

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I**

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**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

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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. 2014-AP-775

Defendants-Appellants,

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

Defendants.

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

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**SUPPLEMENTAL REPLY BRIEF OF DEFENDANTS-APPELLANTS**

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Dated: July 25, 2016

Jeffrey K. Spoerk (Wis. Bar No. 1005405)  
James E. Goldschmidt (Wis. Bar No. 1090060)  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue, Suite 2350  
Milwaukee, WI 53202-4497  
(414) 277-5000

Leon F. DeJulius, Jr.  
Charles H. Moellenberg, Jr.  
JONES DAY  
500 Grant Street, Suite 4500  
Pittsburgh, PA 15219-2514  
(412) 391-3939

**Counsel to Defendant-Appellant  
The Sherwin-Williams Company**

**On Behalf of Defendant-Appellant American Cyanamid Company:**

GASS WEBER MULLINS LLC  
**Ralph A. Weber** (SBN 1001563)  
309 N. Water St., 7th Floor  
Milwaukee, WI 53202  
(414) 223-3300

GIBSON DUNN & CRUTCHER LLP  
**Richard W. Mark**  
200 Park Avenue  
New York, NY 10166  
(212) 351-3818

ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
**Elyse D. Echtman**  
51 West 52nd St.  
New York, NY 10019  
(212) 506-3753

**On Behalf of Defendant-Appellant Armstrong Containers, Inc.:**

BASCOM BUDISH & CEMAN SC  
**Timothy A. Bascom** (SBN 1010017)  
2600 N. Mayfair Road, #1140  
Wauwatosa, WI 53226  
(414) 774-8835

MORRIS, MANNING & MARTIN,  
LLP  
**Robert P. Alpert**  
Jeffrey K. Douglass  
1600 Atlanta Financial Center  
3343 Peachtree Road, N.E.  
Atlanta, GA 30326  
(404) 233-7000

**On Behalf of Defendant-Appellant E.I. Du Pont De Nemours & Company:**

MICHAEL BEST & FRIEDRICH LLP  
**Paul E. Benson** (SBN 1001457)  
100 E. Wisconsin Ave., Suite 3300  
Milwaukee, WI 53202  
(414) 271-6560

McGUIRE WOODS LLP  
**Steven R. Williams**  
Joy C. Fuhr  
Christian E. Henneke  
One James Center  
901 E. Cary Street  
Richmond, VA 23219  
(804) 775-1000

**On Behalf of Defendant-Appellant Atlantic Richfield Company:**

GODFREY & KAHN S.C.

**Anthony S. Baish** (SBN 1031577)

780 N. Water St., Suite 1500

Milwaukee, WI 53202

(414) 273-3500

**Daniel T. Flaherty** (SBN 1011357)

100 W. Lawrence St.

P.O. Box 2728

Appleton, WI 54913

(920) 830-2800

ARNOLD & PORTER LLP

**Phillip H. Curtis**

Bruce R. Kelly

William Voth

Matthew D. Grant

Reuben S. Koolyk

399 Park Avenue

New York, NY 10022

(212) 715-1000

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## INTRODUCTION

Plaintiff does not address the arguments in Defendants' supplemental brief – that Wisconsin law allows the Legislature to set standards applicable to pending cases, as in *Bank Markazi*, and the Legislature had a rational basis for the 2013 Act. Contrary to Plaintiff's arguments, *Bank Markazi*'s principles are directly on point, Plaintiff's claim derives from tort law, not Article I, Section 9, and Plaintiff has no vested right at stake.

### **I. UNDER *BANK MARKAZI* AND WISCONSIN LAW, RATIONALITY IS THE TEST FOR RETROACTIVE LEGISLATION.**

Plaintiff incorrectly suggests that *Bank Markazi* is limited to foreign affairs. Plaintiff misses *Bank Markazi*'s central point: retroactive civil legislation is constitutional even when aimed at resolving a particular case. This principle has been reaffirmed since *United States v. Schooner Peggy*, 5 U.S. 103 (1801), and the U.S. Supreme Court's recent decisions have erased "[a]ny lingering doubts on that score." *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1324-25 (2016) (citations omitted).

Contrary to Plaintiff's contention that *Landgraf v. USI Film Prods.* suggests the 2013 Act is constitutionally suspect, the Court made clear that

restrictions on retroactive legislation are “of limited scope,” and, absent a specific constitutional violation, potential unfairness “is not a sufficient reason for a court to fail to give a statute its intended scope.” 511 U.S. 244, 267 (1994). Citing its prior opinions holding that a retroactive law is presumed to be constitutional and violates due process only when it lacks a rational basis, the *Landgraf* Court recognized that retroactive legislation is appropriate “to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law.” *Id* at 267-68. These same rational bases justify the 2013 Act.

Plaintiff cannot dispute that Wisconsin law is “substantially equivalent” to federal law. Suppl.Br. 3. The Wisconsin Supreme Court’s retroactivity decisions rely on federal law, make rationality the touchstone for retroactive legislation, and establish the presumption of constitutionality beyond a reasonable doubt. *See, e.g., Lands’ End v. City of Dodgeville*, 2016 WI 64, ¶¶ 20, 34 n.14, 82 n.37. In *Soc’y Ins. v. LIRC*, the Court rejected heightened scrutiny, reaffirming that retroactive legislation is “justified by a rational legislative purpose.” 2010 WI 68, ¶ 30 n.12, 326 Wis. 2d 444, 786 N.W.2d 385 (citing *Pension Benefit Guar. Corp.*



*v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)); *see also Lands' End*, 2016 WI 64, ¶¶ 143-162 (Ziegler, J., concurring).

Plaintiff, who has the burden to overcome the presumption of constitutionality beyond a reasonable doubt, has not offered any evidence that the 2013 Act lacked a rational purpose. Nor could she. As in *Kopec*, the Legislature acted rationally to apply the law to pending cases in order to ensure consistency, to correct a mistake, and to close a gap in the law. Suppl.Br. 5-11. The rational bases for the 2013 Act, moreover, included preventing thousands of potential risk-contribution lawsuits against Wisconsin manufacturers, upending the purposes of the unchallenged 2011 Act. Because the 2013 Act has a rational basis, it is constitutional, regardless of whether Plaintiff has a vested right or pleads unfairness. In *John R.B.*, the Wisconsin Supreme Court upheld rational, retroactive legislation despite an assumed vested right and claim of unfairness. Suppl.Br. 4-5.

Plaintiff mistakenly argues that the risk-contribution theory derives from the Wisconsin Constitution. This contradicts *Thomas*, which held it was creating a common-law right, not a constitutional right. *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶¶ 129, 131, 285 Wis. 2d 236, 701

N.W.2d 523 (“[A]lthough the Article I, Section 9 provision itself may not create ‘new rights,’ it does allow for a remedy through the existing common law.”). Moreover, not even Plaintiff has challenged the Legislature’s constitutional authority to clarify the risk-contribution theory in the 2011 Act.

## **II. PLAINTIFF HAS NO VESTED RIGHT UNDER WISCONSIN LAW.**

Plaintiff says that she has a vested right because judicial decisions are presumptively retroactive. But retroactivity and vesting are two distinct concepts. Plaintiff has no vested right to any legal standard or tort theory,<sup>1</sup> especially not *Thomas*’ highly contingent expansion of risk-contribution. *Thomas* created a brand-new legal standard attaching liability to actions that ceased decades earlier. This is distinct from the fixed laws held to create vested rights – an amount of damages in *Martin* and *Neiman*, joint and several liability in *Matthies*, and a statute of limitations in *Soc’y Ins.* Sup.Ct. Br. 24-25. Each of those laws created a settled, non-contingent expectation that was “so far perfected that it cannot be taken away by statute.” *Neiman v. Am. Nat’l Prop. & Cas. Co.*, 2000 WI 83, ¶ 14, 236 Wis. 2d 411, 613 N.W.2d 160.

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<sup>1</sup> See *Luria v. United States*, 231 U.S. 9, 14-15 (1913); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996).

In *Lands' End*, the Wisconsin Supreme Court reaffirmed that “when the existence of a right is contingent on an uncertain future event . . . [there is] no vested right in the application of the prior law.” 2016 WI 64, ¶ 50.<sup>2</sup> The plaintiff had no vested right in recovering a statutory interest rate because application of that rate was still “contingent on a subsequent determination by a court” – whether the plaintiff was entitled to judgment. *Id.* ¶¶ 72-77. As *Lands' End* recognizes, when disputed issues of fact or law remain undecided for an action to be perfected or a right to attach, there is no vested right, even if the relevant facts later are found.

So, too, here. The viability of Plaintiff’s claim under *Thomas* remains contingent upon uncertain future determinations: whether the theory can be constitutionally applied;<sup>3</sup> whether her claim survives Wisconsin’s public policy analysis; and whether white lead carbonate pigments are fungible (a prerequisite to the risk-contribution theory that was assumed on summary judgment in *Thomas* but no fact-finder has determined). What matters now is not the answer to these questions, but

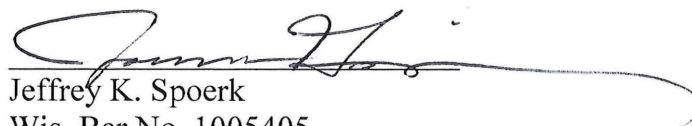
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<sup>2</sup> A copy of *Lands' End* is attached for the Court’s convenience. *Lands' End* overruled this Court’s decision in *Johnson v. Cintas Corp. No. 2*, 2015 WI App 14, 360 Wis. 2d 350, 860 N.W.2d 515, on which Plaintiff relied before the Wisconsin Supreme Court. See Pl.’s Sup.Ct. Br. 28.

<sup>3</sup> At the time the Legislature passed the 2013 Act, *Thomas* had been held unconstitutional. See *Gibson v. American Cyanamid Co.*, 750 F. Supp. 2d 998 (E.D. Wis. 2010), *rev’d*, 760 F.3d 600 (7th Cir. 2014).

that they remained open when the Legislature passed the 2013 Act, precluding the perfected status necessary for a vested right. Plaintiff's constitutional challenge to the 2013 Act accordingly fails under any analysis.

Dated: July 25, 2016



Jeffrey K. Spoerk  
Wis. Bar No. 1005405  
James E. Goldschmidt  
Wis. Bar No. 1090060  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue,  
Suite 2350  
Milwaukee, WI 53202-4497  
(414) 277-5000

Leon F. DeJulius, Jr.  
Charles H. Moellenberg, Jr.  
JONES DAY  
500 Grant Street, Suite 4500  
Pittsburgh, PA 15219-2514  
(412) 391-3939

**Counsel to Defendant-Appellant  
The Sherwin-Williams  
Company**

### **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. Stats. (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 1,093 words.

Dated: July 25, 2016



Jeffrey K. Spoerk  
Wis. Bar No. 1005405  
James E. Goldschmidt  
Wis. Bar No. 1090060  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue,  
Suite 2350  
Milwaukee, WI 53202-4497  
(414) 277-5000

Leon F. DeJulius, Jr.  
Charles H. Moellenberg, Jr.  
JONES DAY  
500 Grant Street, Suite 4500  
Pittsburgh, PA 15219-2514  
(412) 391-3939

**Counsel to Defendant-Appellant  
The Sherwin-Williams  
Company**

# **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: July 25, 2016



Jeffrey K. Spoerk  
Wis. Bar No. 1005405  
James E. Goldschmidt  
Wis. Bar No. 1090060  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue,  
Suite 2350  
Milwaukee, WI 53202-4497  
(414) 277-5000

Leon F. DeJulius, Jr.  
Charles H. Moellenberg, Jr.  
JONES DAY  
500 Grant Street, Suite 4500  
Pittsburgh, PA 15219-2514  
(412) 391-3939

**Counsel to Defendant-Appellant  
The Sherwin-Williams  
Company**

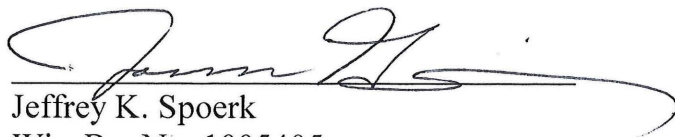
### CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the Supplemental Brief of Defendants-Appellants and this Certificate of Service were sent via U.S. Mail this 25th day of July, 2016, to the following:

Peter G. Earle  
Law Offices of Peter Earle, LLC  
839 N. Jefferson Street, Suite 300  
Milwaukee, WI 53202

Jonathan D. Orent  
Motley Rice LLC  
321 South Main Street, Suite 200  
Providence, RI 02903

Dated: July 25, 2016



Jeffrey K. Spoerk  
Wis. Bar No. 1005405  
James E. Goldschmidt  
Wis. Bar No. 1090060  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue, Suite 2350  
Milwaukee, WI 53202-4497  
(414) 277-5000

Leon F. DeJulius, Jr.  
Charles H. Moellenberg, Jr.  
JONES DAY  
500 Grant Street, Suite 4500  
Pittsburgh, PA 15219-2514  
(412) 391-3939

**Counsel to Defendant-Appellant  
The Sherwin-Williams Company**