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**STATE OF WISCONSIN 03-08-2016
IN SUPREME COURT**

**CLERK OF SUPREME COURT
OF WISCONSIN**

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,

Appeal No. 2014AP000775

Defendants-Appellants,

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

Defendants.

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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INTRODUCTION

Plaintiff's opposition brief attempts to distract this Court from the essential legal issues. Plaintiff confuses the presumed retroactivity of a judicial decision with the totally different analysis of a vested right. It is Plaintiff's lack of a vested right to bring a risk-contribution claim that is critical to a proper legal analysis. Plaintiff could not have had any settled expectation and vested right in a right of action under *Thomas*¹ when it did not exist at the time of her alleged injury and its viability still remains contingent on unresolved legal and factual issues.

Plaintiff also would overturn decades of this Court's jurisprudence by transforming this Court into the arbiter of economic policy. The Legislature stated rational bases for applying Wis. Stat. §895.046 to pending cases, including its

¹ *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523.

balance of statewide public policy goals against private interests held by Plaintiff and others. Yet Plaintiff ignores the strong presumption of constitutionality that requires the Court to defer to the Legislature's rational bases, simply because Plaintiff disagrees with the Legislature. Plaintiff's argument, if followed, would frustrate the Legislature's economic policy by preventing courts from applying the statute for another generation.

Plaintiff appeals to sympathy and tries to tarnish certain manufacturers for exercising their federal and state constitutional freedom to petition the government. Neither gambit should succeed. Plaintiff has a claim against her landlords who violated their duty to protect her from lead paint hazards.² She and other potential plaintiffs have remedies. Moreover, the statute was not "smuggled" into law; public hearings were held, and Plaintiff's counsel

² Under federal and state law, intact, well-maintained lead paint is not a hazard. *See* 40 C.F.R. §745.65; Wis. Admin. Code, DHS §163.42.

testified. Nor is the statute private legislation. The statute addresses a matter of statewide concern and covers all manufacturers of myriad products.

The Court should uphold Wis. Stat. §895.046 as constitutional, reverse the trial court, and remand with directions to enter judgment for Defendants.

I. WIS. STAT. §895.046 DOES NOT IMPAIR A VESTED RIGHT.

Vested rights protect parties' settled legal expectations as they exist at the time of injury, not at the time lawsuits are filed (Pl.Br.24; *but see* Pl.Br.22). *See, e.g., Hunter v. Sch. Dist.*, 97 Wis.2d 435, 293 N.W.2d 515 (1980); *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, 244 Wis.2d 720, 628 N.W.2d 842. Plaintiff also cannot belatedly claim a second injury to avoid dismissal. As the trial court found, Plaintiff conceded the date of her injury, R.476; A-App. 027, and she "is claiming indivisible injuries that accrued during the first

period of exposure in March of 2003.” *Id.* A claim accrues with manifestation of the first compensable injury. *Nierengarten v. Lutheran Soc. Servs. of Wis.*, 219 Wis.2d 686, 580 N.W.2d 320 (1998). In 2003, the time of her alleged injury, Plaintiff could not have had any settled expectation in a right of action that did not then exist.

A. Retroactive Application Of *Thomas* Cannot Create A Vested Right.

Plaintiff mistakenly focuses on whether courts can apply judicial decisions retroactively. Pl.Br.23-24. Retroactive application of a *judicial decision* does not mean that a *right* can vest retroactively. No Wisconsin court has suggested that a right may vest retroactively.

Moreover, Plaintiff’s argument defies logic: “[T]here 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.”

Boykin v. Boeing Co., 128 F.3d 1279, 1283 (9th Cir. 1997) (emphasis in original).³ Because *Thomas* did not exist at the time of her alleged injury, Plaintiff did not have a vested right in that future decision. R.476; A-App. 019. Plaintiff never discusses *Boykin* or refutes its logic.

Nor could *Collins v. Eli Lilly Co.*⁴ create any settled expectation that Plaintiff had a vested right of action against unidentified former white lead carbonate (“WLC”) manufacturers before *Thomas*. In 2003, Plaintiff only sued her landlords, in effect admitting she did not have a claim then against WLC manufacturers. Only after *Thomas* did Plaintiff add claims against some manufacturers. In contrast, in *Martin*, *Matthies*, and other cases on which Plaintiff relies,

³ Also persuasive are cases finding no due process violation in modifying a statute of limitations before it has run. *See, e.g., Soc’y Ins. v. Labor & Indus. Review Comm’n*, 2010 WI 68, 326 Wis.2d 444, 786 N.W.2d 385.

⁴ 116 Wis.2d 166, 342 N.W.2d 37 (1984).

the Legislature was overturning traditional law, not restoring the common law as the 2013 Act did.

Moreover, *Thomas* was not an inevitable application of *Collins* to a “factually similar” case. Pl.Br.8-9. *Thomas* recognized that WLC claims are “not identical to *Collins*” and “dissimilarities” exist. 2005 WI 129, ¶¶147, 150, 152, 154, 285 Wis.2d 236, 701 N.W.2d 523. *Collins* addressed the unique circumstances of an identically formulated drug, DES, that produced a signature injury, had a relevant time period of only nine months, and a relevant geographic area of a neighborhood pharmacy. Consequently, in *Thomas*, the trial and appellate courts applied existing law to rule that the plaintiff could not maintain a risk-contribution claim for WLC. 2004 WI App 131, 275 Wis.2d 377, 685 N.W.2d 791. To suggest that Plaintiff’s right to rely on the risk-contribution theory was settled before *Thomas* lacks credibility: this Court never had extended *Collins* to another

product; *Thomas* was divided and contentious; public outcry followed *Thomas*, as Plaintiff's attorney acknowledged, R.490; A-App. 059; and the Legislature found the extension to be "improperly expansive." Wis. Stat. §895.046(1g).

Gibson v. Am. Cyanamid Co., 760 F.3d 600 (7th Cir. 2014), does not control this Court. Pl.Br.21-22. This Court is the ultimate decision-maker on state law issues and has equal authority to determine federal constitutional issues. *See Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis.2d 395, 400, 573 N.W.2d 842 (1998). The Seventh Circuit followed the trial court's erroneous decision in this case, and this Court may independently determine whether retroactive application of the risk-contribution theory to manufacturers decades after they stopped selling WLC violates federal or state due process of law.

**B. As Of 2013, Clark's Claim Relying On
Thomas Was Subject To Too Many
Contingencies To Create A Vested Right.**

Plaintiff does not deny that questions of law and fact regarding the extension of risk-contribution to WLC were unresolved as of 2013, and many remain unresolved. When the Legislature passed the 2013 Act, the only court to have addressed the issue had declared *Thomas's* expansion of risk-contribution to WLC unconstitutional. *See Gibson v. Am. Cyanamid Co.*, 750 F. Supp. 2d 998 (E.D. Wis. 2010).

Plaintiff concedes that public policy questions persist, but says that the Court should ignore those open questions because they are not ripe. Pl.Br.25. However, Plaintiff's concession that the risk-contribution theory is contingent on undecided public policy issues undermines her argument that her right of action has been absolutely vested since 2003. Moreover, Wisconsin courts grant motions to dismiss claims or defenses that contradict public policy. *See, e.g., MBS-*

Certified Pub. Accountants, LLC v. Wis. Bell, Inc., 2012 WI 15, ¶72, 338 Wis.2d 647, 809 N.W.2d 857. Also, as Plaintiff does not deny, no court has undertaken the necessary retroactivity inquiry set forth in *Wenke v. Gehl Co.* with respect to *Thomas*. 2004 WI 103, ¶¶70-71, 274 Wis.2d 220, 682 N.W.2d 405.

Finally, a finding that WLC pigments are fungible is a prerequisite to the risk-contribution theory. *Thomas*, 2005 WI 129, ¶140 & n.47. Neither *Thomas* nor *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶23, 319 Wis.2d 91, 768 N.W.2d 674, made a conclusive finding of fungibility. No decision-maker has adjudicated the disputed issues of fact at an evidentiary hearing upon a fully developed factual record. Binding Defendants without such an opportunity would violate state and federal due process of law, *see, e.g., Oddsen v. Bd. of Fire & Police Comm'rs for City of Milwaukee*, 108 Wis.2d 143, 159, 321 N.W.2d 161

(1982), and contravene their right to a jury trial on disputed issues of fact. Wis. Const. art. I, §5.

Each of these four contingencies (due process, public policy, *Thomas's* retroactive application, and fungibility) goes to whether Plaintiff has a legally viable claim against Defendants, not to whether Plaintiff can prove her claim and recover damages. *Cf.* Pl.Br.27. It is hard to imagine a right of action that is more unsettled and, therefore, not a vested right.⁵

II. THE TRIAL COURT IMPROPERLY SUBSTITUTED ITS OWN VIEW FOR THE LEGISLATURE'S RATIONALE.

Because Plaintiff cannot overcome it, Plaintiff ignores the strong presumption of constitutionality that applies to retroactive legislation. *See Soc'y Ins.*, 2010 WI 68, ¶30; *Chappy v. LIRC*, 136 Wis.2d 172, 180, 401 N.W.2d 568 (1987). “Statutes are presumed to be constitutional, ‘and the

⁵ Footnote 7 of Plaintiff’s Opposition Brief raises statutory provisions that are not before the Court and need not be considered.

party seeking to overcome the presumption must prove the statute unconstitutional beyond a reasonable doubt.” *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶43, 363 Wis.2d 1, 866 N.W.2d 165 (citation omitted); *State v. Smith*, 2010 WI 16 ¶17, 323 Wis.2d 377, 780 N.W.2d 90. If retroactive legislation is “justified by a rational legislative purpose,” it is constitutional. *Soc’y Ins.*, 2010 WI 68, ¶30 n.12.

Defendants are asking this Court to give due deference to Legislative findings and policy, not to abdicate its authority to review legislation, as Plaintiff wrongly contends. Pl.Br.29. Here, the Legislature applied §895.046 to pending cases for a valid reason: to promote manufacturing growth and jobs in Wisconsin by protecting manufacturers from unanticipated, unlimited liability of dubious constitutionality. It weighed those statewide public policy goals against private interests

like Plaintiff's, and expressed its view that the balance favored the 2013 Act.

The Legislature explained that the 2013 Act “protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products.” Wis. Stat. §895.046(1g). Thus, the Legislature engaged in “the balancing of competing values and interests, which in our democratic system is the business of elected representatives.” *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981); *see also Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶60, 281 Wis.2d 300, 697 N.W.2d 417 (“[W]hen 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’”). Because the Legislature stated its purposes for the 2013 Act, this case is unlike *Society Insurance, Matthies, Martin, and Neiman*, on which Plaintiffs rely. Pl.Br.29-30.

Under Plaintiff's argument, the Legislature's policy would be thwarted for a generation or more, because plaintiffs claiming injury before February 2011 from exposure to chemicals or other products deemed to be fungible could sue manufacturers without product identification. Pl.Br.15, n.6 (*Valoe* filed after February 2011); R.476; A-App. 038, n.8. Impeding the Legislature's policy by filing over 170 claims against WLC manufacturers, some even after the statute's effective date, "offended" the 2013 Act's Senate sponsor and other legislators. Pl.Br.16 (citing R-476, Ex. 6).

Unless the Court determines that the Legislature had no rational purpose in concluding that statewide public interests in the Constitution, fair tort law, and the economy outweigh the private interests of a litigant to bring an uncertain claim that did not exist at the time of her injury, it

must defer to the Legislature and hold the statute constitutional.⁶ *Soc’y Ins.*, 2010 WI 68, ¶30 n.12.

The trial court improperly discredited the Legislature’s reasons as lacking an evidentiary record and improperly discounted the Legislature’s policy rationale. R.476; A-App. 039-40; *Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 46, 205 N.W.2d 784 (1973) (courts may not “try the legislature and reverse its decision as to the facts”); *see also F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (“[L]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data”). The trial court compounded that error by disregarding legislative history and other evidence that did not support its view. *See Northwest Airlines, Inc. v. Wis. Dep’t of Revenue*, 2006 WI 88, ¶59, 293

⁶ Whether Plaintiff has an injury from ingestion of WLC is not before the Court. A jury found that Steven Thomas was not injured from exposure to WLC pigments in paint. *Thomas v. Mallett*, 2011 WI App 19, 331 Wis.2d 486, 795 N.W.2d 62 (2010).

Wis.2d 202, 717 N.W.2d 280. Nor do the Legislature’s public purposes need to be substantial, though they are. *Soc’y Ins.*, 2010 WI 68, ¶30 n.12. The trial court’s second-guessing of legislative and economic policy harkens back to the discredited *Lochner* era. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985).

Ironically, Plaintiff contends the Legislature infringed on the judiciary’s domain by “inten[ding] to abrogate the *Thomas* Court’s interpretation of Art. I, §9, of the Wisconsin Constitution.” Pl.Br.36-37. However, the Legislature has the right to explain its reasons for the 2013 Act. As the Legislature explained, the 2013 Act does not deny access to the courts—the right Art. I, §9 protects. Article I, §9 does not create claims, it does not guarantee Plaintiff a right of action if one does not exist,⁷ and it does not prohibit the Court or

⁷ Not all “wrongs” give rise to a right of action. *See, e.g., State v. Cardenas-Hernandez*, 219 Wis.2d 516, 537, 579 N.W.2d 678 (1998) (immunity for defamatory statements in judicial proceedings).

Legislature from clarifying the law. *See Doering v. WEA Ins. Grp.*, 193 Wis.2d 118, 130-31, 532 N.W.2d 432 (1995); *Kroner v. Oneida Seven Generations Corp.*, 2012 WI 88, ¶89, 342 Wis.2d 626, 819 N.W.2d 264 (Roggensack, J., concurring).

Plaintiff mistakenly tries to fix the common law at her preferred point in time as an immutable constitutional right. However, this Court could overturn its expansion of the common law in *Thomas*, and the Legislature has passed laws to supersede judicial decisions, *Northern Air Servs., Inc. v. Link*, 2011 WI 75, ¶51, 336 Wis.2d 1, 804 N.W.2d 458, or to amend tort principles, *Ervin v. City of Kenosha*, 159 Wis.2d 464, 476, 464 N.W.2d 654 (1991); *MBS-Certified Pub. Accountants, LLC*, 2012 WI 15, ¶3. The Legislature's restoration of pre-*Thomas* common law is no different.

In sum, the 2013 Act is based on a rational legislative purpose to which this Court should defer.

III. SECTION 895.046 IS NOT PRIVATE LEGISLATION.

Section 895.046 was not “smuggled” into law. The language of the 2013 amendment first appeared in an earlier, single-subject bill: 2011 Senate Bill 373, introduced in January 2012. The Senate conducted a public hearing on Senate Bill 373, and Plaintiff’s counsel testified against it, advocating the interests of Plaintiff and other claimants. R.476; A-App. 036. When Senate Bill 373’s text was reintroduced as part of 2013 Wisconsin Act 20, Plaintiff’s counsel again publicly opposed the amendments. *Id.*; *see also* R.471; A-App. 139, 147, 150, 154. The trial court erred when it mistakenly held that Plaintiff lacked notice of the 2013 Act. R.476; A-App. 040.

That the 2013 Act was part of the biennial budget bill is of no consequence. Under Article IV, §18 of Wisconsin’s Constitution, courts must presume constitutionality “where it

is evident that the legislature did adequately consider or discuss the legislation in question, even where such legislation was passed as part of a voluminous bill.” *Flynn v. Dep’t of Admin.*, 216 Wis.2d 521, 537, 576 N.W.2d 245 (1998). Thus “[f]orged in the deliberative kiln of public debate,” §895.046 is constitutional. *Jackson v. Benson*, 218 Wis.2d 835, 886-87, 578 N.W.2d 602 (1998).

Most bills are the subject of lobbying by interested persons exercising their constitutional right to petition the government. *See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). Lobbying does not impact Section 895.046’s presumption of constitutionality. *See Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, ¶¶12, 19-20, 289 Wis.2d 498, 710 N.W.2d 701; *Group Health Coop. v. Wis. Dep’t of Revenue*, 229 Wis.2d 846, 851 n.2, 601 N.W.2d 1 (Ct. App. 1999).

Finally, §895.046 is not unconstitutional, private legislation. Pl.Br.40-43. Section 895.046 applies to all manufacturers and sellers, for all products, across the state. It reaches “all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property....” Wis. Stat. §895.046(2).

Opting for a pro-jobs, pro-growth policy, the Legislature enacted §895.046 to serve “the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability....” Wis. Stat. §895.046(1g). This statewide concern precludes a finding of private legislation. *See Milwaukee Brewers Baseball Club v. Wis. Dep’t of Health & Soc. Servs.*, 130 Wis.2d 79, 119, 387 N.W.2d 254 (1986).⁸ The benefit to Defendants or burden on

⁸ In her dissent in *Milwaukee Brewers*, Justice Abrahamson properly

others is irrelevant; “general legislation which legitimately serves the public interest will often incidentally confer a benefit or burden on particular entities.” *Id.* at 116. That incidental benefit does not upset §895.046’s broader purposes to serve “the public interest,” preserve historical Wisconsin tort law, and ensure that “businesses may conduct activities in this state without fear of being sued for indefinite claims of harm.” Wis. Stat. §895.046(1g).

CONCLUSION

This Court should reverse the Circuit Court, hold constitutional Wis. Stat. §895.046 as amended in 2013, and direct the trial court to enter judgment for Defendants.

(continued...)

saw *Soo Line R.R. Co. v. Dep’t of Transp.*, 101 Wis.2d 64, 76, 303 N.W.2d 626 (1981) (Pl.Br.40-43), to be an “exceptional” case. 130 Wis.2d at 133. Written by Justice Abrahamson, *Soo Line* struck down legislation related “to a specific point on a specific highway” only affecting “a particular entity, the Soo Line Railroad.” 101 Wis.2d at 76.

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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 reply brief produced with a proportional serif font (Times New Roman, 13 pitch). The length of this brief, including footnotes, is 2,975 words.

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

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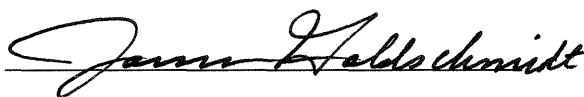
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