STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Yasmine Clark a Minor, by her Guardian ad litem, Susan M. Gramling,

Plaintiff-Respondent,

v.

American Cyanamid Company, Armstrong Containers. Inc., E.I. Dupont De Nemours and Company, Atlantic Richfield Company and The Sherwin-Williams Company,

Defendants-Appellants,

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

Defendants.

Appeal No. 2014-AP-775

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

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS

Dated: June 30, 2016

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INTRODUCTION

This appeal seeks to uphold the Wisconsin Legislature's constitutional authority to protect the state's manufacturing economy and fairness in tort law. The 2013 legislation at issue ("the 2013 Act") applied Wis. Stat. § 895.046 ("the 2011 Act") to all cases, whenever filed or accrued. The 2011 Act rejected the Supreme Court's expansion of the novel risk-contribution theory in *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523. It clarified the elements needed to prove the risk-contribution theory and returned tort law to its traditional standards before *Thomas*.

As the United States Supreme Court reaffirmed in *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), there is nothing unconstitutional or untoward with the Legislature's actions. *Bank Markazi* held that a legislature has the authority to apply different, even outcome-altering legal standards to existing cases. Wisconsin precedent accords with *Bank Markazi* and confirms the constitutionality of retroactive legislation when it serves a rational purpose, as the 2013 Act articulated. This Court should uphold the 2013 Act as a constitutional exercise of the Legislature's authority.

I. WISCONSIN LAW ALLOWS LEGISLATION THAT APPLIES NEW LEGAL STANDARDS TO PENDING CASES.

After the Wisconsin Supreme Court's remand of this case, the United States Supreme Court in a 6-2 decision written by Justice Ginsburg decided *Bank Markazi*, reaffirming the Legislature's long-held authority to apply new standards to pending cases. There, the Central Bank of Iran challenged the retroactive application of a 2012 statute that made Bank assets available to satisfy unpaid judgments in actions by victims of Iran-sponsored terrorism. 136 S.Ct. at 1316-17. The statute referred to a consolidated enforcement proceeding identified by docket number. *Id.* at 1317.

The U.S. Supreme Court upheld the legislation, noting that the Legislature's "'power to make valid statutes retroactively applicable to pending cases has often been recognized.'" *Id.* at 1324 (quotation omitted) (citing *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801)). The Court explained, "[W]hen a new law makes clear that it is retroactive, the arguable 'unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope.' So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." *Id.* at 1325 (quoting

Landgraf v. USI Film Prods., 511 U.S. 244, 267-68 (1994); citing *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992), *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 226 (1995)). Although the statute applied to a single pending case, the Court held the statute to be permissible because "[t]his Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." *Id.* at 1328 (citations omitted).

Wisconsin law is in accord. As the Wisconsin Supreme Court has recognized, the Due Process Clauses of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution are "substantially equivalent." *In re Paternity of John R.B.*, 2005 WI 6, ¶ 18, 277 Wis. 2d 378, 690 N.W.2d 849. Retroactive legislation enjoys a "strong presumption of validity." *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). "If there is any reasonable basis" for a retroactive law, "the court must assume that the legislature had such fact in mind and passed the act pursuant thereto." *Id.* The party challenging the statute has the burden to show beyond a reasonable doubt that there is no rational basis for the law. *Soc'y Ins. v. Labor & Indus. Review Com'n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385.

In *In re Paternity of John R.B.*, 2005 WI 6, the Wisconsin Supreme Court upheld two retroactive amendments creating new legal standards and applying them to pending cases. The petitioner challenged the retroactive application of 1993 and 1997 amendments, which barred modification of past due child support and limited courts' ability to grant credit to child support payers. *Id.* ¶ 7. The petitioner had made an extrajudicial agreement in 1983 with his child's mother that cancelled her rights to child support. *Id.* ¶ 3. In 1983, those agreements were permissible and courts had discretion to revise a child support debt upon a showing of cause or justification. *Id.* ¶ 9. The petitioner argued that the retroactive amendments violated due process by depriving him of his vested right in his 1983 agreement. *Id.* ¶ 7.

The Wisconsin Supreme Court disagreed. The Court upheld the retroactive application of new legal standards to the petitioner's case, based on the rational purposes behind the retroactive amendments: financially providing for children, requiring parents to provide financial support for their children, and securing federal funds via compliance with federal child support requirements. *Id.* ¶¶ 23-27. The Legislature designed the retroactive amendments to provide certainty to custodial parents, obtain

federal funds for Wisconsin, and ensure that changes to child support would be made only with court supervision and only in circumstances warranting fairness. *Id.* Those rational purposes justified the Legislature's retroactive application of the amendments. *Id.* ¶ 32.

II. THE LEGISLATURE HAD RATIONAL REASONS FOR APPLYING THE 2013 ACT TO PENDING CASES.

The Legislature also had rational purposes for passing the 2013 Act. Wisconsin is the only State to have adopted a risk-contribution theory of liability, and the only State to have held that former manufacturers of white lead carbonate pigments ("WLC") may be held liable without proof of product identification. In 2005, by dramatically altering Wisconsin tort law, *Thomas* potentially imposed industry-wide liability on a wide range of Wisconsin manufacturers, not just former WLC manufacturers.[1] The impact was grossly unfair to former WLC manufacturers because WLC pigments were last made and sold for use in residential paints several

[1] In *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984), the Wisconsin Supreme Court created the risk-contribution theory to apply to an identically formulated prescription drug, DES, that reached users without any product identification, marketing, brand, or logo. By potentially applying the risk-contribution theory to WLC pigments, which were ingredients of end products made by others, and which had a variety of chemical formulations, different physical properties and characteristics that were marketed for particular applications, and distinctive marketing, brand names, and logos, the Wisconsin Supreme Court departed from the strict limitations of the risk-contribution theory and made it potentially applicable to thousands of generally similar products, ingredients, and component parts made and sold in Wisconsin.

decades ago, just a few of the many former WLC manufacturers remain in business, and some of those manufacturers had minimal market presence. These few remaining former manufacturers were now potentially liable for all WLC used in residential paints over the last century and a half—whether they made it or not. The fractured *Thomas* decision was highly controversial.

The Legislature recognized that the excessive and disproportionate liability threatened by *Thomas* jeopardized Wisconsin's manufacturing economy and fairness in tort law. In 2011, the Legislature passed legislation that prospectively restored the risk-contribution theory to its historical roots. The Legislature's goals were thwarted, however, when more than 160 risk-contribution actions were filed shortly before the 2011 Act went into effect in February 2011. Plaintiffs continue to file new cases today against former WLC manufacturers and manufacturers of other products such as asbestos and solvents, alleging pre-2011 injuries. The wave of new lawsuits "offended" Wisconsin legislators, R-476, Ex. 6, who had sought to limit the risk-contribution theory, and the lawsuits threatened to expose manufacturers to thousands of future risk-contribution claims over the next generation.

The Legislature quickly acted to apply the 2011 Act to all cases, whenever filed or accrued. In a December 2011 memo to the Legislative Reference Bureau—less than a year after the 2011 Act went into effect—a Senator warned that "Plaintiff lawyers threaten to seek to continue to apply the 'risk-contribution' exception for a broad array of ingredients and products – from metals in pots and pans, to grains in bread and rolls, to drills and hammers." Drafting File for 2011 S.B. 373, 2011-2012 Legis., Reg. Sess., at 10-11 (Wis. 2011) (*available at* https://docs.legis.wisconsin.gov/2011/related/drafting_files/senate_intro_legislation/senate_bills_not_enacted/2011_sb_373/01_sb_373/11_3693df.pdf). A January 2012 draft of the 2013 Act stated the Legislature's intent to apply the 2011 Act to "all parties to product liability claims, including Wisconsin manufacturers, in a uniform, consistent and predictable manner," and predicted that, without retroactive application of the 2011 Act, "Wisconsin courts could continue to apply *Thomas*' 'risk-contribution theory' to Wisconsin manufacturers for years or even decades to come." *Id.* at 26. To effectuate its intent, the Legislature passed the 2013 Act, which restored the common law for all cases, whenever filed or accrued.

This case is remarkably similar to *Kopec v. City of Elmhurst*, 193 F.3d 894 (7th Cir. 1999).[2] In *Kopec*, a former police officer alleged age discrimination. He challenged a retroactive amendment to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(j), that barred his lawsuit against a local law enforcement agency. *Kopec*, 193 F.3d at 896. In 1983, the U.S. Supreme Court held that the ADEA could apply to local fire and law enforcement officers. *Id.* at 896-97. The decision opened the door to age discrimination lawsuits against state and local agencies that had established maximum hiring and retirement ages for firefighters and police officers. *Id.* In 1986, Congress reinstated the exemption for local law enforcement agencies, but the exemption did not apply to pending cases and expired in 1993. *Id.* Then, in 1996, Congress restored the exemption retroactively for state and local governments that had age-based restrictions in place as of the Supreme Court's decision in 1983. *Id.* at 898. The amendment's effective date was identical to the 1993 expiration date of the 1986 temporary exemption, thus filling the gap in the law between the 1993 expiration and the new retroactive amendment. *Id.* at 903. Congress "believed that a national standard presumptively

[2] The Seventh Circuit did not address *Kopec* in its decision in *Gibson v. American Cyanamid Co.*, 760 F.3d 600 (7th Cir. 2014).

barring [age limits in the public safety context] was inappropriate," and passed the amendment "to afford state and local governments the flexibility to make their own judgments in this area." *Id.* at 903-04.

The Seventh Circuit upheld the retroactive amendment as constitutional. The court held that the amendment "restored consistency to the law, closing the gap that had opened when the [original exemption] expired, and furthered the purpose of the legislation by relieving state and local governments of the burden of defending lawsuits based on events that took place after the expiration of the [original exemption] and prior to enactment of the [] amendment." *Id.* at 904. The court acknowledged that the "Supreme Court long ago confirmed that Congress has the authority 'to effect a change in the law and to make that change controlling as to pending cases.' So long as retroactive application of the change is rationally related to a legitimate legislative purpose, the constraints of due process have been honored." *Id.* at 903 (citations omitted). Although the retroactive application of the amendment extinguished the plaintiff's ADEA claim, the court held that "the clear intent of Congress . . . was to extinguish causes of action that had arisen in the three years following the expiration of the 1986 amendment. As [plaintiff] had no vested right in the law remaining

unaltered, and Congress had a rational basis for legislating retroactively, we are obliged to honor its wish and affirm the dismissal of [plaintiff's] suit." *Id.* at 904.

Here, too, the Wisconsin Legislature acted rationally by restoring the common law and closing the gap created when *Thomas* unexpectedly changed the law. The Legislature permissibly reinstated the common law that existed at the time of Plaintiff's injury to protect Wisconsin manufacturers from lawsuits arising out of alleged injuries in the gap between *Thomas* and the 2011 Act. As the U.S. Supreme Court has explained, correcting a perceived mistake in the common law, preventing circumvention of a statute, and providing comprehensive effect are all rational bases for applying retroactive legislation. *Landgraf*, 511 U.S. at 267-68. And as the Wisconsin Supreme Court made clear in *John R.B.*, when the Legislature acts with a rational purpose, as it did in enacting the 2013 Act, it does not matter whether Plaintiff had a vested right, which she did not. Here, the substantial public interests in ensuring consistent, fair, and constitutional application of Wisconsin public policy and tort law outweigh Plaintiff's highly uncertain, contingent private interests in a newly created theory of liability under *Thomas*, which could change at any

time, and had been held unconstitutional at the time of the 2013 Act. 2005 WI 6, ¶ 31; *see also* Sup. Ct. Br. at 32-41.

The Legislature is in the best position to consider and weigh the interests of all stakeholders, consider all facets of public policy, and determine the allocation of economic benefits and burdens. Plaintiff's assertion of unfairness does not meet her burden of proving that the 2013 Act is irrational beyond a reasonable doubt, and she has produced no evidence to satisfy her burden. The courts thus must defer to the Legislature's policy judgment. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 60, 281 Wis. 2d 300, 697 N.W.2d 417; *see also Bank Markazi*, 136 S.Ct. at 1325-26.

Accordingly, this Court should reverse the Circuit Court's decision, hold the 2013 Act is constitutional, and direct the trial court to enter judgment in favor of Defendants.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to this Court's Order on supplemental briefing dated June 10, 2016, and the rules contained in Wis. Stat. (Rules) §§ 809.19 (8) (b) and (c) as to form and length for a brief produced with a proportional serif font (Times New Roman, 13 pitch). The length of this brief is 2,247 words.

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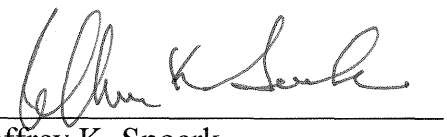
CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. (Rule) § 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.

Dated: June 30, 2016



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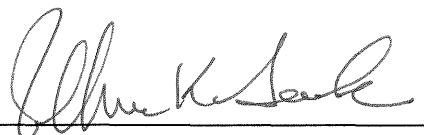

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