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You are hereby notified that the Court has entered the following opinion and order:

2014AP775 Yasmine Clark, a Minor by her Guardian ad Litem, Susan M. Gramling v. American Cyanamid Company, et al. (L.C. #2006CV12653)

Before Kessler and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

This appeal is taken from a non-final order of the trial court that granted partial summary judgment in favor of the Plaintiff-Respondent and denied the Defendants-Appellants' motion for

summary judgment. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily dismiss the appeal and remand to the trial court for further proceedings.

This lead paint case has a complicated procedural history, as detailed below. Several procedural facts are crucial to this order. First, on August 21, 2014, this court granted the petition for leave to appeal that was filed by the Defendants-Appellants (i.e., numerous manufacturers and sellers of white lead carbonate). Next, on September 29, 2015, this court certified the appeal to the Wisconsin Supreme Court, which accepted jurisdiction over the appeal. Six members of the supreme court subsequently heard oral argument and considered the parties' briefs.[2] On April 15, 2016, the supreme court vacated its order granting certification and remanded the case to the court of appeals. *See* ***Clark ex rel. Gramling v. American Cyanamid Co.***, 2016 WI 24, ¶3, 367 Wis. 2d 540, 877 N.W.2d 117 (per curiam). The supreme court explained that it was "equally divided on whether to affirm or reverse the decision of the circuit court for Milwaukee County" and, therefore, justice would be better served by remanding the case to this court for consideration. *See* ***id.***, ¶¶1-2.

We have considered the briefs the parties filed in the court of appeals and the supreme court, as well as post-remand briefs filed at the Defendants-Appellants' request. After further consideration, we conclude that the petition for leave to appeal was improvidently granted. Therefore, we summarily dismiss the appeal and remand to the trial court for further

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

[2] Justice Rebecca G. Bradley did not participate in the proceedings in the supreme court.

proceedings. Because the parties have expended a great deal of time and effort in presenting this case, both in this court and at the supreme court, we will briefly explain our decision. *See* ***State v. Castillo***, 213 Wis. 2d 488, 489-90, 570 N.W.2d 44 (1997).

Additional background

The procedural background is important to our decision. Our September 29, 2015 certification provides a helpful recitation of the procedural facts:

> According to the complaint, [Yasmine] 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.
>
> ….
>
> 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…. 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 [d]efendants 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*** [***v. Mallett***, 2005 WI 129, ¶¶149, 161-63], 285 Wis. 2d 236, [701 N.W.2d 523]. ***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.

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) [***Gibson III***].

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.

Nearly two years later, a decision in [the appeal of] ***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 *retroactive* in nature. The amendments were published on July 1, 2013; they became law the next day. *See* 2013 Wis. Act. 20, § 2318G.

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;
>
> 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."

Clark ex rel. Gramling v. American Cyanamid Co., No. 2014AP775, unpublished slip order at 2-10 (WI App Sept. 29, 2015) (footnotes omitted).

On April 8, 2014, the Defendants-Appellants filed a petition for leave to appeal with this court, seeking review of the trial court's order declaring that WIS. STAT. § 895.046 is unconstitutional. The petition noted that "Clark's case is one of at least 171 currently pending claims seeking to proceed under the ***Thomas*** rule" and asserted that if the Defendants-Appellants were to succeed on appeal, "Clark's case would be dismissed under § 895.046 and the other, similar cases are also highly likely to fail." (Bolding added.)

On April 23, 2014, Clark filed a response in which she "agree[d] that the constitutionality of [WIS. STAT.] § 895.046 … as amended, is a proper subject of a permissive appeal because such an appellate determination will clarify an issue of general importance in the administration of justice" because the statute "seeks to retroactively abrogate the currently pending causes of action of 171 children in 8 lawsuits which were filed after the Wisconsin Supreme Court … applied Wisconsin's risk contribution doctrine to childhood lead poisoning cases." Clark said that if the petition is granted, this court should consider all three of her constitutional challenges to the statute.

On July 24, 2014, while the petition for leave to appeal was still pending, the United States Court of Appeals for the Seventh Circuit released its decision reversing ***Gibson II***, over

three years after the District Court decision was released. *See* ***Gibson v. American Cyanamid Co.***, 760 F.3d 600, 627 (***Gibson III***) (holding that the "decision in ***Thomas***, establishing the risk-contribution theory of liability for lead pigment claims, does not violate the Due Process, Takings, or interstate-commerce Clauses of the Constitution") (bolding added).[3]

In the course of deciding ***Gibson III***, the Seventh Circuit determined that it had "no choice but to address the challenge under the Wisconsin Constitution to the state legislature's attempt [through WIS. STAT. § 895.046] to extinguish risk-contribution theory in already-pending cases," because of the federal court's "general duty to avoid *federal* constitutional issues if the matter can be resolved on other grounds—including *state* constitutional grounds." ***Gibson III***, 760 F.3d at 608. Applying Wisconsin Supreme Court precedent, the Seventh Circuit concluded that "the state constitution's due-process guarantee prohibits retroactive application of [§] 895.046." ***Gibson III***, 760 F.3d at 610.

One month after ***Gibson III*** was decided, this court granted the petition for leave to appeal, concluding "the criteria for interlocutory review are satisfied." *See* ***Clark ex rel. Gramling v. American Cyanamid Co.***, No. 2014AP775, unpublished slip order at 2 (WI App Aug. 21, 2014).

Subsequently, in her February 2015 appellate brief, Clark urged this court to dismiss the appeal on grounds that the petition for leave to appeal had been improvidently granted in light of the Seventh Circuit's decision in ***Gibson III***. Clark recognized that ***Gibson III*** was not binding

[3] The United States Supreme Court denied the defendants' petition for *certiorari* on May 18, 2015. *See* ***American Cyanamid Co. v. Gibson***, 135 S.Ct. 2311 (2015).

on Wisconsin courts, but she noted: "Of the 173 lead poisoning plaintiffs pursuing risk contribution claims in Wisconsin, 171 of the plaintiffs have their claims pending in federal court, therefore, the Seventh Circuit's opinion in ***Gibson*** [***III***] is binding authority in all of those cases." (Bolding added.) Clark concluded: "Therefore, a decision by this [c]ourt will only be binding precedent for the two lead poisoning cases pending in Wisconsin's state courts."

Clark also argued that the delay in proceeding to trial was harmful to her, noting her case had been pending for more than eight years. Clark concluded:

> Given the extraordinary delay in getting her case to trial, and the recent intervening event of the Seventh Circuit issuing its published opinion in [***Gibson III***] on the precise legal issue in this appeal, [Clark] respectfully requests that this Court consider whether leave to file this permissive appeal was, in hindsight, improvidently granted. This is because in light of the publication of the ***Gibson*** [***III***] decision, this permissive appeal no longer implicates with the same force any of the factors identified in [WIS. STAT. §] 809.50(1)(c)…. As such, justice would be best served by dismissing this permissive appeal and allowing [Clark's] case to finally go to trial. In the event Clark prevails at trial, the Defendants-Appellants will not be prejudiced because they will be able to pursue an appeal as a matter of right.

(Bolding added.) In their reply brief, the Defendants-Appellants did not respond to Clark's argument that this court should dismiss the appeal as improvidently granted.

Discussion

Petitions for leave to appeal are governed by WIS. STAT. § 808.03(2), which states:

> APPEALS BY PERMISSION. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:
>
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
>
> (b) Protect the petitioner from substantial or irreparable injury; or

> (c) Clarify an issue of general importance in the administration of justice.

In addition, the party seeking leave to appeal "must also show a substantial likelihood of success on the merits." ***State v. Webb***, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

Having now reviewed the numerous briefs filed in this case, as well as the ***Gibson III*** decision, this court concludes that the criteria for permissive appeal were not satisfied and, therefore, we conclude that the petition for leave to appeal was improvidently granted.

Upon consideration after remand from the supreme court, we are not convinced that review of the trial court's ruling will "[m]aterially advance the termination of the litigation." *See* WIS. STAT. § 808.03(2)(a). The trial court concluded that WIS. STAT. § 895.046 was unconstitutional on a single basis. If we were to reverse that ruling, the issue of whether the statute is unconstitutional on the other two bases offered by Clark would still not be resolved. The parties offered only minimal briefing to this court and the supreme court on those constitutional arguments, and this court does not have the benefit of the trial court's analysis because the trial court did not address the merits of those two constitutional challenges to the statute.

Moreover, the fact that the vast majority of claimants attempting to apply ***Thomas*** to their lead paint cases brought their cases in federal court and are subject to the ruling in ***Gibson III*** reduces the likelihood that a decision by this court will "[c]larify an issue of general importance in the administration of justice." *See* WIS. STAT. § 808.03(2)(c). In addition, given the ***Gibson III*** ruling, as well as the subsequent split vote in our own supreme court after oral argument in this case, it is not at all clear that the Defendants-Appellants can demonstrate "a substantial likelihood of success on the merits." *See* ***Webb***, 160 Wis. 2d at 632.

Finally, this court is cognizant of the fact that the trial has been delayed for years in this case. The trial was scheduled for May 2, 2011, before being stayed on January 2011 pending the appeal of ***Gibson II***. Over five years have passed. Additional months or years of delay will make trying the case all the more difficult.

For the foregoing reasons, we conclude that the criteria for permissive appeal were not satisfied and, therefore, we conclude that the petition for leave to appeal was improvidently granted. We therefore summarily dismiss the appeal and remand to the trial court for further proceedings.

IT IS ORDERED that the appeal is summarily dismissed pursuant to WIS. STAT. RULE 809.21 and the cause remanded to the trial court for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals