

SUPREME COURT OF WISCONSIN

CASE NO.: 2008AP697-CR

COMPLETE TITLE:

State of Wisconsin,
Plaintiff-Appellant,
v.
Dimitri Henley,
Defendant-Respondent.

ORDER ON MOTION TO FILE NON-PARTY BRIEF

ORDER FILED: July 12, 2011

SUBMITTED ON BRIEFS:

ORAL ARGUMENT:

SOURCE OF APPEAL:

COURT:

COUNTY:

JUDGE:

JUSTICES:

CONCURRED: ZIEGLER, J. concurs (Opinion filed).
PROSSER, J. and GABLEMAN, J. join concurrence.
DISSENTED: ABRAHAMSON, C. J., BRADLEY, J. and CROOKS, J.
dissent (Opinion filed, combined authorship).
NOT PARTICIPATING: ROGGENSACK, J. withdrew from participation.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

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A. John Voelker
Acting Clerk of Supreme
Court

Order on motion to file non-party brief.

¶1 On December 8, 2010, the court granted the motion of Yasmine Clark to file a non-party amicus brief in support of Henley's motion for reconsideration.

¶2 On December 18, 2010, Yasmine Clark filed an amicus brief in support of Henley's motion for reconsideration. Henley's motion for reconsideration has been denied. See per curiam of July 12, 2011.

¶3 Upon review and discussion of the amicus brief, three justices, Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, and Justice N. Patrick Crooks, would grant the relief requested by the amicus. See attached writing by Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley, and Justice N. Patrick Crooks.

¶4 Upon review and discussion of the amicus brief, three justices, Justice David T. Prosser, Justice Annette Kingsland Ziegler, and Justice Michael J. Gableman, have concluded that the amicus brief should not have been accepted because it does not address any issue in the underlying motion for reconsideration, and thus, the motion to accept the amicus should have been denied. See attached writing by Justice Annette Kingsland Ziegler.

¶5 The court is equally divided as to whether the relief requested by the amicus should be granted.

¶6 Justice Patience Drake Roggensack withdrew from participation.

¶7 SHIRLEY S. ABRAHAMSON, C.J., ANN WALSH BRADLEY, J., and N. PATRICK CROOKS, J. We disagree with Justice David T. Prosser, Justice Annette K. Ziegler, and Justice Michael J. Gableman that the motion to accept the amicus brief should now be denied.

¶8 We stand by the full court's decision on December 8, 2010, to accept the amicus brief urging the court to reconsider footnote 29 in ¶75 of the majority opinion in State v. Henley, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350. We should not now retroactively deny the amicus's motion to file a brief.

¶9 We would grant the relief requested by the amicus to revise footnote 29 in State v. Henley to clarify the Henley opinion.¹

I

¶10 Yasmine Clark filed a motion on November 23, 2010, asking the court to accept an amicus brief in support of Henley's timely filed motion to reconsider the Henley opinion. Yasmine Clark, a minor who is asserting lead poisoning claims against a former manufacturer, asserts that footnote 29 in the Henley criminal case is affecting her pending civil lead paint case.

¶11 With all justices participating, the court granted Ms. Clark's motion on December 8, 2010. After the motion was granted and the amicus brief was filed, Justice Roggensack

¹ "A motion for reconsideration may result in the court's issuing a corrective or explanatory memorandum to its opinion without changing the original mandate." Supreme Court Internal Operating Procedures II.J.

withdrew from participation in deciding Ms. Clark's grounds for reconsideration of the Henley opinion.

¶12 At the time of granting the amicus's motion to file a brief, the court was fully aware that the amicus was seeking revision of footnote 29 and the reasons for the request, that the amicus was not a party, and that the time for filing a motion for reconsideration had elapsed. No party to the Henley case objected to the amicus's request.

II

¶13 The duty of this court is to clarify the law, not to create more confusion. Here's an opportunity to help create clarity when we unintentionally may have caused confusion. Instead of taking this opportunity the court rejects it, possibly creating more confusion and providing the opportunity for continued conjecture by litigants and other courts.

¶14 The amicus calls our attention to footnote 29, ¶75 of the Henley opinion, which states as follows:

Finally, we note that this court's unwarranted expansion of its own powers through Article I, Section 9 has recently been checked. In Gibson v. Am. Cyanamid Co., the Eastern District of Wisconsin held that this court's holding Thomas v. Mallett, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, which created a new remedy under Article I, Section 9, was arbitrary and irrational and violated the Fourteenth Amendment. Gibson, 2010 U.S. Dist. LEXIS 59378, slip op., *16-18 (E.D. Wis. June 15, 2010). Despite the dissent's broad description of our inherent authority, we simply do not have the authority to craft any remedy we want.

¶15 In its motion for leave to file an amicus brief, the amicus asks the court's revision of this footnote for the following reasons, which were amplified in the brief filed:

1. Nothing in Henley, a criminal case, implicates the Thomas case or lead paint poisoning or the risk contribution doctrine.
2. The footnote is pure dicta, that is, totally unnecessary to determine any issue in the Henley case.
3. Lead pigment manufacturers have relied on the footnote to imply that a majority of the court disfavors the risk contribution doctrine upon which Ms. Clark relies, notwithstanding that it has been a feature of Wisconsin law since 1984.²
4. Lead pigment manufacturers have drawn the implication that the justices joining the Henley majority opinion would overturn the Thomas decision.³
5. Reading the Henley footnote as overturning the Thomas decision is unreasonable inasmuch as Justice Roggensack recused herself from Thomas and she would not join a footnote that overturned the Thomas decision.
6. The Gibson decision, a federal district court decision, is not binding on this court on a federal constitutional question.⁴

² In a court filing, one manufacturer recited the holding of the federal district court and citing the Henley footnote stated: "The Wisconsin Supreme Court then noted the federal court's decision approvingly."

³ In a court filing, another manufacturer, citing the Henley footnote, stated: "This State's Supreme Court recently acknowledged that the district court's holding in Gibson, albeit a Federal Court decision, has 'checked' the 'unwarranted expansion of its own powers through Article I, Section 9.'"

¶16 We three were in the majority in the Thomas case. We three were in dissent in Henley. Obviously we would have written in dissent in Henley about footnote 29 had we thought the majority was overturning the holding of Thomas, commenting or casting doubt in a substantive manner on the holding of Thomas, or casting doubt on the risk contribution doctrine. We do not read footnote 29 as endangering the ruling of the Thomas lead paint case. Nevertheless, because the amicus motion (which was granted by the full court on December 8, 2010) and the amicus brief (which was filed on December 17, 2010) have demonstrated that this footnote can be misused, we would now

⁴ Elections Bd. Of State of Wis. v. Wis. Mfrs. & Commerce, 227 Wis. 2d 650, 670 n.19, 597 N.W.2d 721 (1999) ("On federal questions, this court is bound only by the decisions of the United States Supreme Court."); State v. Harris, 199 Wis. 2d 227, 245 n.10, 544 N.W.2d 545 (1996) ("[A]lthough they may at times be informative, we are in no way bound by decisions of the federal circuit courts even if they are on all fours with the case before us."); Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 307, 340 N.W.2d 704 (1983) (quoting with approval United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970): "[B]ecause lower federal courts [in contrast to the United States Supreme Court] exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.").

The Gibson decision has been appealed to the United States Court of Appeals for the Seventh Circuit. Gibson v. Am. Cyanamid Co., 750 F. Supp. 2d 998 (E.D. Wis. 2010).

In contrast to the Gibson decision, on April 5, 2011, Judge Lynn Adelman, a United States district court judge in the Eastern District of Wisconsin, ruled that allowing the plaintiffs in four lead paint suits to proceed against defendant manufacturers does not violate the constitutional rights of the defendants. See Burton v. Am. Cyanamid Co. (Case No. 07-C-0303), Owens v. Am. Cyanamid Co. (Case No. 07-C-0441); Stokes v. Am. Cyanamid Co. (Case No. 07-C-0865); Sifuentes v. Am. Cyanamid Co. (Case No. 10-C-0075).

delete the footnote or explain that this footnote does not overturn the rule of law set forth in the Thomas case.

¶17 For the reasons set forth, we would not now retroactively deny the amicus motion for relief, and we would now delete or modify footnote 29 as the amicus requests.

¶18 ANNETTE KINGSLAND ZIEGLER, J. Dimitri Henley (Henley), a party to State v. Henley, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350, filed with this court a motion for reconsideration of our July 21, 2010, decision. Henley's motion for reconsideration has been denied. Yasmine Clark (Clark), a non-party, filed an amicus curiae brief in support of Henley's motion for reconsideration. Justice Prosser, Justice Gableman, and I conclude that this court should not have granted Clark's motion to accept her amicus curiae brief.

¶19 Clark is not a party to Henley. Instead, Clark is the plaintiff in a pending civil case before the Milwaukee County Circuit Court, Clark v. 3738 Galena LLC, No. 2006CV12653, in which she claims that several former manufacturers of white lead carbonate pigments are liable for her lead poisoning under a theory of risk-contribution. Clark herself acknowledges that "[t]he issues before the Court in Henley are totally unrelated to the Clark case or any other lead poisoning case proceeding on the basis of the risk contribution doctrine." Nevertheless, Clark seeks to use Henley's reconsideration motion as a forum for this court to amend a footnote in Henley, an unrelated, criminal matter, and thereby presumably impact Clark's pending case. Moreover, Clark seeks relief from this court without us having the benefit of hearing from the opposing side or any competing point of view. It is unprecedented for this court to unilaterally amend a decision as requested by a non-party who seeks relief in an unrelated, pending case, particularly when we have not heard from both sides on the issue. Accordingly, we

respectfully decline to address the issue raised by Clark's amicus curiae brief.

¶20 For the foregoing reason, I respectfully submit this writing.

¶21 I am authorized to state that Justices DAVID T. PROSSER and MICHAEL J. GABLEMAN join this writing.

