WISCONSIN SUPREME COURT

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,
And NL INDUSTRIES, INC.

Defendant.

On Certified 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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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.

(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.

(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.

INTRODUCTION

Yasmine Clark was severely poisoned by white lead carbonate pigments in the residential paint used the the homes in which she lived on two occasions, first, in 2003 when she was a two and a half year old toddler, and then again in 2006 when she was a five year child. She promptly filed her lawsuit relying on the legal precedent set forth in this Court's 2005 decision in *Thomas v. Mallett,* 2005 WI 129, 285 Wis.2d 236. In 2013, after seven years of expensive litigation, the Defendants-Appellants succeeded in convincing the state legislature to retroactively change the statutory law governing this case and sought dismissal of Yasmine's claims.

The trial court declared the retroactive statutory change unconstitutional because it violated Yasmine's substantive due process rights. Subsequently, the U.S. Court of Appeals for the Seventh Circuit also held the statute unconstitutional for the same reason. *Gibson v. American Cyanamid Co.,* 760 F.3d 600 (7th Cir. 2014).

Defendants-Appellants now seek to reverse the trial court on two grounds: (1) that Yasmine had no vested right to pursue her cause of action in the first place; and (2) that her private interest in avoiding extinguishment of her vested right is out weighed by the public interest in the retroactive abrogation of her cause of action.

As to the first ground, the Defendants-Appellants assert that Yasmine's right to file a cause of action on December 27, 2006, pursuant to the risk contribution theory did not exist because she was first injured in 2003 before the date of the decision in *Thomas v. Mallett,* 2005 WI 129, 285 Wis.2d 236. This argument is advanced despite the fact that Wisconsin adheres to the 'Blackstonian Doctrine,' which provides that judicial decisions are presumptively retroactive, and the fact that in 1984 the common law had already been changed in *Collins v. Eli Lilly Co.*, 116 Wis.2d 166 (1984), to allow risk contribution claims in situations factually similar to the DES cases.

With regard to the second ground, Defendants-Appellants assert that the public interest furthered by retroactively extinguishing Yasmine's cause of action outweighs her private right to pursue it. In so arguing, they export the declared public interest in the prospective application of the statute into their argument concerning retrospective application. Perhaps even more erroneously, Defendants-Appellants argue that anytime the legislature purports to balance the public and private interests in a declaration of statutory intent, the judiciary must abandon its authority to review the constitutionality of the retroactive legislation—and instead simply defer to the legislature's determination of that balance—thereby allowing the private interest to be extinguished without examination by this Court.

For the reasons set forth below, the well established law of Wisconsin demands affirmance of the trial court below.

A. BACKGROUND OF RISK CONTRIBUTION

In *Collins v. Eli Lilly Co.*, 116 Wis.2d 166 (1984), the Wisconsin Supreme Court was faced with a choice: allow the innocent plaintiff to "bear the cost of injury" because she could not identify the manufacturer of the DES that injured her, or require the defendants to incur liability "for DES which they may not have produced or marketed." *Id.*, at 190-191. In "the interests of justice and fundamental fairness," and in direct response to the mandate of Article I, §9, of the Wisconsin Constitution, the *Collins* Court chose the latter, and created a new method of recovery, thereby modifying the common law. *Id.* The *Collins* Court explicitly anticipated the application of the new method to "situations which are factually similar to the DES cases." *Id.* at 191.

The *Collins* Court also clearly established the factual criteria that led it to modify the common law: (1) the existence of many potential innocent plaintiffs (*Id.* at 181); (2) the shared culpability all manufacturers in producing or marketing what was later shown to be an unreasonably harmful product[1](*Id.* at 191-192); (3) the inability of the innocent victims to identify the precise

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[1] Given the procedural posture of this case on summary judgment, the only issue before the Court is the constitutionality of § 895.046, Wis. Stats., not the *Thomas* decision, nor the egregious culpability of the conduct of the Defendants-Appellants. Nevertheless, the Defendants-Appellants' erroneously assert that subsequent litigation proved that white lead carbonate manufacturers did not know the health risks to children when selling the pigments for residential paint use before the 1970's. *See* Defendants-Appellants' Brief at page 10, fn 1. However, in the case of *People of California v. Atlantic Richfiled Co., et. al.*, Case No. 1-00-CV-788657 (12/16/13), after a trial on the merits, the court explicitly found that Sherwin-Williams and two other white lead pigment manufacturers had both actual and constructive knowledge of the health risks to children as of the early 1900's, yet continued to manufacture, promote and sell the product notwithstanding that knowledge. (R-461, Ex. 3).

manufacturer of the product that caused the injury because of the generic or fungible nature of the product, the large number of manufacturers, the passage of time, and the loss of records (*Id.* at 180-181); and (4) the inability of the innocent plaintiffs to recover from the potentially negligent manufacturers. *Id.* at 177, 180-81.

Following the precedent of *Collins,* a lead poisoned child named Steven Thomas filed an amended complaint in Milwaukee County Circuit Court on September 10, 1999, asserting the right to recover under the risk contribution doctrine because of the factual similarity between the circumstances of DES victims and that of lead poisoned children injured by the ingestion of residential paint containing white lead carbonate. *Thomas v. Mallett,* 2005 WI 1267, ¶15, 285 Wis.2d 139. On October 30, 2002, the lead pigment manufacturer defendants filed motions for summary judgment arguing that the circumstances of children poisoned by white lead carbonate paint pigment were not factually similar to the circumstances of DES victims and the state constitutional right to a remedy clause did not apply because of the availability of a remedy for his injuries against the owners of the premises at which he was poisoned. *Id.*, at ¶ 17. The *Thomas* trial court agreed with the defendants and granted the motion for summary judgment on January 17, 2003, and the case was dismissed on March 10, 2003. *Id.*, at ¶ 18.

The *Thomas* case was timely appealed on May 30, 2003. *Id.*, at ¶ 20. The central issue before the Court of Appeals was whether white lead

carbonate cases were factually similar to DES cases. Significantly for purposes of this appeal, the majority decision agreed that white lead carbonate cases and DES cases were factually similar. *Id.*, at ¶ 21.

However, the Court of Appeals majority went on to hold that as a matter of state constitutional law, the risk contribution doctrine only applied to situations that were factually similar to DES and in which the innocent plaintiff had no alternative remedy for his or her injuries. *Id.*, at 22. Therefore, the Court of Appeals concluded that "unlike the situation in *Collins,* Thomas had 'an already existing right'–a remedy for his injuries; as noted he filed and then settled an action against the owner of one of the houses, and settled his claims against the other owner without filing suit." *Thomas v. Mallett,* 2004 WI App 131,¶ 7, 275 Wis.2d 377 (Wis. App. 2004).

At bottom the majority opinion at the Court of Appeals level agreed that DES and white lead carbonate paint pigments were factually similar, but based on the requirements of the state constitutional right to a remedy clause, concluded that the application of the risk contribution doctrine was limited to situations where the innocent victim had no alternative remedy. In a concurrence, Judge Richard S. Brown disagreed:

> "I do not concur with the reasoning employed by the majority. Distilled to its essence, the majority's rationale is that because plaintiff's lead poisoning injury was addressed in a suit against the landlords, he received the benefit of a remedy for his injury and is not entitled to anything more. The majority apparently interprets article 1, § 9 of our state constitution to ask two things : Was there an injury? If so, did the plaintiff obtain redress in the courts for that injury. If so, the plaintiff has had his day in court and is not entitled to "plumb" for deep pockets against any other alleged wrongdoers.

> I disagree with this interpretation as it overlooks the unambiguous wording of article 1, § 9. The plain meaning of this section is that every person is entitled to a certain remedy for "all injuries *or* wrongs which he may receive in his person." [emphasis added.] 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."

Id., at ¶¶21, 22 (emphasis in original).

The *Thomas* case was then appealed to the Wisconsin Supreme Court which adopted Judge Brown's interpretation of the disjunctive nature of the word "or" in the state's right to a remedy clause, framing the issue as follows:

> Thus, although the Article I, Section 9 provision itself may not create "new rights," it does allow for a remedy through existing common law. As *Collins* allowed for the recognition of the risk contribution theory in factually similar cases, we must assess whether this common law applies to Thomas's situation."

Thomas, 2005 WI, at ¶¶ 121, 122, 129.

The *Thomas* Court described its reasoning in terms "plaintiffs" (in the plural), who "may have been severely harmed" (in the past tense):

> As a prefatory note, as this court did in *Collins* with DES cases, we recognize that cases involving lead poisoning stemming from lead pigment pose difficult problems. See id. at 190. The entirely innocent **plaintiffs** may **have been severely harmed** by a substance they **had** no control over, and they may never know or be able to prove with certainty which manufacturer produced or promoted the white lead carbonate that caused the injuries. The Pigment Manufacturers are faced with possible liability for white lead carbonate they may not have produced or marketed. As this court did in *Collins*, we again conclude "that as between the plaintiff, who probably is not at fault, and the defendants, who may have provided the product which caused the injury, the interests of justice and fundamental fairness demand that the latter should bear the cost of injury."

Id., at ¶ 132. (emphasis added).

In the very next paragraph the *Thomas* Court noted that as an individual innocent plaintiff, Steven Thomas was one of many potential plaintiffs:

> "Further, given the disturbing numbers of victims of lead poisoning from ingesting lead paint, and given that white lead carbonate was the overwhelming pigment added to that paint, it is clear from the summary judgment record that we are not dealing with an isolated or unique set of circumstances. *See id.* at 181"

Id., at ¶133.

The *Thomas* Court's quotation of *Collins* at page 181, is significant for one of the central issues on this appeal because it demonstrates clearly that the *Thomas* Court intended its holding to apply to innocent victims whose lead poisoning injuries had already occurred, just as the *Collins* Court did for innocent DES victims. The full paragraph at page 181 of the *Collins* decision reads as follows:

> "By the time that DES was banned for use in pregnancy in 1971, many women already had been exposed to DES during their mothers' pregnancies. Reliable estimates placed on the number of individual or class action DES suits then pending at approximately 1,000. **It is probable, given the sheer number of potential victims, that many other suits will arise. Thus, it is quite clear that in this case we are not dealing with an isolated, unique set of circumstances which will never occur again.** We are faced with a choice of either fashioning a method of recovery for the DES case which will deviate from traditional notions of tort law, or permitting possibly negligent defendants to escape liability to an innocent, injured plaintiff. In the interest of justice and fundamental fairness, we choose to follow the former alternative.

Collins, 116 Wis.2d at 181 (emphasis added).

The *Collins* Court issued its decision on January 4, 1984. Since the use of DES was banned in 1971, it is an inescapable reality that the *Collins* Court's anticipation that "many other suits will arise" related wholly to the "many"

potential plaintiffs whose injuries had already accrued long before the date of the court's decision because as of 1971, no more female fetuses were being exposed to DES in utero. In short, the *Collins* Court did not intend that only Therese Collins would benefit from the retroactive application of risk contribution while all other victims would be limited to such claims that accrued after the date of the decision. Rather, in 1984, the *Collins* Court modified the common law and vested in each DES victim the right to a cause of action for their injuries that, in all cases, had accrued prior to 1971.

Ultimately, on July 15, 2005, the *Thomas* Court held that for purposes of the applicability of the risk contribution doctrine, white lead carbonate cases are indeed factually similar to DES cases:

> "This court in *Collins* authorized the expansion of the theory [of risk contribution] in other factually similar scenarios. Although this case is not identical to *Collins,* we conclude that it is factually similar such that risk-contribution theory applies."[2]

Thomas, at ¶131.

In so doing, the Wisconsin Supreme Court acted pursuant to its interpretation 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."

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[2] The *Thomas* Court specifically noted that it ***did not*** expand *Collins* in the course of holding that risk contribution applied to children poisoned by white lead carbonate paint pigments. *Thomas,* at ¶134, fn. 43.

Kroner v. Oneida Seven Generations Corp[3]., 2012 WI 88, ¶90, 342 Wis.2d 626, 665, (2012). Like *Collins,* the *Thomas* Court did not intend to limit the retroactive application of its decision to only Steven Thomas; rather, the Wisconsin Supreme Court cited its reasoning in *Collins* that because "in this case we are not dealing with an isolated, unique set of circumstances," therefore, "many other suits will arise." *Collins*, 116 Wis.2d at 181

In another factually similar case pending in federal court, on June 15, 2010, Judge Rudolph Randa granted the Defendant-Appellant ARCO's motion for summary judgment on the grounds that imposition of liability pursuant to the risk contribution doctrine would violate ARCO's substantive due process rights under the United States Constitution. *Gibson v. American Cyanamid,* 719 F.Supp.2d 1031 (E.D. Wis. 2010). A few months later, Judge Randa granted similar motions to each of the remaining Defendants-Appellants, as well as, the dismissed Defendant, NL Industries, Inc. *Gibson v. American Cyanamid,* 750 F.Supp.2d 998 (E.D. Wis. 2010). On September 1, 2010, each Defendant-Appellant, and NL Industries, Inc., filed similar motions for summary judgment in the case at bar. *See* (R-303, 304, 313, 314, 316, 317, 320, 321, 323, 324, 334, 335).

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[3] 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.

The issue of the constitutionality of the risk contribution doctrine was appealed to the United States Court of Appeals for the Seventh Circuit on December 6, 2010. (R-329, 331). All risk contribution cases in both state and federal courts—including this case—were stayed pending that appeal. On July 24, 2014, the Seventh Circuit issued its decision reversing Judge Randa and finding that Wisconsin's risk-contribution theory does not violate the substantive and procedural due process rights of the Defendants-Appellants, nor does it violate the Takings or the Commerce Clauses of the United States Constitution. *Gibson v. American Cyanamid,* 760 F.3d 600 (7th Cir. 2014)(en banc review denied). Not one judge from the Seventh Circuit voted for *en banc* review and on May 18, 2015, the United States Supreme Court rejected the Defendants-Appellants' petition for a writ of certiorari. *Id.,* 135 S.Ct. 2311 (2015).

B. BACKGROUND OF YASMINE CLARK'S INJURY AND LAWSUIT

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 for negligence and strict product liability pursuant to the risk contribution doctrine. (R-1). The factual record indicates that Yasmine, like the *Thomas* plaintiff, was severely lead poisoned on two separate and distinct occasions. Her first lead poisoning occurred on August 15, 2003, when she was hospitalized for emergency chelation treatment after being diagnosed with an

elevated blood lead level of 46 ug/dl while she lived at 3738 West Galena Street in Milwaukee. (R-1, at ¶¶ 17-8, 38-39). The second poisoning occurred three years later in 2006 while she lived at 1940 North 26th Street, and at 1327A North 28th Street, both addresses also in the City of Milwaukee. (R-1, at ¶¶ 19, 43-45; *see also* R-390, at ¶¶ 2, 4, 5). 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 separate and distinct addresses and the resulting second hospitalization occurred after the Wisconsin Supreme Court had decided the *Thomas* case.[4]

Between the date that Yasmine Clark filed her complaint on December 27, 2006, and the date that the Defendants-Appellants filed their Notice of Appeal on August 25, 2014, the trial court docket accumulated over 400 entries spanning more than six years of active litigation. The Plaintiff-Respondent

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[4] Defendants-Appellants erroneously argued at page 16 of their opening brief at the Appeal Court level 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, relying on *Nierengarten v. Lutheran Soc. Serv. Of Wis.*, 219 Wis.2d 686 (1998), and *Pritzlaff v. Archdiocese of Milwaukee,* 194 Wis.2d 302(1995). Before this Court, the Defendants-Appellants do not develop this argument and simply cite to the trial court at A-App. 027. 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 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.

identified and produced reports for eleven experts and the Defendants-Appellants collectively identified and produced reports for another twenty one experts. (R-390, at ¶ 7). Prior to the close of discovery, all thirty two experts had been deposed. The Plaintiff-Respondent estimated that her litigation costs have exceeded $300,000.00 as of the close of discovery on November 30, 2010. (R-408, at p. 9). Indeed, on September 1, 2010, the Defendants-Appellants filed ten separate motions for summary judgment. (R-303, 307, 310, 313, 316, 320,n 323, 327, 334, 336). The final pretrial conference was set for February 18, 2011, and a jury trial was scheduled to begin on May 2, 2011. (R-243).

On December 10, 2010, the Defendants-Appellants filed a motion to stay Yasmine's lawsuit pending an appeal to the Seventh Circuit Court of Appeals of Judge Randa's decision in the *Gibson* case. (R-388). On January 13, 2011, during the oral argument on the motion for a stay, the Defendants-Appellants argued that in addition to the pendency of the *Gibson* appeal, it would be relevant for the trial court to consider the fact that legislation abrogating the risk contribution doctrine would be voted on by the Senate Judiciary Committee the very next day:

> "Your Honor, to the extent this pending legislation is relevant to your decision, I have a copy of the bill, which I'd be happy to provide to court and counsel, and I can tell you this bill will be voted on in the Senate Judiciary Committee tomorrow, likely voted on by the full senate on Tuesday, and it's expected that the assembly would vote on it before the end of next week, leaving the possibility that the governor may yet sign it next week, at the latest the week after that.

> By its terms it would apply to cases that are currently pending. We're not, of course, moving that the bill would require dismissal or a stay, but I think it might be relevant to Your Honor's decision under the circumstances."

(R-489, at 12:25 to 13:16, *see also,* 9:25 to 10:25, 39:1 to 40:3).

The trial court responded that it was not inclined to consider "possible" legislation, but nevertheless granted the motion for the stay over Yasmine's vigorous opposition. (R-489, at 13:17-18, 30:5-16, 50:3-6, 50:20-55:13).

C. BACKGROUND OF RETROACTIVE AMENDMENT TO §895.046, Wis. Stats.

The pending legislation referred to by the Defendants-Appellants' counsel during the above mentioned January 13, 2011, hearing before the trial court was Senate Bill 1, which was introduced on January 5, 2011, during the January, 2011, Special Session of the Legislature[5]. (*See* Affidavit of Victor C. Harding, ¶¶ 3, 4, Exhibit 1). As initially worded, SB-1 contained a provision in Section 45(5) captioned "Initial Applicability, Civil Actions" which would have retroactively applied to all pending cases:

> "The treatment of sections . . . 895.046, . . . of the statutes . . . . first apply to actions or special proceedings that are commenced *or* *continued* on the effective date of this subsection."

Id. (emphasis added).

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[5] The Plaintiff-Respondent has filed a Motion to Supplement the Record and Request for Judicial Notice, with an accompanying Affidavit of Victor C. Harding, which was filed contemporaneously with this Brief and has attached seven exhibits pertaining to the legislative history of § 895.046, Wis. Stats., of which Exhibit 1 is the original bill, Senate Bill 1, that led to the enactment of the statute, Exhibit 2 is Senate Amendment 1 to Senate Bill 1,, Exhibit 3 is Senate Bill 373, and Exhibits 4 through 7 are records and certified reports from the Government Accountability Board documenting lobbying activity by the Atlantic Richfield Company, Sherwin-Williams and the dismissed defendant, NL Industries, Inc., concerning said legislation. Further references to these documents in this Brief, will henceforth refer to ""Affidavit of Victor C. Harding, Ex. __."

However, on January 13, 2011, the same day as the hearing on the stay, SB-1 was amended so that the words "or continued" were deleted—thereby striking the language that would have of made § 895.046, Wis. Stats., retroactive to cases which were pending on the date of enactment, such as Yasmine's. (Affidavit of Victor C. Harding, Ex. 2). As predicted by counsel for the Defendants-Appellants, § 895.046, Wis. Stats., was fast tracked and was enacted on January 27, 2011. As worded, the statute only 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.[6]

A year later, but also during the 2011-2012 legislative session, another bill, SB-373, was introduced in the state senate on January 10, 2012. (Affidavit of Victor C. Harding, Ex. 3). This second bill would attempt to abrogate the risk contribution doctrine as applied to lead pigment manufacturers retroactively. Like with the initial legislation that created § 895.046, Wis. Stats, attempts were made to fast track SB-373 for rapid approval by the Senate Committee of Judiciary, Utilities, Commerce and Government Operations. (R-467, Ex., at pp 1, 9).

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[6] 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.

The legislative intent for the retroactive application of the legislation to all pending lead poisoning cases was specifically addressed by the lead co-sponsor, Senator Glenn Grothman at a hearing which occurred on January 19, 2012:

> CHAIRMAN ZIPPERER: So in essence applied to any claims made after enactment of Act 2. Your legislation would look back to those cases filed before the enactment of Act 2, is that right?
>
> SENATOR GROTHMAN: Right, exactly. I'm not sure of the exact effective date. It was something like March 15th of last year, sometime around then, and there were many cases filed a month before or two months before enactment, and we are saying this bill applies to those cases, as well.

(R-467, Ex. 6, at pp. 9:3 to 9:14; *see also* pp 9:15 to 12;18).

> CHAIRMAN ZIPPERER: Senator Risser, this legislation only applies to risk contribution is my understanding. The rest of Act 2 as a comprehensive packet, including the Daubert Rules of Evidence, this legislation does not touch.
>
> SENATOR RISSER: So you are just making part of Act 2 retroactive?
>
> SENATOR GROTHMAN: Yes.
>
> SENATOR RISSER: And what's your rationale for making just part of that Act retroactive?
>
> SENATOR GROTHMAN: Because it is the part that offends us the most.
>
> SENATOR RISSER: Who's "us?"
>
> SENATOR GROTHMAN: Me. Me and the co-sponsor. Me and Senator Fitzgerald. It offends us.

(R-467, Ex. 6, at p. 26:8 to 26:24)(emphasis added).

The drafting request included a four page unsigned legal memorandum entitled "Wisconsin 2011 Act 2 Fell Short of Clearly Restoring Traditional Wisconsin Law for All Manufacturers." *Id.*, at pp. 10-14. According to the

transcript of the January 19, 2012 hearing on SB-373, Senator Erpenbach asked Senator Grothman about the identity of the lawyer who authored that unsigned memorandum:

> SENATOR ERPENBACH: It would seem to me that trying to figure out where this particular piece of paper came from that was submitted into the file - -
>
> SENATOR GROTHMAN: We will check that.
>
> SENATOR ERPENBACH: - - is extremely important, so I would hope - -
>
> SENATOR GROTHMAN: We have all day to find it. I will ask around here, but somewhere, if he's listening downstairs, we will find out who did this.
>
> SENATOR ERPENBACH: I would hope, Mr. Chairman, before the end of the day, before this committee hearing is done, we can find out where this came from, because its extremely important, because if it came from just some non-biased lawyer or law firm out there that doesn't have a stake in this case one way or the other, that's one thing, but if it came from a law firm that is representing a defendant or could be representing a defendant, that's a whole other thing. And it's submitted into the bill jacket which again without a name - - I have never seen it before. So I would hope that by the end of the committee hearing we will find out where it came from.

(R-467, Ex. 6, at pp. 22-23)(emphasis added). The memo's drafter was not identified on the day of the hearing.

An attorney for NL also testified during the hearing, and provided the Senate Committee with written comments as well. (R-467, Ex. 6, at p. 50). A side-by-side comparison of the written comments with the unsigned legal memorandum attached to the drafting instructions indicates that the documents are nearly identical and for the most part verbatim duplicates each other. ((R-467, Ex. 2 and Ex. 6, at p. 50). Further implicating the direct involvement of

the Defendants-Appellants in the drafting of the retroactive amendment to §895.046, Wis. Stats., NL's attorney testified that:

> "In fact, courts often say if you don't like the law, go to the legislature and get it changed. That's what's going on here."

(R-467, Ex. 6, at p. 66).

Reacting to the fact that the final legislation that became §895.046, Wis. Stats., on January 27, 2011, had dropped the retroactive provision mentioned during the hearing on the stay on January 13, 2011, NL's attorney further stated:

> "The bill that's before you now, 373, is - - I guess I would call it a cleanup bill relative to the details of Act 2 adopted last year."

(R-467, Ex. 6, at p. 67:12-15; *see also for full context,* p. 66:25 to 67:18)

Finally, during the hearing before Judge Hansher on January 23, 2014, it was admitted that out-of-town counsel for NL Industries, Inc., drafted the anonymous memo in the drafting package and NL also participated in the drafting of the legislation. (R-490, at pp. 26:21 to 30:15). But NL, Industries, Inc., did not act alone, other Defendant-Appellants were involved too. (Affidavit of Victor C. Harding, Ex. 7) For example, the certified lobbying reports of Sherwin-Williams indicate that it spent $180,000.00 for 155 hours of lobbying activity related to SB-373. (*Id.*, Ex. 5) Further, Sherwin-Williams, Atlantic Richfield Company, and NL Industries, Inc., collectively spent $367,500.00 for a total of 710 hours of lobbying activity related to their efforts to procure legislation that would retroactively abrogate the law in all the risk

contribution cases they had pending against them, including Yasmine Clark's case. (*Id.*, Ex. 4,5, 6, 7).

The lobbying efforts finally bore fruit on June 30, 2013, when the Governor of Wisconsin signed the state's biennial budget into law, which contained within it, an obscure and last minute amendment to §895.046, Wis. Stats., retroactively abrogating those lead poisoning cases relying on risk contribution that had been filed before February 1, 2011. 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 retroactively applicable to the limited universe of cases that had been filed prior to February 1, 2011. § 895.046(2), Wis. Stats.

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. (R-476, at p. 20-21)

The summary judgment record—evidenced by the unrebutted affidavits of Senator Lena Taylor, Representative Evan Goyke, and Representative Leon Young—establish the undisputed fact that:

> The retroactive provision amending §895.046, Wis. Stats., was smuggled into the biennial budget in the early morning hours of June 5, 2013, on the last day of budget proceedings of the Joint Finance Committee without any prior notice or indication of sponsorship by any individual legislator. It was then adopted by the Senate on June 21, 2013, just 16 days later without any public hearing being held.

(R-463, at ¶ 18; R-464; R-465).

After its enactment on June 21, 2013, the retroactive amendment to § 895.046, Wis. Stats., became law on July 1, 2013. (R-476, at p. 20). A few weeks later, Defendants-Appellants filed their motion to lift the stay and dismiss Yasmine's case on the ground that her cause of action was extinguished by § 895.046, Wis. Stats. (R-451; R-452).

On March 25, 2014, Judge Hansher issued his decision and order denying the Defendant-Appellants' motion dismiss and granting Yasmine's motion for partial summary judgment seeking a declaration that § 895.046, Wis. Stats. violates Article I, § 1 of the Wisconsin Constitution. Four months later, the Seventh Circuit agreed, holding that "Wisconsin Supreme Court precedent demands holding that § 895.046, Wis. Stats., violates state due-process principles by trying to extinguish [plaintiff's] vested right in his negligence and strict-liability causes of action." *Gibson,* 760 F.3d at 609.

STANDARD OF REVIEW

Whether a retroactive statute is constitutional is a question of law reviewed *de novo. Society Insurance v. Labor & Industry Review Com'n,* 2010 WI 68, ¶13, 326 Wis.2d 444, 457. In determining whether § 895.046, Wis. Stats., is unconstitutional, the reviewing court "will uphold the circuit court's findings

of historical fact unless they are clearly erroneous." *Id.*

ARGUMENT

A. 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.*; *see also Society Ins.*, 2010 WI 68, at ¶28. 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 interest served by retroactively applying the statute against the private interest that the retroactive application of the statute would affect." *Id.*, at ¶30 (quoting *Matthies v. Positive Safety Mfg.*, 2001 WI 82, § 27, 244 Wis.2d 720).

1. 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 has a vested property interest that would be eliminated by the retroactive nature of the legislation at issue. This question was unequivocally answered by the Seventh Circuit when it determined that a lead-poisoned child had a

> "vested right" in his claims under *Thomas*'s risk-contribution theory. The Wisconsin Supreme Court decisions in *Matthies* and in *Martin* both dictate that a plaintiff's interest in a common-law claim is a protected vested interest. In *Matthies*, the interest was the plaintiff's previously existing common-law negligence claim, specifically, his right to hold a defendant jointly and severally liable without having to prove that the defendant was more than 50% negligent (the statute at issue extinguished joint and several liability unless that threshold of comparative negligence was met). *Matthies* explained that 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." Similarly, in *Martin*, the statute at issue imposed caps on non-economic damages, and the Wisconsin Supreme Court held that, when the plaintiffs' claim accrued, they "had a substantive right to recover, in full, the non[-]economic damages awarded by the jury," and that right was vested for due-process purposes. Just so here, where Gibson's right to pursue the risk-contribution theory of liability on his negligence and strict-liability claims had already accrued by the time Section 895.046 tried to extinguish that right in June 2013.

Gibson, 760 F. 3d at 609. Significantly, the lead poisoned child in *Gibson,* like Yasmine, was poisoned before this Court's decision in *Thomas* and he filed suit against the lead pigment manufacturers after the *Thomas* decision was issued.

The holding in *Gibson* is supported by black-letter Wisconsin precedent. 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*, at ¶ 29; *Matthies*, at ¶22.

"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 her complaint, Yasmine'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.

The Defendants-Appellants erroneously argue that §809.046, Wis. Stats., is not retroactive as to Yasmine because *Thomas* 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 assert 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 for several reasons. First, it is abundantly well established that judicial decisions have retroactive application under Wisconsin law, this is the rule, not the exception. R-476, 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.

Second, 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 – a holding that was applicable to the lead poisoning claims of Steven Thomas *that had accrued in 1993*. *Thomas,* at ¶¶ 5-10. Such judicial holdings that clarify state constitutional law do not change constitution provisions, rather they declare the meaning of those provisions and the clarification is necessarily retroactive. In other words, there is not one version of Article I, § 9, existing before the *Thomas* decision in which the meaning of the word "or" is not interpreted in the disjunctive and another version after the *Thomas* decision where it is.

Third, as explained at pages 4 to 10 of this Brief, *infra,* 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, such a suggestion is contrary to the entire foundation of the judicial system and logic itself. It is not difficult to conceive of the mayhem that would be created if each judicial decision was limited to declaring the law in that particular case only, as opposed to the law in all similar cases.

Fourth, as explained in *Society Insurance* (at ¶ 33), the Court should look to determine whether Yasmine relied "upon the law as set forth by the courts [i.e. *Collins* and *Thomas*] and the legislature [no statute precluded risk contribution and no statute of repose applied]" when she filed her lawsuit on December 27, 2006. Yasmine's reliance on the law declared by this Court was indisputably justified, and the retroactive legislation "suddenly and without

individualized consideration" swept away her "settled expectation" that she had a right to her cause of action. *Id.*

Defendants-Appellants have no basis to argue that Yasmine's right to a cause of action under risk contribution could not have vested because in their erroneous view four "serious questions remain unanswered regarding the *Thomas* decision":

(1) "[W]hether the expansion of risk contribution theory to WLC comports with due process." This assertion is bogus and merits no consideration by the Court in light of *Gibson,* 760 F.3d at 627.

(2) "[W]hether it could pass muster under Wisconsin's public policy analysis." This assertion is not ripe and merits no consideration by the Court in light of *Alvarado v. Sersch,* 2003 WI 55, 262 Wis.2d 74 (2003).

(3) "[W]hether *Thomas* can be applied retroactively." This assertion has no merit in light of the facts that: (a) *Collins'* creation of risk contribution was undeniably retroactive to the many additional lawsuit for past exposure to DES expressly contemplated by the Court (116 Wis.2d at 181), (b) *Thomas* itself which expressly cited that reasoning in determining white lead pigments were factually similar to DES, (*See infra,* at pp. 8-10), and (c) The Court in *Gibson,* 760 F.2d 600 clearly answered this question for Ernest Gibson, finding that the *Thomas* decision's retroactive application to factually analogous situations was constitutionally permissible.

(4) "[W]hether the facts below would support the product fungibility." This assertion similarly is without merit and has been answered by this Court previously in *Thomas,* as well as *Baez-Godoy v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, 319 Wis.2d 91. In *Thomas*, this Court found that the "facts presented in this case, when construed in the light most favorable to Thomas, however, ***establish that white lead carbonate is fungible*** under any of the above meanings." *Thomas* at ¶ 145. *See also Baez Godoy*, at ¶ 23("[i]n *Thomas,* we concluded that for purposes of risk-contribution, white lead carbonate is fungible.").[7]

The absence of substantive legal merit to any of these so-called "open questions" aside, it is also pertinent to point out that the argument involves 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

[7] 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 *Matthies.* 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 (1986)(new law changing a statute of limitations cannot be applied retroactively to extinguish a vested right to a cause of action).

> *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."

R-476, at 13. (emphasis in original)

No one disputes that a right to actual recovery is contingent until perfected by judgment.[8] 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,* at ¶22. Any "uncertainty" regarding whether Yasmine 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, is wholly irrelevant. These asserted contingencies do not in any way limit the vesting of Yasmine's substantive right to her cause of action under risk contribution.

[8] Even so, it should be noted that in *Matthies,* (at ¶46), 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.

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

a. When reviewing the constitutionality of retroactive litigation, the Court—not the state legislature—is to weigh the public purpose against the private interest

Wisconsin law is clear: it is within the judicial branch's authority to review the constitutionality of retroactive legislation. Citing to United States Supreme Court precedent, this Court set out the analysis that *courts* should undertake when considering the constitutionality of retroactive legislation:

> To determine whether a retroactive statute comports with due process *we* must weigh the public interest served by the retroactive statute against the private interests that are overturned by it. *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080 (1st Cir. 1977). Implicit within this analysis is a consideration of the unfairness created by the retroactive legislation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13 (1977) (*quoting Welch v. Henry*, 305 U.S. 134, 147 (1983), and citing *Turner Elkhorn*, 428 U.S. at 14-20) (stating that retroactive legislation may offend due process if it is "particularly 'harsh and oppressive'").

Martin by Scoptur v. Richards, 192 Wis. 2d 156, 201 (Wis. 1995) (emphasis added); *see also Society Insurance,* at ¶ 30 (quoting *Matthies* at ¶27)(the court's analysis "involves weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect."). This "Martin balancing test" has been applied by Wisconsin courts on numerous occasions. *E.g., Neiman v. American Nat'l Prop. & Cas. Co.,* 2000 WI 83 (Wis. 2000); *Barbara B. v. Dorian H. (In re John R. B.),* 2005 WI 6 (Wis. 2005); *Johnson v. Cintas Corp. No. 2,* 2015 WI App 14 (Wis. Ct. App. 2015).

It is clear that the "we" that the *Martin* Court held responsible for the weighing of public and private interests is the court, itself. It is also clear that the court should not simply defer to the opinions of another body. In fact, in *Martin*, this Court specifically recognized that it had seen the state's arguments (in support of the public interests furthered by the legislation) raised and discussed in "other forums"—but it was the court that was the ultimate determiner of the constitutionality of the retroactive legislation. *Martin*, 192 Wis. 2d at 203-206.

By asserting, at pages 47, and 57 to 59 of their brief, that courts cannot weigh the public purpose and private interests on their own—and simply must defer to the legislature's own weighing of those interests—Defendants-Appellants seek to completely abrogate the role of the Court in the interpretation of the Wisconsin constitution.[9] (Defendants-Appellants' Brief at 57-59). First, it goes without saying that almost any time a piece of legislation is passed, the state legislature has weighed the public and private interests at stake. There is simply no support for the argument that the court is precluded from weighing interests on its own. *See, e.g., Neiman v. American Nat'l Prop.*

[9] The Defendants-Appellants' demand that the "Court cannot set aside the Legislature's balance of public and private interests" (*see* section C, at page 57 of Brief) would conflate the rational basis review for prospective statutes with the rational basis review for retroactive statutes. This flies in the face of all reported precedent of this Court and borders on being a frivolous argument. Further, the argument also presumes that the Legislature in fact actually balanced Yasmine's private interests before deciding to extinguish them in favor of the public policies declared in the statute. First, the legislature did no such thing—there is not a scintilla of evidence to support this contention. And as noted in *Society Insurance,* at ¶33, due process review of retroactive statutes requires "individualized consideration" of the private interests swept away by the statute.

& Cas. Co., 2000 WI 83 (Wis. 2000) (despite the fact that the Court acknowledged that "[t]he record illustrate[d] that the legislature heard persuasive testimony about the need for th[e] amendment" at issue, the Court still conducted its own *Martin* balancing test.).

When called upon, it is the Court's job to consider—and ultimately determine—the constitutional implications of legislation. The Defendants-Appellants' argument completely neuters the role of the Court in resolving Constitutional issues; under their paradigm, this Court is completely powerless to protect the citizens and corporations of Wisconsin from state action anytime the legislature has claimed to have already weighed the public and private interests at stake. Indeed, a simple proclamation that in passing the statute the legislature has already sufficiently balanced all applicable interests could be written into any piece of legislation—which, according to Defendants-Appellants', would serve to preclude any review of the statute by this Court. And if applied to other areas of the law, Defendants-Appellants' contention that the courts cannot "second-guess" the legislature would prevent any recourse for citizens claiming unlawful regulatory takings,[10] exercising of eminent domain, or other potential legislative violations of their due process rights.

[10] For example, evaluating constitutionality under the takings clause involves *the court's* examination of the "justice and fairness" of the regulation. Three factors have "particular significance" to this inquiry: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

Defendant-Appellants' position can find no support in the law. In cite footnote 12 in *Society Insurance*. 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. As footnote 12 explains: "[r]retroactive legislation must be justified by a rational purpose." The next footnote further explains that the justification for prospective legislation may not suffice to justify the retroactive application of the same legislation. *Id.,* footnote 13. 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, 2010 WI 68 at ¶30, (quoting *Matthies,* citations omitted).

Equally inapposite are the Defendants-Appellants citations to cases involving judicial deference to legislative choices in a variety cases unrelated

to retroactive statutory abrogation of vested rights.[11] Defendants-Appellants' brief at pp. 41-40. Moreover, none of the cases cited by Defendant-Appellants stand for the proposition that a court's analysis of the constitutionality of a statute is a violation of the separation of powers. *See e.g. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 459 (1985)(wherein the majority of the Supreme Court in that case did exactly what Defendant-Appellants assert that the court cannot do here: balance the public and private interests and, in the end, "second-guess" the legislature); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) ("States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs" so long as those laws do not "run afoul" of a constitutional prohibition.).

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 the bogus argument that somehow that deference requires abandoning the time tested balancing of public and private interests as defined

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[11] See for example: *HammerhillPaper Co. v. La Plante,* 58 Wis.2d 32 (1973)(whether statute was an unlawful delegation of a statewide matter to a municaplity); *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); *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); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 850 (7th Cir. 2011).

by every Wisconsin case that has considered the due process constitutionality of retroactive statutes that impair vested rights.

b. <u>The trial court properly weighed the public purpose against the private interests at stake in this litigation</u>

More importantly on the merits, the trial court below carefully and thoughtfully adhered to the mandate of *Martin* and its 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 <u>*retroactive*</u> active application of the statute. (R-476, 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.* (R-476, 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).

The trial court's reasoning is consistent with the private interests recognized by this Court in *Thomas.* 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[12] served by the retroactive application of §895.046, Wis. Stats., but Yasmine's private interests are supported by the strong public policies enunciated by the Wisconsin Supreme Court in the *Thomas* decision which would be

[12] 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. *See Collins,* 116 Wiss.2d at 198, fn 12.

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.

B. 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, p. 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. 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 regarding the constitutional meaning of the word "or." *Thomas,* at ¶¶ 121, 122, page 298-9. 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 *Thomas* that set its holding apart from the prior holding in *Collins* and it was an act of constitutional interpretation.

This constitutional holding is significant because by its explicit terms, §895.046(4)(a)(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(4)(a)(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 prospectively abrogate that remedy created by the Court is perhaps an open question, but it is not one presented by the facts of this case. But surely, in pending cases, 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 should hold that §895.046, Wis. Stats. violates the separation of powers.

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

The Court should also determine whether § 895.046(2), Wis. Stats., 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," and to 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. *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); *Soo Line Railroad v. Department of Transportation,* 101 Wis.2d 64, 72 (1981).

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 record below establishes that the retroactive amendment to §895.046, Wis. Stats., was 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. (R-463, at ¶ 18; R-464; R-465). The amendment was not sponsored by any identified legislators and the bill had no title. (R-463, at ¶¶ 3, 7, 10, 18). No public hearings were held on the amendment. (R-463, at ¶ 6). 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 the biennial budget bill into law. (*Id.*; R-463, at pp. 12, 18).

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. (R-490, at pp. 26:21 to 30:15; Affidavit of Victor C. Harding, ¶¶ 1-9, Ex. 4, Ex. 5, Ex. 6, Ex. 7). The averments of Senator Taylor are facts that have not been disputed by the Defendants-Appellants in their filings below. (R-463). 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. 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;* (R-463, at ¶¶ 16, 17). By contrast, 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.

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 solely 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.

IV. 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 spent $367,500.00 to purchase 710 hours of professional lobbying effort in order to extra-judicially and retroactively change the law 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 cruel and pharisaic

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 mid-stream by the extra-judicial 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, Plaintiff-Respondent respectfully requests affirmance of the decision below. In the event that the Court disagrees that state substantive due process protections render §895.046, Wis. Stats., unconstitutional on its face, or as applied, then 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 and the statute be found unconstitutional on that alternate basis.

Dated at Milwaukee, Wisconsin, this 25th day of January, 2016.

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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 for body text and size 11 for quotes and footnotes) and contains 10,990 words.

Dated this 25th day of January, 2016.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief 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.

Dated this 25th day of January, 2016.

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CERTIFICATE OF SERVICE

I certify that I have arranged for my office to send via U.S. Mail this 25th day of January, 2016, three true and accurate copies of the Brief of the Plaintiff-Respondent, along with this and the other attached Certifications to the following counsel:

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Additionally, as a courtesy, a PDF copy of this brief has been sent via e-mail to the lead national counsel for each Defendant-Appellant on this day.

Dated this 25th day of January, 2015.

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