Appeal No. 2014AP775 **Cir. Ct. No. 2006CV12653**

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.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Curley, P.J., Kessler and Bradley, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2013-14),[1] we certify this appeal to the Wisconsin Supreme Court for its review and determination.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

ISSUE

Does applying WIS. STAT. § 895.046—which prohibits plaintiffs from asserting claims against manufacturers of white lead carbonate under the risk-contribution theory as articulated in ***Thomas v. Mallett***, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523—retroactively deprive a plaintiff of a vested property right in violation of the due process protections guaranteed by Article I, Section I of the Wisconsin Constitution?

BACKGROUND

Nature of the Case

This is a lead paint case. According to the complaint, Clark was poisoned and suffered significant and irreversible neurological damage following her exposure to paint containing white lead carbonate while residing at two different rental properties in Milwaukee. Clark and her family lived at the first residence from approximately March 2003 to March 2004, when Clark was two- to three-years-old. Clark and her family lived at the second residence from approximately February 2006 to June 2006, when she was five years old.

Procedural History

Clark, through her *guardian ad litem*, filed the instant action on December 27, 2006. She alleged negligence against the owners of the aforementioned properties for failing to maintain their premises. She also alleged negligence and strict liability against numerous manufacturers and sellers of white lead carbonate (hereafter referred to as "WLC"), including: The Sherwin-Williams Company; Atlantic Richfield Company; American Cyanamid

Company;[2] Armstrong Containers, Inc.; and E.I. DuPont de Nemours & Company. We hereafter collectively refer to these defendants as "the WLC defendants."

Because Clark cannot identify which manufacturer or manufacturers produced the white lead carbonate to which she was exposed, Clark is suing the WLC Defendants under the risk-contribution theory first pronounced in ***Collins v. Eli Lilly Co.***, 116 Wis. 2d 166, 193-95, 342 N.W.2d 37 (1984), and later extended to cases involving white lead carbonate poisoning in ***Thomas***, 285 Wis. 2d 236, ¶¶149, 161-63. ***Thomas*** governs situations in which a plaintiff claims injuries resulting from exposure to or ingestion of white lead carbonate but cannot identify the entity that produced or sold the white lead carbonate that allegedly caused his or her injuries. *See* ***id.***, ¶¶1-3, 17. Generally speaking, ***Thomas*** holds that once such a plaintiff has established the other elements of a negligence or strict-liability claim and has met the prerequisites to the application of risk contribution, the burden of proof shifts to each defendant to prove that it did not produce or market white lead carbonate during the relevant time period or in the geographic market where the exposure occurred. ***Id.***, ¶¶161-63.

[2] American Cyanamid filed its reply brief in this appeal on April 14, 2015. Three months later, it moved to supplement the record and asked this court to take judicial notice of a legal brief that the attorney representing Clark in this appeal filed on March 16, 2015, in a federal case involving different plaintiffs against American Cyanamid. Clark opposed American Cyanamid's motion on several bases, including on grounds that American Cyanamid should have made its argument concerning that federal case in its reply brief, given that Clark cited the same federal case in her response brief. Clark asserts that American Cyanamid "missed the opportunity to argue the relevance of the holding from [the federal] case in the due course of the briefing schedule of this appeal" and "there is no reason to resort to judicial notice or supplementation of the record when the very same holding … has already been cited and previously ignored by [American Cyanamid] … in the due course of the briefing that has been long completed in this case." We agree that American Cyanamid's request is untimely and, on that basis, we deny the motion.

On June 15, 2010, while the instant action was pending, the United States District Court for the Eastern District of Wisconsin, in ***Gibson v. American Cyanamid Co.***, 719 F. Supp. 2d 1031, 1052 (E.D. Wis. 2010) (***Gibson I***), ruled that the risk-contribution doctrine as expanded in ***Thomas*** violated the federal substantive due process rights of one of the WLC defendants in that case. ***Gibson I*** was later extended to the remaining WLC defendants in the case, *see* ***Gibson v. American Cyanamid Co.***, 750 F. Supp. 2d 998, 999 (E.D. Wis. 2010) (***Gibson II***), which was thereafter appealed to and reversed by the United States Court of Appeals for the Seventh Circuit, *see* 760 F.3d 600 (7th Cir. 2014).

Because of the pending ***Gibson II*** appeal, the trial court stayed the instant case on February 3, 2011. The stay came on the heels of the legislature's enactment of WIS. STAT. § 895.046 (2011-12), which abrogated ***Thomas*** prospectively as of February 1, 2011.[3]

[3] WISCONSIN STAT. § 895.046 (2011-12), "Remedies against manufacturers, distributors, sellers, and promoters of products," provided:

> **(1)** DEFINITIONS. In this section:
>
> **(a)** "Claimant" means a person seeking damages or other relief for injury or harm to a person or property caused by or arising from a product, or a person on whose behalf a claim for such damages or other relief is asserted.
>
> **(b)** "Relevant production period" means the time period during which the specific product that allegedly caused a claimant's injury or harm was manufactured, distributed, sold, or promoted.

(continued)

(2) APPLICABILITY. This section applies to all actions in law or equity in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION. Except as provided in sub. (4), the manufacturer, distributor, seller, or promoter of a product may be held liable in an action under sub. (2) only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm.

(4) REMEDY WITHOUT SPECIFIC PRODUCT IDENTIFICATION. Subject to sub. (5), if a claimant cannot meet the burden of proof under sub. (3), the manufacturer, distributor, seller, or promoter of a product may be held liable for an action under sub. (2) only if all of the following apply:

(a) The claimant proves all of the following:

1. That no other lawful process exists for the claimant to seek any redress from any other person for the injury or harm.

2. That the claimant has suffered an injury or harm that can be caused only by a manufactured product chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

3. That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted a complete integrated product, in the form used by the claimant or to which the claimant was exposed, and that meets all of the following criteria:

a. Is chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

(continued)

Nearly two years later, a decision in ***Gibson II*** had yet to arrive, and the stay in the instant case was extended until June 30, 2013, at which point the legislature amended WIS. STAT. § 895.046, making its abrogation of ***Thomas*** now

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> **b.** Was manufactured, distributed, sold, or promoted in the geographic market where the injury or harm is alleged to have occurred during the time period in which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted.
>
> **c.** Was distributed or sold without labeling or any distinctive characteristic that identified the manufacturer, distributor, seller, or promoter.
>
> **(b)** The action names, as defendants, those manufacturers of a product who collectively manufactured at least 80 percent of all products sold in this state during the relevant production period by all manufacturers of the product in existence during the relevant production period that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.
>
> **(5)** LIMITATION ON LIABILITY. No manufacturer, distributor, seller, or promoter of a product is liable under sub. (4) if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted the specific product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.
>
> **(6)** APPORTIONMENT OF LIABILITY. If more than one manufacturer, distributor, seller, or promoter of a product is found liable for the claimant's injury or harm under subs. (4) and (5), the court shall apportion liability among those manufacturers, distributors, sellers, and promoters, but that liability shall be several and not joint.

retroactive in nature.[4] The amendments were published on July 1, 2013; they became law the next day. *See* 2013 Wis. Act. 20, § 2318G.

[4] WISCONSIN STAT. § 895.046 now provides:

> **(1g)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in ***Collins v. Eli Lilly Company***, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures 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. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in ***Thomas v. Mallet***, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in ***Collins***, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in ***Collins***.
>
> **(1r)** DEFINITIONS. In this section:
>
> **(a)** "Claimant" means a person seeking damages or other relief for injury or harm to a person or property caused by or arising from a product, or a person on whose behalf a claim for such damages or other relief is asserted.
>
> **(b)** "Relevant production period" means the time period during which the specific product that allegedly caused a claimant's injury or harm was manufactured, distributed, sold, or promoted.

(continued)

(2) APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION. Except as provided in sub. (4), the manufacturer, distributor, seller, or promoter of a product may be held liable in an action under sub. (2) only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm.

(4) REMEDY WITHOUT SPECIFIC PRODUCT IDENTIFICATION. Subject to sub. (5), if a claimant cannot meet the burden of proof under sub. (3), the manufacturer, distributor, seller, or promoter of a product may be held liable for an action under sub. (2) only if all of the following apply:

(a) The claimant proves all of the following:

1. That no other lawful process exists for the claimant to seek any redress from any other person for the injury or harm.

2. That the claimant has suffered an injury or harm that can be caused only by a manufactured product chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

3. That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted a complete integrated product, in the form used by the claimant or to which the claimant was exposed, and that meets all of the following criteria:

a. Is chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.

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Consequently, the WLC defendants filed a motion to lift the stay and dismiss the case. Clark opposed the motion, arguing that the 2013 amendment to WIS. STAT. § 895.046 was unconstitutional on three separate grounds:

> 1. Retroactive application of the statute deprives Clark of a vested property right in violation of the due process protections guaranteed by Article I, Section 1 of the Wisconsin Constitution;

> **b.** Was manufactured, distributed, sold, or promoted in the geographic market where the injury or harm is alleged to have occurred during the time period in which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted.
>
> **c.** Was distributed or sold without labeling or any distinctive characteristic that identified the manufacturer, distributor, seller, or promoter.
>
> **(b)** The action names, as defendants, those manufacturers of a product who collectively manufactured at least 80 percent of all products sold in this state during the relevant production period by all manufacturers of the product in existence during the relevant production period that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.
>
> **(5)** LIMITATION ON LIABILITY. No manufacturer, distributor, seller, or promoter of a product is liable under sub. (4) if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted the specific product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.
>
> **(6)** APPORTIONMENT OF LIABILITY. If more than one manufacturer, distributor, seller, or promoter of a product is found liable for the claimant's injury or harm under subs. (4) and (5), the court shall apportion liability among those manufacturers, distributors, sellers, and promoters, but that liability shall be several and not joint.

> 2. The legislature violated the separation of powers doctrine inherent in Article VII, Section 2 of the Wisconsin Constitution by passing the amended statute in an explicit effort to overrule the Wisconsin Supreme Court's interpretation of Wisconsin's "right to remedy" clause; and
>
> 3. The amendments to WIS. STAT. § 895.046 constitute private legislation adopted in violation of Article IV, Section 18 of the Wisconsin Constitution.

After converting the WLC defendants' motion to dismiss into one for summary judgment, *see* WIS. STAT. § 802.06(2)(b), the trial court, on March 25, 2014, determined that "retroactive application of WIS. STAT. § 895.046 is unconstitutional as a violation of [Clark's] right to due process…." The trial court therefore denied the WLC defendants' motion and granted Clark partial summary judgment "[t]o the extent that [she] seeks a declaration that WIS. STAT. § 895.046, as amended, violates Article I, Section 1 of the Wisconsin Constitution."[5]

About four months later, on July 24, 2014, the United States Court of Appeals for the Seventh Circuit decided ***Gibson v. American Cyanamid Co.***, 760 F.3d 600, 609, *cert. denied*, 135 S. Ct. 2311 (7th Cir. 2014) (***Gibson III***), consistent with the trial court's decision here, ruling that WIS. STAT. § 895.046 "cannot be retroactively applied in light of the state constitution's guarantee of due process." The WLC defendants now appeal the trial court's March 25, 2014 decision.

[5] The trial court did not consider Clark's second and third arguments about the statute's constitutionality.

DISCUSSION

On appeal, the parties dispute whether WIS. STAT. § 895.046 is constitutional. "The legislature can pass a statute that has retroactive effect so long as it does not violate the federal or state constitution." ***Society Ins. v. LIRC***, 2010 WI 68, ¶26, 326 Wis. 2d 444, 786 N.W.2d 385. We start with the presumption that the retroactive legislation is constitutional, *see* ***id.***, and then apply a two-part test to determine whether the retroactive statute comports with due process, *see* ***id.***, ¶28. For the first part of the two-part test, we "determine whether application of the statute[] in question … actually has a retroactive effect." *See* ***id.***, ¶29. "This inquiry turns on whether the challenging party has a 'vested' right." ***Id.*** (citation omitted). If we identify a vested property right, we next "employ the balancing test set forth in ***Martin v. Richards***, 192 Wis. 2d 156, 531 N.W.2d 70 (1995), which 'examines whether the retroactive statute has a rational basis.'" ***Society Ins.***, 326 Wis. 2d 444, ¶30 (citation omitted). Whether a rational basis exists "involves weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect." ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶27, 244 Wis. 2d 720, 628 N.W.2d 842.

The WLC defendants argue that WIS. STAT. § 895.046 is constitutional because it does not impair a vested right and because the public's interest in abrogating ***Thomas*** retroactively outweighs Clark's private interest in her claims. Regarding whether there is a vested right, the WLC defendants first argue that because ***Thomas*** did not expand ***Collins***' risk-contribution theory until two years after Clark was initially injured, she had no vested right to sue them when she was exposed to white lead carbonate in 2003. In other words, according to the WLC defendants, § 895.046 simply restores the common law that existed in

March 2003; thus, it has no retroactive effect on Clark's claims. They additionally argue that there is no vested right because too many "contingencies" exist, including: whether the ***Thomas*** decision comports with due process, whether ***Thomas*** comports with public policy, "and whether the facts would support the product fungibility and other findings necessary to justify extending risk-contribution" to Clark's claims. Regarding whether the statute has a rational basis, the WLC defendants argue that § 895.046 serves the reasonable public purpose of limiting the application of risk-contribution theory and that this purpose outweighs Clark's private interest because the statute merely reinstates the law as it was before ***Thomas*** and leaves Clark "no better and no worse off than when her claims arose."

Clark, on the other hand, argues that WIS. STAT. § 895.046 is unconstitutional because she did have a vested right in her claims and because her private interest outweighs the public interest advanced by the statute.[6] Clark first contends that she does have a vested right in her claims even if they arose in 2003 because ***Thomas*** applies retroactively. *See* ***State v. Thiel***, 2001 WI App 52, ¶7, 241 Wis. 2d 439, 625 N.W.2d 321 ("Wisconsin generally adheres to the 'Blackstonian Doctrine,' which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively."); *see also* ***Fitzgerald v. Meissner & Hicks, Inc.***, 38 Wis. 2d 571, 579-80, 157 N.W.2d 595 (1968). Clark also points out that even if ***Thomas*** had not been decided in 2003, Wisconsin law had at that time already adopted the risk-contribution theory in

[6] Clark also renews the other constitutional arguments not considered by the trial court—namely, that WIS. STAT. § 895.046 violates Article VII, § 2 of the Wisconsin Constitution as well as Article IV, § 18.

Collins—which was decided nearly two decades before Clark was first injured and which left the door open for expansion of risk-contribution theory in factually-similar situations. *See* ***id.***, 116 Wis. 2d at 191. Regarding whether the statute has a rational basis, Clark argues that "it is difficult to place a value on the cited public purpose" behind the statute because there is "no record evidence demonstrating the extent to which businesses in Wisconsin have been unfairly prejudiced by the ***Thomas*** decision and" it is nearly impossible to discern how many defendants have been deprived of property because of ***Thomas***. She further contends that, while it is difficult to value the *defendants'* loss, it is abundantly clear that she and other similarly-situated children poisoned by lead paint would be deprived of their causes of action should the statute's retroactive application, *see* § 895.046(2), be held constitutional. Clark also argues that retroactive legislation is viewed with suspicion. *See* ***Martin v. Richards***, 192 Wis. 2d 156, 201, 531 N.W.2d 70 (1995).

Whether WIS. STAT. § 895.046 is constitutional is currently unsettled and the question of its validity is likely to recur. Moreover, as noted, this litigation has been delayed for many years, and we should not delay justice any longer. Further complicating matters is the fact that the Seventh Circuit has already held that § 895.046 does indeed violate due process in ***Gibson III***. *See* ***id.***, 760 F. 2d at 608-10. Thus, if this court were to hold that § 895.046 is in fact constitutional, this holding would directly conflict with federal law. *See* ***State v. Jennings***, 2002 WI 44, ¶19, 252 Wis. 2d 228, 647 N.W.2d 142 ("[T]he court of appeals may … certify to this court a case that presents a conflict between a decision of this court and a subsequent decision … on a matter of federal law."). Therefore, because of the unsettled state of the law, the pressing need for a final resolution, and the potential for conflict with federal law, we certify this case to the supreme court.

CONCLUSION

For the foregoing reasons, we respectfully request the supreme court's guidance regarding whether applying WIS. STAT. § 895.046 retroactively deprives Clark of a vested property right in violation of the due process protections guaranteed by Article I, Section I of the Wisconsin Constitution.