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In The 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.

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

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

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ARGUMENT

After the Wisconsin Supreme Court remanded this case, this Court allowed supplemental briefing to address "new legal authority and new issues that were raised after briefing in the Wisconsin Supreme Court." Suppl. Br. Order 4. This brief will address two new issues: a question asked by Justice Abrahamson at oral argument that requires more explanation to answer, and the United States Supreme Court's recent decision in *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), which was issued after oral argument.

1. During oral argument, Justice Abrahamson asked an important question about the rational-basis balancing test that deserves a longer response than was possible at argument. Under Wisconsin Supreme Court precedent, once a law enacted by the Legislature is found to have a retroactive effect, courts must then "weigh[ ] the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect" to determine whether retroactive application has a rational basis. *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 2010 WI 68, ¶ 30, 326 Wis. 2d 444, 786 N.W.2d 385. With respect to the "affect[ed]" "private interest" side of the balance, Justice Abrahamson asked, "Whose settled expectations are [courts] concerned with, the defendants', or the plaintiff's?" Oral Arg.

22:29–34.[1] The State responded that, due to the unique circumstances of this case, the private interests of *both* Clark, the plaintiff, and the defendant-manufacturers must be weighed in the balance. Oral Arg. 22:34–23:32. This brief will expand on that response.

There are almost always at least two parties affected by a retroactive change in tort law—one that benefits from the change, and another that is harmed by it. Sometimes a retroactive change benefits plaintiffs, *e.g.*, *Neiman v. Am. Nat'l Prop. & Cas. Co.*, 2000 WI 83, ¶ 1, 236 Wis. 2d 411, 613 N.W.2d 160 (increase in damages cap), and sometimes defendants, *e.g.*, *Martin ex rel. Scoptur v. Richards*, 192 Wis. 2d 156, 200, 531 N.W.2d 70 (1995) (creation of a damages cap). Regardless of whether a change is plaintiff- or defendant-friendly, the Court *normally* considers only the interests of the side *harmed* by the change. That is because the Court is ultimately concerned with the "fairness" of a retroactive change in the law,[2] and when the side benefitting from the

[1] The recorded oral argument is available at http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/10495.

[2] Every recent Wisconsin Supreme Court case considering a retroactive change in the law has emphasized "fairness" as a primary concern. *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 55, __ Wis. 2d __, __ N.W.2d __ ("[T]he presumption against retroactive application of a statute is premised on considerations of fairness."); *Soc'y Ins.*, 2010 WI 68, ¶¶ 44, 55; *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶¶ 27, 34, 38, 47, 244 Wis. 2d 720, 628 N.W.2d 842; *Neiman*, 2000 WI 83, ¶¶ 9, 15, 18, 22; *Martin*, 192 Wis. 2d at 198, 201, 209–12.

change gets something it never expected, the windfall it receives is typically not relevant to concerns about fairness.

Matthies v. Positive Safety Manufacturing Co. made this point explicitly. There, the plaintiff had been injured by a punch press at work. 244 Wis. 2d 720, ¶ 1. After the accident, the Legislature retroactively changed the rules of joint and several liability in a way that limited the plaintiff's potential damages against the manufacturer of the press. *Id.* The Wisconsin Supreme Court held that the manufacturer's private interests were not relevant in the balancing test because the change was "a boon to [the manufacturer]," and "[t]his hardly befits notions of fundamental fairness." *Id.* ¶ 43 (quoting *Martin*, 192 Wis. 2d at 210).

The present case, however, is different in a critical way. The retroactive statute at issue here did not introduce a new change to the law; it reset the law back to what it was before *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, changed it dramatically. Att'y Gen. Amicus Br. 9–10. And—even if one thinks that *Thomas* was rightly decided—there is no question that it had a significant retroactive *effect*, because it opened the door to liability for conduct that occurred decades earlier. Att'y Gen. Amicus Br. 4. So, in this case, the parties benefitting from the retroactive change enacted by the Legislature (the manufacturers) did not receive a "boon" or windfall; they simply got back what they correctly understood they had all along. In other words,

unlike in the normal case, there are two sets of unsettled expectations here—Clark's, which were directly overturned by the newly enacted law, and the defendant-manufacturers', which were overturned by *Thomas* but restored by the 2013 law. 2013 Wis. Act 20, §§ 2318e–2318g. This Court has no way to avoid upsetting one of these two legal expectations: it must either reimpose *Thomas*'s dramatic retroactive effect on the defendant-manufacturers, contrary to a century of settled expectations, or uphold the relatively mild retroactive effect on Clark, contrary to six years of expectations.[3] Therefore, in order to assess the "fairness" of the law in this case, this Court must weigh its effects on the settled expectations of both Clark and the defendant-manufacturers.

Accordingly, applying the balancing test is straightforward in this case. The defendant-manufacturers' nearly one hundred years of reliance on traditional tort law principles easily outweighs whatever reliance Clark formed in the six brief years *Thomas* was viable. Att'y Gen. Amicus Br. 9–10. The "private interest" side of the balance thus strongly favors the retroactive law. Since "both the public interest and settled private interests" cut in the same direction, there is nothing to balance and the law must be upheld. *See* Att'y Gen. Amicus Br. 9.

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[3] This is assuming, for the sake of argument, that there is *any* retroactive effect on Clark. As noted in the State's amicus brief, the State does not concede that Clark had a vested right to a claim under *Thomas*'s risk-contribution theory. Att'y Gen. Amicus Br. 8.

But even if this Court concludes that only Clark's interest is relevant in the balancing test, that interest is still outweighed by the strong public interest in retroactively undoing *Thomas*, as the State argued in briefing and at oral argument to the Wisconsin Supreme Court. Att'y Gen. Amicus Br. 9–10; Oral Arg. 19:53–20:57. *Thomas* significantly undermined confidence in settled law, for *all* businesses and individuals in Wisconsin, not just the defendant-manufacturers in this case. *See* Wis. Stat. § 895.046(1g). The only way to fully restore that confidence was to retroactively overrule *Thomas*—the Legislature needed to send the message that if a court opinion creates sudden, new liability for decades-old conduct, the Legislature can and will act as a safety valve to cut off the surge of lawsuits filed before the Legislature could respond prospectively.

2. At argument, the Justices asked whether retroactive legislation can alter the outcome of pending cases. Oral Arg. 35:52–37:38. The State responded that the Legislature "can pass laws of general applicability that can have effect on any case that has not reached a final judgment." Oral Arg. 36:24–32. In expanding upon this point and then answering some follow-up questions, the State referenced *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), Oral Argument 36:52–37:38, which, at the time, had been fully briefed and argued before the U.S. Supreme Court, but not yet decided.

The Supreme Court's subsequent decision in *Bank Markazi* confirms that the State's answer at oral argument

was correct because *Bank Markazi* held that legislation that impacts pending cases is generally permissible. The statute at issue in *Bank Markazi* "designate[d] a particular set of assets and render[ed] them available to satisfy . . . judgments [in a] proceeding that the statute identifie[d] by . . . docket number." 133 S. Ct. at 1317. The Court upheld the statute against a separation-of-powers challenge, holding that Congress "may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases," as long as it does not attempt to "reopen final judgments" or "direct the result without altering the legal standards." *Id*. at 1323–25 (citations omitted). In this case, the Legislature changed a generally applicable legal standard without attempting to reopen any final judgments, so *Bank Markazi* establishes that there is no separation-of-powers issue solely because the law might alter the outcome of Clark's pending case.

Bank Markazi is also relevant to Clark's argument that the law is unconstitutionally retroactive. The Supreme Court in *Bank Markazi* summarized "the restrictions that the Constitution places on retroactive legislation" and explained that they "'are of limited scope.'" 136 S. Ct. 1310 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 267 (1994)). *Bank Markazi* therefore reinforces the State's argument that the law in this case "easily passes th[e] Court's rational-basis balancing test." Oral Arg. 19:43–48.

In her supplemental brief before this Court, Clark does not address *Bank Markazi*'s primary relevance to this case,

but instead asserts that the case is not directly relevant to her version of a "separation-of-powers" argument. Pl.-Resp's Suppl. Br. 2–4. But that is correct only because Clark mislabeled her own argument. Clark's argument turns on the assertion that *Thomas*'s expansion of the risk-contribution theory was constitutionally *required* by the Remedies Clause of Article I, Section 9 of the Wisconsin Constitution. *See* Pl.-Resp's Suppl. Br. 4; Oral Arg. 40:40–41:20. If that were true—and it is plainly not, *see infra*—the law in this case would implicate the Remedies Clause, not separation of powers. That would indeed be a different issue than the one in *Bank Markazi*.

The reason Clark's mislabeled "separation-of-powers" argument fails is that *Thomas*'s expansion of the risk-contribution theory was not even arguably constitutionally required. The *Thomas* majority was explicit that it was creating a new remedy "through the existing common law." 2005 WI 129, ¶ 129. The Court's analysis of the Remedies Clause was in response to an argument that the Court did not have the *authority* to create a new remedy because Thomas already had a remedy against his landlord. *Id.* ¶¶ 110, 112, 126. Accordingly, the Court held only "that Article I, Section 9 is not a *bar* to [extending the risk-contribution theory.]" *Id.* ¶ 131 (emphasis added). That the Remedies Clause *allowed* the Court to alter the common law absent contrary legislative action does not mean that the Clause *required* it to. As the

Court acknowledged, the Remedies Clause does "not create 'new rights.'" *Id.* ¶ 129.

Furthermore, if *Thomas*'s holding were constitutionally required, then the Legislature could not overrule *Thomas* even *prospectively*, as it did in a law not challenged in this case. 2011 Wis. Act 2, § 30. Multiple Justices identified this logical corollary to Clark's argument, Oral Argument 43:45–50, 43:57–44:10, 45:37–55, and even Clark's attorney seemed hesitant to go that far, Oral Argument 43:50–57, 45:55–46:15. Clark's mislabeled "separation-of-powers" argument fails on its own terms.

CONCLUSION

The decision of the circuit court should be reversed and the law held constitutional.

Dated July 27, 2016.

Respectfully submitted,

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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 1,844 words.

Dated July 27, 2016.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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 July 27, 2016.

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