findings. Therefore, the Court should reverse and direct the trial court to enter judgment for the WLC manufacturer defendants.

BACKGROUND

Plaintiff Yasmine Clark alleges that she was injured in 2003 from ingestion of paint containing WLC at two former residences built in 1891 and 1907. *See* R.476; A-App. 027 ("March of 2003 constitutes the operative time period for this Court's analysis"). Consequently, those WLC pigments 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.

When the rental properties were built, property owners typically hired master painters, who mixed ingredients on site to make paint. *Thomas*, 2005 WI 129, ¶187 (Wilcox, J. dissenting) (referring to undisputed facts in record). Paint containing WLC was the gold standard then, because it adhered, covered surfaces well, and lasted. *Id*. ¶¶37, 182-84. The brand, type, and amount of WLC and other

lead and non-lead ingredients within a particular paint batch varied by each painter's mixture. *Id.* ¶188.

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, which is a processed raw material, was also used in paints for many non-residential applications and was "not a material used exclusively by the paint industry." *Id.* ¶186. By the twentieth century, the market for WLC was well-developed. *Id.* ¶¶183, 186, 188. Hundreds of companies produced or sold WLC or paint with WLC in Wisconsin. *Id.* ¶¶185-190 (over 200 paint manufacturers in Milwaukee alone between 1910 and 1971).

Paints containing WLC remained prominent throughout the early decades of the 1900s. *Id.* ¶¶13, 183, 186, 188. Their use, however, diminished as alternative pigments were developed and ready-mixed paints became available that the general public could

easily apply. *Id.* ¶13. In 1955, as a result of evolving medical knowledge, paint manufacturers adopted a voluntary standard prohibiting the use of WLC in interior residential paints. *Id.* In 1972, the United States Food & Drug Administration banned household paint with greater than 0.5% lead by weight from interstate commerce as of December 31 of that year. 37 Fed. Reg. 4915 (March 7, 1972), 5229 (March 11, 1972), 16872 (August 22, 1972). This regulation effectively prohibited the use of WLC as a pigment in any residential paint. In 1978, the federal government banned paint with more than 0.06% lead from residential use. 16 C.F.R. § 1303.1.

Federal, state, and local laws do not consider intact lead paint to be a hazard. Wis. Admin. Code, DHS § 163.42. They also require owners to prevent or abate lead-based paint hazards on their properties. For example, the federal Residential Lead-Based Paint Hazard Reduction Act requires owners of pre-1978 housing to disclose to prospective tenants any known lead-based paint or lead-based paint hazard within the property. *See* 42 U.S.C. § 4852d. The Act creates a statutory right of action against owners who knowingly

fail to comply. *Id*. Environmental Protection Agency and Department of Housing and Urban Development regulations reinforce these statutory requirements, *see* 24 C.F.R. § 35.88, and EPA has sued owners for non-compliance. *See, e.g.*, *United States v. Sherard*, No. 05-CV-486-JPS, 2015 WL 1840050 (E.D. Wis. Apr. 22, 2015).

Landlords of pre-1978 residential rental properties also have a common-law duty to test for lead-based paint if they know or should know of deteriorating paint, and they may be held liable for a tenant's injury. *See Antwaun A. v. Heritage Mut. Ins. Co.*, 228 Wis. 2d 44, 596 N.W.2d 456 (1999). In addition, on pain of criminal penalties, Milwaukee's city ordinances prohibit a landlord from "knowingly allow[ing] to exist in or on their property any lead-based nuisance." *See* City of Milwaukee Code of Ordinances § 66-22(1)(a). Clark sued her landlords, R.1; A-App. 002, ¶¶3-6, and neither the 2011 nor 2013 Act affected her claims against her landlords for negligent maintenance.

In 2003, when Clark's claim accrued, Wisconsin law did not permit her to recover from any WLC manufacturer without proving

that it made the pigment she ingested. Two years later, this Court changed Wisconsin law. In *Thomas*, the Court reviewed a summary judgment granted in favor of the former WLC manufacturers. Because of the procedural posture, the Court assumed that plaintiff's allegations were true. 2005 WI 129, ¶¶4, 140 n.47. Consequently, the Court assumed that the former WLC manufacturers acted culpably with knowledge that their products would harm children,[1] and that former WLC manufacturers could insure, absorb, or distribute the costs of adverse judgments. *Id.* ¶136.

Based on those assumptions, among others, the *Thomas* majority held that plaintiffs alleging injury from WLC ingestion could rely on the risk-contribution theory if they proved certain fact-based criteria and if their claims passed tests of constitutionality and public policy that *Thomas* deferred for future decision. *Id.* ¶¶131, 166. The *Thomas* majority acknowledged that it was making new law, *id*.

[1] Later litigation has proven this assumption to be mistaken. In *City of Milwaukee v. NL Indus., Inc.*, 2008 WI App 181, 315 Wis. 2d 443, 762 N.W.2d 757, the jury found, and the Court of Appeals affirmed, that the leading WLC manufacturer historically did not know the health risks to children from lead dust when selling WLC pigments for residential use before the 1970s.

¶¶134, 149; the dissents called that extension "an unwarranted and unprecedented relaxation of the traditional rules governing tort liability," *id*. ¶178, a "drastic expansion of the risk-contribution theory [that] clearly distorts the original rationale behind the *Collins* decision," *id*. ¶259, and the adoption of "a version of risk-contribution theory explicitly rejected in *Collins*." *Id*. ¶261.

Collins itself had "deviate[d] from traditional notions of tort law" to allow recovery without identification of a specific manufacturer in cases involving the generic drug diethylstilbestrol ("DES"). 116 Wis. 2d at 181. Central to *Collins* 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 signature injury; the relevant time period 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.

The *Thomas* majority acknowledged that WLC claims are "not identical to *Collins*" and several "dissimilarities between [the two

cases]" exist, including lack of a generic product, wide window of harm, and many other causes of harm and lead sources. 2005 WI 129, ¶¶147, 150, 152, 154. The Court further recognized that it was changing the common law and that this change would create legal uncertainty. *Id*. ¶130. As the *Thomas* majority said, 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 only took the first step in analyzing whether the risk-contribution theory could extend to WLC manufacturers and, if so, the criteria for that theory. The Court left many facts and issues unresolved, including the constitutional and public policy questions raised by defendants. *Id*. ¶166 ("These constitutional issues are not ripe"). Consequently, whether plaintiffs who could not identify specific WLC manufacturers as the cause of their alleged injuries had a viable right of action was still uncertain and evolving.

Thomas spawned numerous lawsuits. 173 risk-contribution claims were filed against former WLC manufacturers. 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).

Thomas's monumental shift in tort law triggered immediate public debate. 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.[2]

Similarly, former Wisconsin Supreme Court Justice and current U.S. Court of Appeals Judge Diane Sykes commented that *Thomas* "basically operates as a 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…."[3] The *Wall*

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

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

Street Journal predicted that Wisconsin would become "a favorite trial lawyer destination."[4] Others just as vigorously defended the *Thomas* majority. Public debate over *Thomas* and the expansion of Wisconsin tort law continued during the election campaign of the decision's author years later.[5]

In response to the public debate, the Legislature passed corrective legislation immediately in 2005, but the then-Governor vetoed it.[6] In January 2011, the Legislature enacted the 2011 Act. This Act restored prospectively *Collins*'s risk-contribution criteria and expressed the Legislature's belief that the risk-contribution theory should not apply to former WLC manufacturers. Before the effective date of the 2011 Act, 164 new plaintiffs filed risk-contribution claims

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

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

[6] *See* 2005 S.B. 402, 2005-2006 Legis., Reg. Sess. (Wis. 2005). The legislative history for Wis. Stat. § 895.046, as passed in 2011 and amended in 2013, can be found at https://docs.legis.wisconsin.gov/session_archive. *See, e.g.*, https://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_002_sb_1_jr1; https://docs.legis.wisconsin.gov/2011/related/drafting_files/senate_intro_legislation/senate_bills_not_enacted/2011_sb_373; and https://docs.legis.wisconsin.gov/2013/related/drafting_files/state_budget. This Court may take judicial notice of the legislative history, some of which is included in the record. R.471, Ex. D, A-App. 138-45; Exs. K-L, A-App. 190-207.

based on *Thomas*. That same year, a Senator began the process to effectuate the purpose of the 2011 Act by applying it to pending cases, whenever filed.[7] Eighteen months later, after public hearing, the Legislature amended Section 895.046 to apply to "all actions in law or equity, whenever filed or accrued." This amended law, which became effective July 2, 2013, applies to Clark's claims.

The Legislature's Findings and Intent explained its reasoning for applying Wis. Stat. § 895.046 to pending cases. 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).

[7] An initial draft amendment, submitted on January 3, 2012, explained that the Legislature's intent to "restore to Wisconsin law the traditional common law requirements" was thwarted by the rush to the courthouse and plaintiffs' argument that the 2011 Act did not apply to claimants exposed to products before its enactment. *See* Drafting File for 2011 S.B. 373, 2011-2012 Legis., Reg. Sess., at 26 (Wis. 2011) (*available at* https://docs.legis.wisconsin.gov/2011/related/drafting_files/senate_intro_legislation/senate_bills_not_enacted/2011_sb_373/01_sb_373/11_3693df.pdf). The draft stated that the 2011 Act should apply to "all parties to product liability claims, including Wisconsin manufacturers, in a uniform, consistent and predictable manner," but that, without the proposed amendment, "Wisconsin courts could continue to apply Thomas' 'risk contribution theory' to Wisconsin manufacturers for years or even decades to come." *Id.* Thus, the legislative history confirms the plain language of the Legislature's Findings and Intent.

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.* That balance favored limiting the risk-contribution theory, considering that WLC plaintiffs could still pursue damages for their injuries from negligent landlords. *Thomas*, 2005 WI 129, ¶¶124, 198-200.

Third, the Legislature found that *Thomas* "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).

STATEMENT OF THE CASE

In 2006, after *Thomas* changed the law, Clark sued several former WLC manufacturers ("Manufacturers") for injuries she allegedly sustained in 2003, though she could not identify the

manufacturers of the WLC that she allegedly ingested.[8] R.1; A-App. 005, ¶23. Contending that the deteriorated properties in which she lived had "peeling and chipping paint," R.1; A-App. 009, ¶40, 011, ¶46, her landlords had violated City of Milwaukee Code of Ordinances §§ 66-20, 66-22, and 66-29, R.1; A-App. 010-12, ¶¶42, 48, and her landlords' negligent maintenance had caused her injuries, Clark sued her landlords, too. R.1; A-App. 002, ¶¶3-6.

This case proceeded with discovery until 2010. Then, a federal district court held that retroactive application of *Thomas*'s risk-contribution theory to the Manufacturers' long-ago conduct violated federal guarantees of due process. *Gibson v. American Cyanamid Co.*, 719 F. Supp. 2d 1031, 1052 (E.D. Wis. 2010), *rev'd* 760 F.3d 600 (7th Cir. 2014). Pending the appeal in *Gibson*, the Circuit 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.476; A-App.

[8] For the Court's convenience, a timeline of events is included at the end of this brief.

021. Clark opposed dismissal and filed a Motion for Partial Summary Judgment to declare that Section 895.046 violates due process under Wisconsin's Constitution. *Id.* The Manufacturers opposed Clark's motion. *Id*.

The trial court granted Clark's motion and denied the Manufacturers' summary judgment motion. R.476; A-App. 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 and retroactively provided Clark a "vested right" to proceed under *Thomas*'s expanded risk-contribution theory. R.476; A-App. 030. The trial court discounted the uncertainties concerning the applicability, public policy, and constitutionality of the risk-contribution theory as not affecting the right of action, but merely a plaintiff's ability to prove and recover damages. R.476; A-App. 029-30. Saying that Clark had no notice of the 2013 Act, the trial court then determined, contrary to the Legislature's Findings, that Clark's private interest in pursuing a claim under *Thomas* outweighed the

public interests and unfairness to manufacturers articulated by the Legislature. R.476; A-App. 041. It assumed that the former WLC manufacturers were culpable and contributed to Clark's alleged harm. R.476; A-App. 019, 030.

In 2014, the U.S. Court of Appeals for the Seventh Circuit followed the trial court's decision in this case and ruled that the Wisconsin Constitution's due process guarantee prohibits "retroactive application" of Wis. Stat. § 895.046. *Gibson*, 760 F.3d at 610. It further held that *Thomas*'s expansion of the risk-contribution theory did not violate Defendants' federal due process rights because it was foreshadowed by *Collins*—even though Defendants had stopped manufacturing WLC for residential use decades before that 1984 decision.[9] *See Thomas*, 2005 WI 129, ¶¶191-96. Of course, the Seventh Circuit's decision is not binding on this Court, which is the ultimate decision-maker on state law issues and which has equal

[9] Space limitations preclude Defendants from addressing the multiple errors in the Seventh Circuit's constitutional analysis and the constitutional and public policy problems that would arise if *Thomas*'s expanded risk-contribution theory were used in *Clark*. Defendants' briefs in *Thomas* and *Gibson* and the dissents in *Thomas* address those issues in part.

authority to determine federal constitutional issues. *See Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998).

In sum, the trial court and the Seventh Circuit ruled that plaintiffs have a vested right to proceed under *Thomas*, a new judicial decision that dramatically changed Wisconsin common law after the time of alleged injuries and that left constitutional, public policy, and fact issues affecting its applicability open for later decision. Conversely, those courts concluded that the Manufacturers had no vested right in the 150-year-old common law causation rules that had existed both at the time of their allegedly wrongful conduct and at the time of plaintiffs' alleged injuries. The courts held that the judiciary could change the legal consequences of the Manufacturers' conduct that had ended decades earlier, but the Legislature, a co-equal branch, could not constitutionally restore and apply the law as it had always existed to still-undecided, pending cases. This appeal seeks to correct that anomaly, and to uphold the constitutionality of the Legislature's actions.

On December 2, 2015, this Court accepted certification of this appeal and acquired jurisdiction over all issues raised before the court of appeals. Appeal No. 2014AP775 (Wis. Dec. 2, 2015).

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. The lower 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 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)). The challenger has the burden of proving that 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, to determine whether a statute has a potentially unconstitutional, retroactive effect, the court must ascertain whether the legislation impairs a vested right. *Soc'y Ins.*, 2010 WI 68, ¶29. Second, if the statute is found to impair a vested right, then the court 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 Paper Co.*, 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 does not impair a vested right, has a rational basis, and is constitutional.

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

A statute has an unconstitutionally retroactive effect only if it impairs or eliminates a "vested" right. *Matthies*, 2001 WI 82, ¶23. For two independently dispositive reasons, Clark does not have a vested right to assert a claim under *Thomas*, and, therefore, Section 895.046 has no unconstitutionally retroactive effect.

First, Clark conceded in the trial court that her claim accrued in 2003. R.476; A-App. 027. At the time of her alleged injury, Wisconsin tort law did not permit her to recover from a WLC manufacturer without proving that it made the pigment she ingested, a fact which she admits she cannot prove. R.476; A-App. 019. Clark's potential claim against the Manufacturers arose only after *Thomas*—two years after her alleged injury. When her claim accrued, Clark had no right—let alone a vested one—to proceed under a new, expanded risk-contribution theory.[10]

[10] Retroactive application of a judicial decision and retroactive vesting of rights are two separate inquiries, which the trial court improperly collapsed into one. Even if *Thomas* were to apply to Clark's claim—which it does not—this would not automatically vest a previously non-existent

Second, a "vested" right implies 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, at the time of *Collins* and continuing after *Thomas*, numerous contingencies still cast doubt on the viability of a risk-contribution claim applying to WLC: whether *Thomas* violates federal or state due process; whether *Thomas* comports with Wisconsin public policy; whether *Thomas* can be applied retroactively; and whether the risk-contribution theory factually applies to WLC. These uncertainties are not the stuff of vested rights.

A. At The Time Of Clark's Alleged Injury, She Had No Vested Right To Sue Using *Thomas*'s Expanded Risk-Contribution Theory.

For this Court to hold Section 895.046 unconstitutional, Clark first must demonstrate that the 2013 Act has an unconstitutionally retroactive effect. Wisconsin law examines "whether the challenging party has a 'vested' right." *Soc'y Ins.*, 2010 WI 68, ¶29. For torts, a

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(continued…)

right. *See* pages 37-38, *infra*.

claim typically accrues at the time of injury. 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." *Holifield v. Setco Industries, Inc.*. 42 Wis. 2d 750, 754, 168 N.W.2d 177 (1969) (holding, for tort claims, a party's rights and expectations are settled at time of injury); *see also Neiman v. American Nat'l Prop. & Cas. Co.*, 2000 WI 83, ¶13, 236 Wis. 2d 411, 613 N.W.2d 160 (holding "a substantive right fixed on the date that the auto accident occurred"); *Matthies*, 2001 WI 82, ¶22 (finding the plaintiff's "negligence claim accrued on the date of his accident and injury"); *Hunter v. School Dist*. 97 Wis. 2d 435, 438-40, 445, 293 N.W.2d 515 (1980) (holding plaintiff had a "distinct vested property right in a cause of action for negligence at the time of her injury").

In developing its interpretation of vested rights, this Court relied on *Adams Nursing Home, Inc. v. Mathews*. *See Martin by Scoptur v. Richards*, 192 Wis. 2d 156, 201, 531 N.W.2d 70 (1995) (citing *Adams*, 548 F.2d 1077 (1st Cir. 1977)). In *Adams*, a Medicare regulation sought to "recapture" overpayments resulting from the use

of accelerated depreciation methods from providers when they left the program. 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*. *See also Rock Tenn Co. v. Labor & Indus. Review Comm'n*, 2011 WI App 93, ¶¶20, 22, 334 Wis. 2d 750, 799 N.W.2d 904 ("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").

Thus, the question is whether Clark had a vested right—a legitimate, settled expectation—to pursue a *Thomas*-based risk-contribution claim, created in 2005, at the time of her alleged injury in 2003. That question answers itself: Clark had no such vested right in a theory of recovery that did not exist in 2003. When Clark was allegedly injured and her claim accrued, she could not have recovered against any WLC manufacturer without identifying it as the manufacturer of the product that injured her. In line with fundamental Anglo-American jurisprudence, Wisconsin law required Clark to prove causation. *See, e.g.*, *Rockweit by 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 181-82. Justifiably, in 2003, the parties' expectations reflected that well-engrained causation principle, and Clark did not sue the Manufacturers then, because she could not prove that any Manufacturer caused her injury.[11]

The trial court erroneously held, however, that *Thomas* created a vested right for Clark two years after any claim based on her alleged injury accrued. R.476; A-App. 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

[11] If anything, well-established Wisconsin law gave each Defendant a settled expectation and vested right that it would not be subject to suit and held liable without proof that it made the product that allegedly injured Clark. *See Thomas*, 2005 WI 129, ¶¶210, 214 (Wilcox, J. dissenting).

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*, 128 F.3d at 1283 ("A vested right is an immediate, fixed right of present or future enjoyment") (internal citation 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 meant that Clark had an unconditional, vested right as of 2003, when her claim accrued. This is not the law. A new judicial decision does not automatically create a vested right in a previously accrued claim, and this Court has never held otherwise.

The trial court erred by treating this case like those in which a right existed at the time of injury. The Ninth Circuit's decision in *Boykin*, however, is right on point. There, Boeing employees asserted entitlement to overtime pay for work performed between 1992 and 1994. During those years, a statute exempted their positions 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, Washington's Legislature amended the statute to restore the law to pre-*Tift* standards and applied the amendment 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).

This Court has never 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 injury. *See Hunter*, 97 Wis. 2d at 444-45. Section 895.046 does not upset a settled expectation of any party at the time the claim accrued; it restores the law to what existed as of 2003, when Clark's claim accrued. Upholding Section 895.046 places both Clark and Defendants exactly as they were at the time of the alleged injury. Clark is not deprived of any right that she had when her claim accrued. As in *Adams*, where the statute is designed to leave the parties "no better—and no worse—off" than when Clark's

claim accrued, it does not impair any vested right. *Adams*, 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, should govern this Court's retroactivity analysis. Thus, Section 895.046 has no retroactive effect as to Clark, because the legislation is consistent with the law at the time of her alleged injury—Plaintiff could not have had a vested right in *Thomas*, which was decided in 2005, at the time of her alleged injury in 2003.

B. *Thomas* Leaves Too Many Open Questions To Create Any "Vested" Right.

A right vests when it is "not contingent; unconditional; absolute." BLACK'S LAW DICTIONARY (9th ed.). "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 *Soc'y Ins.*, the plaintiff insurer sought to prevent any new claim against it to pay additional benefits after the Legislature eliminated a statute setting a limitations period. Under the

prior statute, the insurer's liability to pay benefits expired in 2002, twelve years after its last payment, and responsibility for any future payments shifted to a state fund. *Id*. ¶3. According to this Court, the insurer's "right to 12 years fixed liability [had] vested," because the insurer's statutory limitations defense no longer depended on any uncertain contingencies. *Id*. ¶43 (citing *State v. Haines*, 2003 WI 39, ¶12, 261 Wis. 2d 139, 661 N.W.2d 72). The same reasoning should apply to a plaintiff's claim for relief.

Here, when the Legislature passed the 2013 Act and continuing today, serious questions remain unanswered regarding the *Thomas* decision. Four of the most significant issues—whether the expansion of risk-contribution theory to WLC comports with due process; whether it could pass muster under Wisconsin's public policy analysis; whether *Thomas* can be applied retroactively; and whether the facts would support the product fungibility and other findings necessary to justify extending risk-contribution to WLC—undermine the very foundation for the decision and Clark's *Thomas*-based risk-contribution claim. Although this Court decided after *Thomas* that a

plaintiff cannot claim that WLC pigments are defectively designed, it has not addressed any of the other outstanding questions that *Thomas* left open and *Collins* never addressed. *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, 319 Wis. 2d 91, 768 N.W.2d 674. Consequently, there can be no reasonable, settled expectation that any plaintiff claiming injury from WLC ingestion can rely on *Thomas* or *Collins* as a basis for recovery.

First, *Thomas* did not grant a vested right, because this Court declined to decide whether its new rule was constitutional and left that substantial question for later decision. 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. By dispensing with the plaintiff's burden to prove causation, the risk-contribution theory guarantees that a defendant can be held liable for harm it did not cause. *See, e.g., Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 852-53 (N.Y. App. Div. 1999); *Jefferson v. Lead Indus.*

Ass'n, Inc., 106 F.3d 1245, 1248 (5th Cir. 1997) (Louisiana law); *Skipworth v. Lead Indus. Ass'n, Inc.*, 690 A.2d 169, 173 (Pa. 1997); *see also* John S. Gray & Richard O. Faulk, *Negligence in the Air? Should 'Alternative Liability' Theories Apply in Lead Paint Litigation?*, 25 Pace Envtl. L. Rev. 147, 162-63 nn. 57-58 (2008) (collecting cases).

The relevant point here is not so much the substance of these constitutional protections, but that there was as of 2013, and still is, real doubt as to whether *Thomas* can be constitutionally applied. When the Legislature passed the 2013 Act, a federal district court—the only court to have addressed any of these issues at that time—had held that *Thomas* could not be constitutionally applied to the Manufacturers. The Legislature believes that it would violate due process to apply the risk-contribution theory against the former WLC manufacturers; this Court still has not spoken. Therefore, Clark could not have had an "unconditional and absolute" right to proceed under *Thomas* at the time of the 2013 Act.

Second, *Thomas* itself questioned whether a risk-contribution claim against former WLC manufacturers could survive the court's traditional public policy analysis. *Alvarado v. Sersch*, 2003 WI 55, ¶10, 262 Wis. 2d 74, 662 N.W.2d 350. As a *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 harms that it did not cause). *See id.* ¶¶306-314 (Prosser, J., dissenting). Additional policy factors include the number of subsequent actors responsible for preventing or abating any lead-based paint hazard, 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

being deemed vested than one that this Court itself has acknowledged may not comport with public policy.

The Legislature actually answered the question that *Thomas* left open—it confirmed that *Thomas*'s expansive risk-contribution criteria violate public policy and that tort plaintiffs should continue to have the same 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 that 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 v. Hadley*, 128 Wis. 2d 371, 378-79, 382 N.W.2d 673 (1986). Before retroactively applying a judicial decision, courts must

examine "(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 factually similar to the uniformly formulated drug DES, *Thomas* disrupted 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. 039.

In explaining the importance of reliance interests, this 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 *Thomas* been the law decades ago when the Manufacturers were making WLC pigments, they could have made numerous business decisions to protect against their potential liability exposure. For example, Manufacturers could have supplemented their liability insurance policies to include claims arising under the risk-contribution theory,[12] or raised prices for 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. But they had no notice and opportunity to protect themselves against new liability 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

[12] No record supports the *Thomas* majority's assumption that the former WLC Manufacturers can now insure, absorb, or pass along costs to consumers for products that they last made decades ago (or, in the case of certain Defendants being sued solely in their capacity as alleged successors, never manufactured at all).

increase for past events); *see also* R.471, Ex. N; A-App. 213-16 (manufacturer has a "near impossible" burden of exculpation). Under *Wenke*, it is far from certain that *Thomas* should apply retroactively to other cases.

Finally, because *Thomas* arose on a summary judgment record, it remains undecided whether WLC pigments were fungible. Fungibility is necessary for the risk-contribution theory to apply, but the Court left the question open to decide later with an evidentiary record. *Thomas*, 2005 WI 129, ¶140 & n.47. Thus, 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 demonstrates that Clark never has had a fixed or absolute right to a claim under the *Thomas* risk-contribution theory, and thus never has had a vested right to sue based on *Thomas*. The trial court dismissed these contingencies as typical and inconsequential. *See* R.476; A-App. 029. It said 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 contingencies here are not run-of-the-mill, case-specific factual inquiries that exist with every tort claim and that may impede a "plaintiff's ultimate recovery." *Id.* Rather, they go to the foundation of Clark's or any plaintiff's right to assert a claim. These contingencies leave open the question whether *any* risk-contribution claim for WLC is viable.

Accordingly, Section 895.046 does not impair a vested right and cannot have an unconstitutionally retroactive effect. For this reason alone, this Court should reverse the trial court's decision and grant summary judgment to Defendants.

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

A. The Legislature May Enact Laws That Apply To Pending Cases.

The Legislature can enact laws that apply to pending cases. Such legislation enjoys a "strong presumption in favor of its validity."

See Hammermill Paper Co., 58 Wis. 2d at 46. This Court has recognized that the Legislature has "the power to define and limit causes of action and to abrogate common law on policy grounds." *Aicher 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.

The challenger must demonstrate that legislation is unconstitutional "*beyond a reasonable doubt*." *Soc'y Ins.*, 2010 WI 68, ¶27 (emphasis added) (internal citation omitted). "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." *Hammermill Paper Co.*, 58 Wis. 2d at 46 (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.

The Court's role is limited to considering whether the legislation "contravenes some constitutional provision." *Hammermill Paper Co.*, 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)). 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, this Court examines whether there is a rational basis for the retroactive application of the legislation. *Soc'y Ins.*, 2010 WI 68, ¶30 (internal citation omitted). 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). The public purpose need not 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 Should Be Upheld.

The Legislature explained its rational purpose for the 2013 Act. The Legislature scrutinized the harm from expansion of the risk-contribution theory 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. The Legislature Explained The Public Policies Justifying The 2013 Act.

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 that does not arbitrarily or unfairly deprive a person of his or her property. Since statehood, Wisconsin law has held that a person's property cannot be taken away unless that person engaged in tortious conduct causing another person's harm. This Court created a narrow carve-out from this fundamental precept for exceptional situations akin to DES when it invented the "risk-contribution" theory. *Collins*, 116 Wis. 2d 166.

In *Thomas*, this 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. *Thomas* acknowledged that its expansive scheme "is not perfect and could result in drawing in some defendants who are actually innocent." 2005 WI 129, ¶164. The trial court in this case 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. 039.

Following immediate public outcry, the Legislature reaffirmed Wisconsin's fundamental tort law principles. The statute articulates a rational public purpose to ensure that any risk-contribution claim is consistent with long-standing principles of Wisconsin law and a fair framework for product liability.[13] As the intense public debate demonstrates, the Legislature addressed a public concern.

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 tort law and limiting risk-contribution theory to its criteria in *Collins*:

> 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

[13] Governor Walker described the impetus behind the 2011 Act: "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. 22-25.

> in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots.

Wis. Stat. § 895.046(1g). The Legislature understood the pervasive public interest in settled expectations under the law. A public policy determination such as this is the rightful 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 determination. *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). Thus, unlike the trial court, which discounted the public's and defendants' interests in fair rules applied evenhandedly, the Legislature found comparatively weaker any 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 risk 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. This Court, accordingly, has commanded "judicial deference to the stated policy of the legislature." *Kohn*, 2005 WI 99, ¶42.

The Legislature's concerns are valid bases to uphold the 2013 Act, no different than those rational bases justifying other constitutional legislation. On numerous occasions, this Court has upheld legislation on grounds that the law would protect or facilitate economic development. For example, in *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, this Court rejected an equal protection challenge and held an airline tax exemption to be constitutional because 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 v. Bailey*, this 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 that does not impose unanticipated and disproportionate liabilities long after the fact.

Third, the Legislature was concerned about the constitutional implications of *Thomas*'s sudden 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 putting aside the constitutional issues for later. The Legislature acted to safeguard a fair tort system. 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 Legislature was not silent. It explained its reasoning, and it took rational steps within its recognized constitutional authority to address a public interest in fair tort law rules. 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. Moreover, this extensive Legislative rationale differentiates Section 895.046 from the legislation at issue in *Matthies* and other cases, where the Legislature offered no or minimal public policy justification. *See, e.g.*, 2001 WI 82, ¶46.

The trial court erred when it decided that the Legislature's articulated purposes had no weight. It found "difficulty in placing a value on the public interest in fairness served by retroactive application of Wis. Stat. § 895.046…" R.476; A-App. 040.

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 may not 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*, this Court reversed the lower court and upheld the constitutionality of a statute granting immunity from civil liability to alcoholic beverage providers. 193 Wis. 2d 118, 532 N.W.2d 432 (1995). Applying the rational basis test, the Court acknowledged that "it is the constitutionality of the statute, not its wisdom, which the court must address." 193 Wis. 2d 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*.[14] Unlike this Court, which has looked to newspaper articles to identify a rational basis, *Northwest Airlines*, 2006 WI 88, ¶61, the trial court improperly dismissed such evidence as "opinion polling," and refused to acknowledge the Legislature's rational concerns. R.476; A-App. 034. By trivializing the Legislature's stated bases for Section 895.046, the trial court erred and failed to resolve any doubt in favor of constitutionality.

2. Clark's 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

[14] The trial court mistakenly distinguished this Court's decision in *Doering* as not involving the constitutionality of retroactive legislation. R.476; A-App. 039. However, the same general principles of judicial deference apply. *Doering*, 193 Wis. 2d at 132. ("[D]eference to the legislature reflects the court's awareness that drawing lines and creating distinctions to establish public policy is a legislative task.")

interests supporting Section 895.046. When Clark claims her injury occurred, she had no expectation of stating a claim against WLC manufacturers that she could not identify as causing her alleged injury, and she did not sue them then. She had no expectation of recovery under *Collins*'s risk-contribution theory; she could not reasonably expect that risk-contribution theory would expand to include WLC used in a multitude of different kinds of paints—products substantially different from one another in formulation, labeling, marketing, distribution, and use, unlike identically formulated DES. Nor could she reasonably rely on a theory of recovery that had yet to be announced. Instead, she expected that she could pursue a negligence claim against her landlords and the Manufacturers pursuant to tort law as it existed at the time of her injury.

Section 895.046, as amended, reinstates the common law that existed at the time of Clark's injury. It leaves Clark no better and no worse off than when her claim arose. *See supra* 24-31. The result is no different than if this Court overruled *Thomas* before her case was

finally decided. Accordingly, her private interest is 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. 036. However, this is not a case where Clark was caught in a trap for the unwary. Courts value notice to prevent the unexpected impairment of rights that existed at the time of injury. For example, in *Matthies*, the Court ruled that plaintiff's private interest outweighed the public interest, because, at the time he was injured, 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." 2001 WI 82, ¶46. That did not happen to Clark 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 merely restored 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 of her alleged injury.

If anything, the policy reasons against retroactivity support the 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 its liability was "fixed on the date of injury." *Neiman*, 2000 WI 83, ¶13. There is no inequity in upholding the constitutionality of the 2013 Act.

C. Under The Rational Basis Test, The Court Cannot Set Aside The Legislature's Balance of Public And Private Interests.

As this Court has instructed, once the Legislature has spoken, a court's role is limited to determining whether a rational basis exists. Allowing a court to balance public against private interests, when the Legislature has already determined that balance, 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, 459 (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 (1963). A similar rationale, along with fear of introducing a heightened level of judicial scrutiny, prompted this 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 rational bases for amending Section 895.046. They are rational—in fact, two 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 determining only whether those bases are 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.

In sum, Clark's attempt to bring a claim using a risk-contribution theory based on *Thomas* fails for a number of independently dispositive reasons: Clark has no vested right to bring a claim under *Thomas* because it was decided after Clark's claim accrued; as of 2013, Clark had no vested right to bring a *Thomas*-based risk-contribution claim because such a claim still faced contingencies, each of which would foreclose her claim; the Legislature has articulated rational bases for the 2013 Act to which this Court must defer; and, in light of further experience and the Legislature's announcement of public policy and constitutional concerns, the risk-contribution theory should not be extended to WLC pigments.

CONCLUSION

This Court should reverse the Circuit Court's decision, hold that Section 895.046 as amended in 2013 is constitutional, and direct the trial court to enter judgment in favor of Defendants.

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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, including footnotes, is 10,563 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) and (13). I further certify that the text of the electronic copy of the brief and appendix is identical to the text of the paper copy of the brief and appendix.

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The undersigned hereby certifies that three true and correct copies of the Opening Brief of Defendants-Appellants and this Certificate of Service were sent via U.S. Mail this 30th day of December, 2015, to the following:

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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 if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 of persons, specifically including juveniles and parents of juveniles, with

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