

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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.

Defendants.

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,

SUPPLEMENTAL BRIEF OF THE PLAINTIFF-RESPONDENT

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<i>Wenke v. Gehl Co.</i> , 2004 WI 103	5

Other Authorities:

Wis. Const. Art.I, § 9	4
Wis. Const. Art.VII, § 2	4
Thomas E. Fairchild, <u>Limitation of New Judge-Made Law to Prospective Effect Only “Prospective Overruling” or “Sunbursting,”</u> 51 Marq.L.Rev. 254 (1967-68)	5

I. Introduction

The Defendants-Appellants requested supplemental briefing on two grounds: first, that the recent decision by the U.S. Supreme Court in *Bank of Markazi v. Peterson*, 136 S.Ct. 1310 (2016) directly addressed the issue of retroactive legislation to pending litigation, and second that the Wisconsin Supreme Court's questions at oral argument revealed concerns that had not been adequately addressed by the parties' briefs to date. See Defendants-Appellants' Procedural Motion for Supplemental Briefing and Oral Argument, p. 1. However, as demonstrated below, the *Bank of Markazi* case says nothing about the constitutionality of legislation that retroactively extinguishes vested property rights, nor about the separation of powers limitations on legislation that retroactively abrogates judicial decisions interpreting the meaning of constitutional provisions. Further, nothing in the Defendants-Appellants' supplemental brief identifies questions at oral argument that revealed concerns not adequately addressed by the parties' briefs. Instead the Defendants-Appellants rehash their previously stated view that the legislature is in the best position to weigh the private interests of Yasmine Clark against the public policies favoring retroactive abrogation of the *Thomas* decision, such that this Court should defer to the legislature's judgment.

Therefore, Ms. Clark will briefly explain why the *Bank of Markazi* case is inapposite. However, with regard to the rehashed argument from previous briefing, Ms. Clark will stand on the briefing previously submitted at both the Wisconsin Supreme Court and Court of Appeals level regarding the well established *Martin* balancing test requiring the Court to weigh "the public interest served by retroactively applying the

statute against the private interest that the retroactive application would affect.” *Society Insurance v. L.I.R.C.*, 2010 WI 68, ¶ 30 (quoting *Matthies v. Positive Safety Mfg.*, 2001 WI 82, ¶27). Instead, Ms. Clark will briefly discuss several cases that were addressed for the first time during oral argument at the Supreme Court regarding the well established presumption of retroactivity for judicial decisions. Finally, the Plaintiff-Respondent further asserts that under the procedural circumstances of this case, there is no need for oral argument as this Court has the benefit of the oral argument between the parties at the Supreme Court.

II. The recent decision in *Bank of Markazi v. Peterson* has no bearing on the legal issues in this appeal.

In their Supplemental Brief at pages 2 through 5, the Defendants-Appellants argue that the recent decision in *Bank of Markazi v. Peterson*, 136 S.Ct. 1310, 1317 (2016) is somehow relevant to the disposition of this case without once mentioning that the *Markazi* is not a substantive due process case, rather it is a separation of powers case in the context of enumerated authority over foreign relations. Nevertheless, according to the Defendants-Appellants, in the *Bank of Markazi* case:

[t]he 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 *Landsgraf 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).

See Defendants-Appellants' Brief at pages 2-3.

In framing their argument this way, the Defendants-Appellants committed a material omission about the purpose for which the *Markazi* Court's quotation from the *Landsgraf* case. First, the *Markazi* Court noted that the *Landsgraf* case explained that the U.S. Constitution places limited restrictions on retroactive legislation. *Markazi*, 136 S.Ct. at 1324-25. Then, the *Markazi* Court extensively quoted the *Landsgraf* Court's enumeration of the various constitutional provisions that limit retroactive legislation, including the *Ex Post Facto* Clause, the impairment of contracts clause, the Taking Clause, the Bills of Attainder Clause, and most relevant for present purposes, the Due Process Clause, noting that "a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application.". *Id.*, at 1325. Accordingly, the *Bank of Markazi* case adds nothing to the analysis of whether the retroactive provision of §895.046, Wis. Stats., comports with Wisconsin's substantive due process protections.

Nor does *Bank of Markazi* have bearing on whether the retroactive provision of §895.046, Wis. Stats., comports with Wisconsin's constitutional separation of powers requirements. The *Markazi* Court stressed that the enactment of the statute challenged in that case was:

"an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States. In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia*, blocking them or governing their availability for attachment. Such measures have

never been rejected as invasions upon the Article III judicial power. . . . By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets."

Id., at 1328-29.

As explained in prior briefing, it cannot be reasonably disputed that in *Thomas*, the Wisconsin Supreme Court interpreted Art. I, § 9, of the constitution (specifically the meaning of the word "*or*" in that clause) 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. Legislative abrogation of a high court's constitutional interpretation is far different than a legislative enactment controlling the disposition of foreign-state assets in ways that may alter the outcome of pending cases, but which does not otherwise impinge on pre-existing constitutional rights of third parties. In the event the Court does not reach the merits of whether the retroactive provision of §895.046, Wis. Stats., violates the substantive due process protections of the Wisconsin Constitution by abrogating Yasmine Clark's vested property right in her cause of action, the separation of powers provisions of Art. VII, §2, continues to provide an alternative basis for finding the statute unconstitutional, notwithstanding the recent decision in *Bank of Markazi*.

III. Yasmine Clark has a vested property interest in her cause of action

The question of whether Yasmine Clark had a vested property interest in her cause of action pursuant to the risk contribution rule as set forth in *Collins v. Eli Lilly*, 116

Wis.2d 166 (1984), and *Thomas v. Mallett*, 2005 WI 129, 285 Wis.2d 236, rides on the most basic and fundamental notions of what judicial decisions are. The entire argument of the Defendants-Appellants that Ms. Clark did not have a vested property right because her first poisoning preceded the *Thomas* decision is based on a basic misunderstanding of the character of judicial decisions. As extensively explained during oral argument at the Wisconsin Supreme Court, the *Thomas* decision did not make new law. Rather, the *Thomas* Court declared an existing right. This is because Courts don't make new law; that is what legislatures do. Courts declare the law, and therefore, those decisions in civil cases are presumptively retroactive. *Heritage Farms v. Markel Insurance*, 2012 WI 26, ¶¶44, 45 (“The Blackstonian doctrine is based on the jurisprudential theory that courts declare but do not make law. In consequence, when a decision is overruled, it does not merely become bad law, -it was never the law, and the later pronouncement is regarded as the law from the beginning.”); *State v. Picotte*, 2003 WI 42, ¶42; *Prosser v. Leuck*, 225 Wis.2d 126, 141 (1999); *Jacque v. Steenberg Homes*, 209 Wis.2d 606, 624 (1997).

Sometimes, Courts will nevertheless limit a judicial decision to prospective application for everyone except the plaintiff. This is called “sunbursting” and it is employed in rare cases and it must be explicitly declared in the decision. *Wenke v. Gehl Co.*, 2004 WI 103 ¶¶ 69-75 (“Because we have not been presented with adequate grounds for applying our ruling prospectively, and because we presume retroactivity, our ruling today applies to Wenke.”); *see also* Thomas E. Fairchild, Limitation of New Judge-Made Law to Prospective Effect Only “Prospective Overruling” or “Sunbursting,” 51 Marq.L.Rev. 254 (1967-68).

Entirely consistent with the established presumption of retroactivity, the reasoning of the *Thomas* Court makes clear that it intended its decision to apply retroactively to all children poisoned by white lead carbonate, as explained at pages 7 through 9 of the Plaintiff-Respondent's Brief filed with the Wisconsin Supreme Court. Since the *Thomas* decision is good law that has not been overruled, its intended retroactive effect must be respected as binding precedent applicable to this appeal.

IV. Conclusion

For all the reasons set forth herein and in the prior briefing before this Court, as well as the briefing and oral arguments made to the Wisconsin Supreme Court and the reasoning of the U.S. Court of Appeals in *Gibson v. American Cyanamid*, 760 F.3d 600, 608-610 (7th Cir. 2014), Yasmine Clark respectfully requests that her constitutionally protected vested property right to her cause of action be vindicated and she finally, after ten years of seemingly endless litigation, be afforded her day in court.

Dated this 20th day of July, 2016.

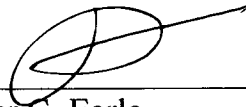


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FORM AND LENGTH CERTIFICATION

I certify that this Supplemental 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) and contains 1678 words.

Dated this 20th day of July, 2016.

A handwritten signature in black ink, appearing to be 'Peter G. Earle', written over a horizontal line.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this Supplemental 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 26 day of July , 2016.



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CERTIFICATE OF SERVICE

I certify that I have sent via U.S. Mail this 20th day of July, 2016, three true and accurate copies of the Supplemental Brief of the Plaintiff-Respondent, along with this and the other attached Certifications to the following counsel:

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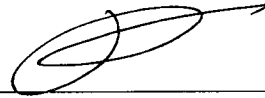
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