No. 14AP775

In The 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, 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

NON-PARTY BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF THE DEFENDANTS-APPELLANTS

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

LUKE N. BERG
Deputy Solicitor General
State Bar #1095644

AMY C. MILLER
Staff Attorney

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
bergln@doj.state.wi.us
(608) 267-9323

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INTRODUCTION

Thomas ex rel. Gramling v. Mallett, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, transformed a century of tort law, exposing certain manufacturers to near absolute liability for conduct occurring so long ago that "no living person can remember" it. *Id.* at ¶ 308 (Prosser, J., dissenting). Since the day it was issued, *Thomas* has been widely criticized, and, as predicted, has spawned an outburst of litigation, including this case. The Legislature responded by overruling *Thomas* in 2011 and then extending that overruling to pending lawsuits in 2013. Clark here attacks the 2013 law for retroactively undoing *Thomas*'s brief six-year existence, a deeply ironic argument given that the Legislature simply restored one hundred years of established expectations that *Thomas* had unsettled. This Court should uphold the Legislature's sound judgment so that Wisconsin can finally put the *Thomas* episode to rest.

STATEMENT OF INTEREST

When a law's constitutionality is at stake, the Wisconsin Attorney General is "entitled to be heard." Wis. Stat. § 806.04(11); *see also State v. City of Oak Creek*, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526.

ARGUMENT

I. *Thomas* Was Wrongly Decided, And The Legislature Was Right To Overrule It.

A. Steven Thomas ingested lead paint as a child in the early 1990s, but because the two houses he lived in were built in early 1900s, he could not identify the manufacturer of the paint. *Thomas*, 2005 WI 129, ¶¶ 6–11, 17. Undaunted, he sued multiple companies that had previously manufactured white lead carbonate, a lead-based pigment that used to be common in white paint (the "Manufacturers"). *Id.*

Although Thomas could not prove causation, a majority of this Court cleared the way for his lawsuit by "chang[ing] the law to fit the facts." *Id.* ¶ 277 (Prosser, J., dissenting). The *Thomas* majority eliminated the standard causation requirement—a "traditional notion[ ] of tort law," *id.* ¶ 102 (majority opinion)—and instead allowed Thomas to prove only that he was injured by the same type of pigment that the Manufacturers had produced. *Id.* ¶¶ 161–62. Thomas needed only to show that the Manufacturers produced the pigment *at some point* during the eight decades between when the houses were built and lead-based pigments were banned in Wisconsin, a "drastically large[ ]" window of time. *Id.* ¶¶ 151–52; *id.* ¶ 217 (Wilcox, J., dissenting).

In order to reach this result, the *Thomas* majority relied on the "risk-contribution" theory of liability first

articulated in Wisconsin in *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984). Although none of the unique circumstances in *Collins* applied to the lead-paint context, *see Thomas*, 2005 WI 129, ¶¶ 209–61 (Wilcox, J., dissenting), the *Thomas* majority still "exten[ded] . . . the risk-contribution theory" of *Collins* for "policy reasons." *Id.* ¶ 134 (majority opinion). This marked a revolution in tort law, as this Court "bec[ame] the first court in the nation to allow such a case to go forward." The Honorable Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 Marq. L. Rev. 723, 729 (2006); *Thomas*, 2005 WI 129, ¶ 295 (Prosser, J., dissenting).

In the following years, *Thomas* was widely criticized. *See In re Sherwin-Williams Co.*, 607 F.3d 474, 477 (7th Cir. 2010); *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1039 and n.10 (E.D. Wis. 2010), *rev'd*, 760 F.3d 600 (7th Cir. 2014); Sykes, *supra*, at 730–31. And no jurisdiction has since followed *Thomas*'s lead. *See* Linda C. Fentiman, *Are Mothers Hazardous to Their Children's Health?: Law, Culture, and the Framing of Risk*, 21 Va. J. Soc. Pol'y & L. 295, 334–35 (2014); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 Envtl. L. 1, 63 and n.316 (2011).

B. *Thomas* is problematic for a variety of reasons, as the dissents and others have pointed out. *Thomas* created an "irrebutable presumption of causation," 2005 WI 129, ¶ 288 (Prosser, J. dissenting), making it "nearly impossible for paint companies to defend themselves or, frankly, for

plaintiffs to lose," *id.* ¶ 268. *Thomas* was "a form of collective tort liability untethered to any actual responsibility for the specific harm asserted." Sykes, *supra*, at 731. The majority even admitted that its rule sweeps in many defendants "who are actually innocent." *Thomas*, 2005 WI 129, ¶ 164 (majority opinion). In fact, the Manufacturers could "be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market." *Id.* ¶ 177 (Wilcox, J., dissenting). Such sweeping liability has "drastic consequences for firms doing business in Wisconsin" since it "render[s] every manufacturer an insurer not only of its own products, but also of all generically similar products manufactured by its competitors." *Id.* ¶ 257 (citation omitted).

These problems are greatly exacerbated by the fact that *Thomas* imposes "retroactive and severe liability based on transactions long closed." *Id.* ¶ 302 (Prosser, J., dissenting) (citation omitted). All liability under *Thomas* is retroactive in the sense that the behavior incurring liability occurred decades ago. *See id.* ¶ 196 (Wilcox, J., dissenting) ("Almost all of the [Manufacturers] had ceased production of white lead carbonate by 1950, approximately 30 years before the use of lead paint was banned in Wisconsin."). And "[i]t is almost impossible to defend against alleged negligence that

no living person can remember." *Id.* ¶ 308 (Prosser, J., dissenting).

Such a significant change in liability was arguably unconstitutional since it overturned settled expectations. *Thomas*, 2005 WI 129, ¶ 264–318 (Prosser, J., dissenting); Wis. Stat § 895.046(1g); *Gibson*, 719 F. Supp. 2d 1031; *see also State v. Henley*, 2010 WI 97, n.29, 328 Wis. 2d 544, 787 N.W.2d 350; *Thomas*, 2005 WI 129, ¶ 166 and n.53 (explicitly leaving open the constitutionality of the new rule); *but see Gibson*, 760 F.3d 600 (7th Cir. 2014). At the very least, *Thomas*'s drastic change in the law raised serious due-process concerns for the Manufacturers.

In sum, "[t]hese shortcomings are the reason that no other court has ever adopted any form of market share liability in lead paint cases." *Thomas*, 2005 WI 129, ¶ 295 (Prosser, J., dissenting). As predicted by a *Thomas* dissent, Wisconsin became "the mecca for lead paint suits," *id.* ¶ 268, with 173 lawsuits being filed since *Thomas* was decided, Defs-Appellants' Br. 12–15.

C. The Legislature carefully considered all of these problems and responded appropriately. It overruled *Thomas* both prospectively, 2011 Wis. Act 2, § 30, and retroactively, 2013 Wis. Act 20, §§ 2318e–2318g. By enacting these laws, the Legislature "return[ed] tort law to its historical, common law roots," and "assure[ed] that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses

may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago." Wis. Stat. § 895.046(1g).

II. The Legislature Advanced The Public Interest And Restored Private Settled Expectations By Overruling *Thomas* In All Of Its Applications.

A. The Legislature has the power "to define and limit causes of action and to abrogate common law on policy grounds." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 51, 237 Wis. 2d 99, 613 N.W.2d 849; Wis. Const. art. XIV, § 13. "[O]n non-constitutional matters the legislature can overrule the courts, not vice-versa." *In re Estate of Laubenheimer*, 2013 WI 76, ¶ 109, 350 Wis. 2d 182, 833 N.W.2d 735 (Gableman, J., dissenting). And all laws—even retroactive ones—are presumed constitutional. *Martin ex rel. Scoptur v. Richards*, 192 Wis. 2d 156, 200, 531 N.W.2d 70 (1995).

However, when retroactive legislation "unsettles important rights, it is viewed with some degree of suspicion." *Id.* at 201. But the same thing can sometimes be said about court opinions—such as *Thomas*—that announce new tort law rules. *See Wenke v. Gehl Co.*, 2004 WI 103, ¶ 69, 274 Wis. 2d 220, 682 N.W.2d 405 ("[B]ecause retroactive application might be inequitable in certain rare situations, we have recognized that, occasionally, the better course is to apply a rule prospectively."). All after, "[d]efendants . . . reasonably rely upon the law as set forth by *the courts and the legislature*." *Neiman v. Am. Nat'l Prop. & Cas. Co.*,

2000 WI 83, ¶ 21, 236 Wis. 2d 411, 613 N.W.2d 160 (emphasis added).

B. Evaluating a due-process challenge to a law based upon its alleged retroactivity involves a two-step inquiry. First, a law is only retroactive if it impairs a "vested right." *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 2010 WI 68, ¶ 29, 326 Wis. 2d 444, 786 N.W.2d 385. Second, if the law does unsettle a vested right, this Court applies a "rational basis test" that "balanc[es] the public interest served by the retroactive application of the statute against the private interests that are overturned by it." *Neiman*, 2000 WI 83, ¶¶ 9, 15 (citation omitted). Ultimately, this Court is concerned with "any unfairness inherent in [retroactive] application." *Id.* ¶ 15 (citation omitted); *Martin*, 192 Wis. 2d at 201.

In the rare instances when this Court has invalidated retroactive legislation in the face of a due-process challenge, it has found that the law "unfairly overturns settled expectations," *Neiman*, 2000 WI 83, ¶ 22, "disturbs the stability of past transactions," *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 42, 244 Wis. 2d 720, 628 N.W.2d 842, changes the law "suddenly and without individualized consideration," *Soc'y Ins.*, 2010 WI 68, ¶ 33, or "subjects [an institution] to potentially significant and unpredictable damage awards," *id.* ¶ 52. Similarly, when a *court* changes tort law and decides whether that change should apply retroactively, it "is concerned about exposing many

individuals and institutions to liability who would have obtained liability insurance had they known they would no longer enjoy immunity." *Wenke*, 2004 WI 103, ¶ 72.

C. The State takes no position on whether Clark's rights under the *Thomas* decision had vested, although the defendants raise some powerful points in this regard. Defs-Appellants' Br. 23–41. The State respectfully submits that this case should be decided by definitely declaring that the Legislature's decision to overturn *Thomas* was entirely consistent with the public interest and the vast majority of settled private expectations. Indeed, overturning *Thomas* in all of its applications advances—rather than undermines—all of the very same reasons this Court has given for invalidating retroactive legislation in other cases.

The Legislature's decision to overrule *Thomas* advances both the public interest and settled private expectations. *Thomas* "overturned settled expectations" by imposing liability on conduct "that may have occurred over 100 years ago." *Id.* ¶ 177 (Wilcox, J., dissenting). *Thomas* imposed tort liability "suddenly and without individualized consideration," such that the Manufacturers "can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries." *Id.* *Thomas* subjected the Manufacturers to "potentially significant and unpredictable damage awards" by "creat[ing] a remedy . . . so sweeping and draconian that it will be nearly impossible for paint companies to defend themselves

or, frankly, for plaintiffs to lose." *Id.* ¶ 268 (Prosser, J., dissenting). And *Thomas* gave the Manufacturers no meaningful "opportunity to . . . [cover] the expense of . . . increased exposure," *Neiman*, 2000 WI 83, ¶ 21—after all, "how will 1930s insurance pay for 21st century damages?" *Thomas*, 2005 WI 129, ¶ 311 (Prosser, J., dissenting).

The Legislature's decision to completely overrule *Thomas* for all cases addresses these problems, and thus forwards both the public interest and settled private interests. By overruling *Thomas*, the Legislature *restored* "settled expectations." *Neiman*, 2000 WI 83, ¶ 22. It *protected* the Manufacturers from "significant and unpredictable damage awards." *Soc'y Ins.*, 2010 WI 68, ¶ 52. And it *preserved* the "individualized consideration" built into traditional tort law, *id.* ¶ 33. The Legislature succeeded in "return[ing] tort law to its historical, common law roots," and "assur[ing] that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago." Wis. Stat. § 895.046(1g).

Overturning the Legislature's judgment would give far too much weight to whatever expectations developed in the six years between *Thomas*'s tort-law revolution in 2005 and its undoing in 2011, and far too little weight to the expectations that had become entrenched during the prior one hundred years. At the absolute minimum, the

Legislature acted with a "rational basis" when it chose to treat a century of settled expectations—during which all of the relevant conduct occurred—as more weighty than the limited reliance, if any, that developed during *Thomas*'s brief, six-year existence. *Neiman*, 2000 WI 83, ¶¶ 9, 15.

III. Clark's Separation Of Powers And Private Bills Arguments Are Entirely Meritless

A. Clark argues that the Legislature violated separation of powers principles by overruling *Thomas*, suggesting that *Thomas*'s rule was constitutionally required. Pl-Resp't's Br. 35–40. But as noted above, the Legislature can "repeal the common law, as long as the change does not conflict with the constitution." *State v. Huebner*, 2000 WI 59, ¶ 50–52, 235 Wis. 2d 486, 611 N.W.2d 727 (Prosser, J., concurring) (citing Wis. Const. art. XIV, § 13). And *Thomas* was simply not constitutionally mandated. Although the majority invoked Article I, § 9 for its *authority* to craft *Thomas*, it never held that its result was constitutionally *required.* 2005 WI 129, ¶ 129. Nor could it, since this Court has repeatedly held that Article I, § 9 does "not create new rights." *Id.*; *see*, *e.g.*, *State v. Henley*, 2010 WI 97 n.29, 328 Wis. 2d 544, 787 N.W.2d 350. The *Thomas* majority made clear that it was creating a "remedy through the existing common law." *Thomas*, 2005 WI 129, ¶ 129. It even claimed to "retain[ ] the ability to limit [its new rule] based on public policy factors"—which would not

be possible if its holding was constitutionally required. *Id.* ¶ 166 n.54.

B. Clark also invokes Article IV, § 18 of the Wisconsin Constitution, which requires "private or local" legislation to be limited to a single subject that is clearly expressed in the title. This argument fails because the 2013 law is not "private or local." While those terms are hard to define specifically, *Soo Line R.R. Co. v. Dep't of Transp., Div. of Highways*, 101 Wis. 2d 64, 73, 303 N.W.2d 626 (1981), they have generally been reserved for laws that are "specific on [their] face as to particular people, places or things," *Davis v. Grover*, 166 Wis. 2d 501, 524, 480 N.W.2d 460 (1992), or that "classify certain entities such as cities or counties." *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 907, 426 N.W.2d 591 (1988).

Clark does not cite a single case holding that legislation defining the boundaries of tort law is "private or local," and the cases she does cite are inapposite. Indeed, the *only* cases that Clark cites that invalidated laws under Article IV, § 18, targeted one specific sewerage district, *Milwaukee Metro. Sewerage*, 144 Wis. 2d at 901, or "specifically prohibit[ed] the Department [of Transportation] from constructing an overhead structure at the intersection of state trunk highway 13 and the Soo Line Railroad," *Soo Line R.R.*, 101 Wis. 2d at 68–70. The Legislature's decision to overturn *Thomas* for everyone, restoring a

century of settled expectations, falls far outside of this limited class of cases.

Clark's theory is that the 2013 law is "private" because its *effect* is limited to a closed set of plaintiffs and defendants. She cites no authority for this principle, but even if valid, the premise is flawed. Part of what motivated the dissents was fear that *Thomas* would be applied to other contexts. *Thomas*, 2005 WI 129, ¶ 247 (Wilcox, J., dissenting); *id.* ¶ 313 (Prosser, J., dissenting). That fear was justified. Defs-Appellants Br. 12–13 (noting that *Thomas*-based claims have been filed for "exposure to asbestos, solvents, and other . . . products"). The 2013 law cuts off all these claims, so it is in no way "private or local," even under Clark's novel theory.

* * *

The Legislature has the authority and duty to overturn wrongly decided, common-law cases. *See Aicher*, 2000 WI 98, ¶ 51; *In re Estate of Laubenheimer*, 2013 WI 76, ¶ 109 (Gableman, J., dissenting); *Huebner*, 2000 WI 59, ¶ 52 (Prosser, J., concurring). The Legislature exercised this authority wisely when it completely overturned *Thomas*, protecting businesses in Wisconsin from being subject to this unfair and arguably unconstitutional decision. The 2013 law does not violate due process or any other constitutional provision. Rather, it advances core interests grounded in due process and basic fairness by restoring expectations that had been settled for a century before *Thomas*.

CONCLUSION

The decision of the Milwaukee County Circuit Court should be reversed.

Dated this 8th day of February, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

LUKE N. BERG
Deputy Solicitor General
State Bar #1095644

AMY C. MILLER
Staff Attorney

Attorneys for Amicus Curiae

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3056
(608) 261-7206 (Fax)
bergln@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,848 words.

Dated this 8th day of February, 2016.

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LUKE N. BERG
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of February, 2016.

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LUKE N. BERG
Deputy Solicitor General