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NO. A07-0889

State of Minnesota
In Court of Appeals

U.S. Home Corporation, d/b/a Lundgren Brothers,
Appellant,

v.

Zimmerman Stucco & Plaster, Inc.,
Respondent.

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

Both parties agree that the 2007 amendment to Minn. Stat. § 541.051 applies retroactively and that this case was pending when that amendment took effect. However, the parties debate the extent of the amendment's retroactive reach. Because the legislature did not expressly limit the retroactivity of the amendment to cases commenced after its retroactive date, precedent requires that the amendment applies to cases pending as of that date as well.

Even if the amendment does not apply, the old version of section 541.051 (2004) violated constitutional equal protection guarantees. Both parties agree that they could each be held liable for the underlying construction defects that prompted Lundgren's contribution and indemnity claims against Zimmerman Stucco. Contrary to Zimmerman's focus on whether Lundgren had time to sue – a due process issue – equal protection analysis must concentrate on whether the parties, who were similarly situated in terms of liability for the defects, faced the same exposure to liability. They did not, and section 541.051 (2004) violated equal protection.

I. APPELLATE COURTS APPLY THE NEW VERSION OF A STATUTE WHEN THAT STATUTE IS AMENDED, APPLIES RETROACTIVELY, AND TAKES EFFECT WHILE THE CASE IS PENDING APPEAL.

Zimmerman Stucco argues that because Lundgren commenced this lawsuit before the retroactive effective date of the 2007 amendment to Minn. Stat. § 541.051, the old version of that statute applies. (Resp't Br. 5, 7.) But appellate courts apply the new version of a law – not the law in effect when a lawsuit began – when that law is amended,

applies retroactively, and takes effect while the case is pending appeal. Therefore, the 2007 amendment applies to this case, as it was pending appeal when the amendment took effect.

The 2007 amendment expressly provides that it is "effective retroactively from June 30, 2006." 2007 Minn. Laws ch. 105, § 4. This case was pending before the district court on that retroactive date, and this appeal was pending when the law was signed by the governor and adopted on May 21, 2007. *Id.* As Lundgren noted in its brief, *Holen v. Minneapolis-St. Paul Metropolitan Airports Commission*, controls this issue.

> When the legislature changes the law while a case is pending, but prior to rendition of judgment, the court may not perpetuate the old law but must apply the new.... Since a court has no power to perpetuate a rule of law which the legislature has either changed or repealed, it follows that amendatory or curative legislation, though enacted after the rendition of a judgment and pending the appeal, must govern the final disposition of the case upon appeal.

250 Minn. 130, 136-37, 84 N.W.2d 282, 287 (1957). "The general rule is that appellate courts apply the law as it exists at the time they rule on a case, even if the law has changed since a lower court ruled on the case." *Interstate Power Co. v. Nobles Co. Bd.*, 617 N.W.2d 566, 575-76 (Minn. 2000) (citing *Holen*). "[W]here a statute which is clearly intended to be retroactive and to apply to pending litigation is enacted after judgment and pending appeal, the Appellate Court may dispose of the case in accordance with the law as changed by the statute." *Donaldson v. Chase Sec. Corp.*, 216 Minn. 269, 277, 13 N.W.2d 1, 5 (1943) (quotation omitted), *aff'd*, 325 U.S. 304, 65 S.Ct. 1137 (1945). These principles apply equally to statutes of limitations and repose – the

legislature can retroactively modify any time limitation to a cause of action. *See Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591-92 (Minn. App. 1994) (concluding that while a party may obtain a vested right not to be sued after the statute of repose runs, a claim can be "revived" by retroactive legislation and the legislature can "constitutionally modify time limitations and thereby divest a party of previously obtained rights"); *Ind. Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F.Supp. 286, 298 (D.Minn. 1990) (upholding, in the face of a due process challenge, a retroactive law that revived a claim that was barred under the section 541.051 repose period); *see also Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 842 (Minn. App. 2007) (noting that in terms of retroactive legislation, it is "immaterial" whether a law alters procedural or substantive rights) (quotation omitted).

While this appeal was pending, the legislature amended section 541.051 "effective retroactively from June 30, 2006." 2007 Minn. Laws ch. 105, § 4. According to precedent, the amended version of the statute now applies. Under the new law, Lundgren must sue Zimmerman Stucco for contribution and/or indemnity arising out of defective and unsafe improves to real property *or* based on breaches of statutory warranty within two years of the earlier of (1) being sued by a homeowner or (2) paying a judgment, settlement, or arbitration award. *Id.* The homeowner sued Lundgren on May 4, 2004, and Lundgren sued Zimmerman for contribution and indemnity on May 3, 2006.[1] Lundgren's claims for contribution and indemnity are therefore timely under the newly enacted section 541.051.

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[1] Lundgren settled the homeowner's claims on April 7, 2005, after the homeowner sued.

Zimmerman Stucco next argues that "effective retroactively from June 30, 2006" means that the amended statute applies only to claims commenced on or after June 30th. (Resp't. Br. 6.) But a plain reading of this language does not support Zimmerman's conclusion. If the legislature wanted to limit the amendment's retroactive application to only claims brought on or after June 30, 2006, it would have provided that in the amendment. The language employed by the legislature permits no logical inference that it intended the amendment to exclude any case brought before June 30, 2006. The plain language supports only one interpretation: the amended statute became the applicable law to all pending and yet-to-be-commenced cases that existed on June 30, 2006.

Zimmerman Stucco cites *K.E. v. Hoffman*, 452 N.W.2d 509 (Minn. App. 1990), *review denied* (Minn. May 7, 1990), to support its assertion that "[i]f the legislature intended for the amendment to apply to 'all claims pending' it would have simply included such language." (Resp't Br. 6.) Zimmerman misreads *Hoffman*. *Hoffman* merely notes that "language applying a statute to 'all cases pending' and establishing an immediate effective date overcomes the presumption against retroactive application." *Id.* at 512. The legislature does not need to use the phrase "all cases pending" to make a law applicable retroactively to pending cases; instead, retroactive laws are presumed to apply to pending cases. This presumption is reinforced by *Gomon v. Northland Family Physicians, Ltd.* In *Gomon*, the Minnesota Supreme Court held that the legislature did not need to include specific language to revive a time-barred claim "over and above a clear and manifest expression of its intent that a statute apply retroactively." 645 N.W.2d 413, 418 (Minn. 2002). The Court rejected the argument that even when a law applies

retroactively, the legislature must provide additional language that it is also reviving time-barred claims. *Id.* at 417-18. Therefore, a law intended to apply retroactively also applies to pending cases unless the legislature includes clear language that limits the law's retroactive reach. Here, the legislature simply made the amendment to section 541.051 effective retroactively to June 30, 2006. Because the legislature did not specifically limit the retroactive reach of the amendment, it applies to any case pending on that date.

At best for Zimmerman Stucco, the enacting language is ambiguous, and courts turn then to legislative history for guidance. *See, e.g., Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). But the legislative history supports Lundgren's argument that the amended statute applies to this case. The amendment to section 541.051 overturns the Minnesota Supreme Court's holding in *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634 (Minn. 2006), and gives builders "two years from the time they are sued in which they can sue whoever is supposed to indemnify them." House Floor Debate on S.F. 241 (May 16, 2007) (statement of Rep. Mullery). In the floor debate on a second bill that contained the same amendment as Senate File 241 and was also enacted into law, the author of the amendment reiterated the intent of the law: "Members, this is the same one that we passed earlier with regard to trying to overrule that court case which really screwed up the law for contractors whereby they were not allowed to sue their indemnifiers or the subcontractors." House Floor Debate on H.F. 1208 (May 16, 2007)

(statement of Rep. Mullery). *See also* 2007 Minn. Laws ch. 140, art. 8, § 29.[2] By making the amendment retroactive to June 30, 2006, the legislature intended to ensure that the result in *Weston* – barring contribution and indemnity actions that arise from defective construction under subdivision 1 and that accrue more than ten years after substantial completion of construction – would apply only to that case.

Zimmerman Stucco's last argument appears to be that even if the amended statute applies to this case, Lundgren's claim would not be "revived" by the statute because the two-year period to sue under the amended statute had expired before its effective date. (Resp't Br. 7-8.) This argument makes little sense because Lundgren did, in fact, sue Zimmerman Stucco within the two-year statute of limitations provided by the amended statute. And Zimmerman incorrectly focuses on the statute-of-limitations prong of the amendment. The legislature revived Lundgren's claims against Zimmerman Stucco by removing the repose barrier imposed by *Weston*, not by anything it did to the amendment's two-year limitations period.

The goal of statutory construction is to give effect to the legislature's intent. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). Only one interpretation of the effective date of the 2007 amendment logically comports with its

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[2] These two laws provide identical changes to section 541.051, although chapter 140 uses slightly different enacting language: "This section is effective retroactive to June 30, 2006." 2007 Minn. Laws ch. 140, art. 8, § 29. Switching "from" to "to" has no substantive affect on the applicability of the amendment. The legislature put the same language in two bills "just to make sure that it gets through because of that really bad court decision." House Floor Debate on H.F. 1208 (May 16, 2007) (statement of Rep. Mullery). These statements on H.F. 1208 can be heard around the 22:00 mark of the archived video at http://www.house.leg.state.mn.us/htv/ls85/hfsD051607.asx.

language, the legislative history, and case law: the amendment applies to any case that existed on or after June 30, 2006, and in which final judgment had not been entered. By providing that the amendment was "effective retroactively from June 30, 2006," the legislature ensured that the result in *Weston* applied only to *Weston*. Accordingly, because final judgment has not been entered in this case, the Court should conclude that the amended version of Minn. Stat. § 541.051 applies, reverse the district court because Lundgren's claims are timely under the new version of the statute, and remand for trial.

II. *CALDER* DID NOT CLOSE THE DOOR TO ALL FUTURE EQUAL PROTECTION CHALLENGES TO MINN. STAT. § 541.051 (2004).

In the event that the Court reaches the constitutional issues addressed in Lundgren's brief, Zimmerman Stucco argues that *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982), settled all equal protection challenges to Minn. Stat. § 541.051. Specifically, Zimmerman quotes *Calder*'s statement that "[w]e believe that our legislature did close the door to objection to the statute on equal protection grounds." (Resp't Br. 15.)

Calder is inapposite to this current matter's equal protection issue. *Calder* held that the legislature's 1980 amendment, which added owners and material suppliers to Minn. Stat. § 541.051, subd. 1, cured any equal protection violation. 318 N.W.2d at 843. The Supreme Court in *Calder* rejected the appellant's argument that additional third parties needed to be included under section 541.051. *See id.* (noting that "construction workers" and "manufacturer[s] of component parts," parties the appellant argued were

improperly excluded from the statute, were clearly included). Here, however, the issue was not that section 541.051 was underinclusive by excluding entire categories of liable parties. Instead, some parties included in section 541.051 were sometimes excluded for reasons not rationally related to the statute's purpose. This distinction violated equal protection and is not foreclosed by *Calder*. The statute should be found unconstitutional.

Importantly, *Calder* interpreted a significantly different version of section 541.051. The 1980 version of the statute provided no definition of "accrual." *See id.* at 840 (quoting Minn. Stat. § 541.051 (1980)). Its limitations applied equally to underlying and third-party actions, and all parties benefited from the two-year extension when a cause of action "accrued" during the last two years of the repose period. *Id.* (quoting Minn. Stat. § 541.051, subd. 2 (1980)). In other words, all contractors faced equal lengths of exposure to liability under the 1980 version of the statute, either through a direct lawsuit by a homeowner or a third-party lawsuit by a co-contractor. As the holding in *Weston* shows, however, post-*Calder* changes to section 541.051 meant that contractors faced varying lengths of exposure to liability, as discussed in greater detail below. Ironically, the 2007 amendment to section 541.051 has the same effect as the 1980 version and eliminates the varying lengths of exposure to liability that exists between equally liable contractors like Lundgren and Zimmerman Stucco.

Lastly, Zimmerman Stucco's reliance on *Calder* – aside from the "close the door" quote – rests on that opinion's retroactivity and due process holdings. Zimmerman quotes *Calder*'s statement that the defendant had 14 months to sue the third-party defendant, which appear in its *retroactivity* analysis. (Resp't. Br. 11 (quoting *Calder*,

318 N.W.2d at 842).) *Calder*'s reliance on that fact also appeared in its due process analysis. 318 N.W.2d at 844. Its equal protection analysis, however, was based solely on the individuals covered by section 541.051. *Id.* at 842-43.

III. EQUAL PROTECTION ANALYSIS FOCUSES ON LUNDGREN AND ZIMMERMAN STUCCO'S EXPOSURE UNDER MINN. STAT. § 541.051, SUBD. 1 (2004), TO LIABILITY FOR CONSTRUCTION DEFECTS, NOT ON WHETHER LUNDGREN HAD TIME TO JOIN ZIMMERMAN IN AN UNDERLYING SUIT ARISING FROM THOSE DEFECTS.

In arguing that Minn. Stat. § 541.051 (2004) did not violate equal protection, Zimmerman Stucco repeatedly states that Lundgren had a chance to sue Zimmerman for contribution and indemnity before the expiration of the statue's ten-year repose period. (Resp't Br. 3, 4, 10-12, 16-17.) That argument addresses due process issues, which Lundgren does not raise, and is not the focal point of the equal protection analysis necessary to this dispute: whether similarly situated co-contractors were treated differently for reasons unrelated to the old statute. Instead, the co-contractors were treated differently because section 541.051 (2004) imposed different lengths of time that each would be liable for the same construction defects. It is the exposure to liability – not the exposure to a lawsuit – that drives the equal protection violation.

Under the common law and section 541.051 (2004), causes of action for contribution and indemnity accrue when a party incurs liability for another's action by paying a settlement or award. Minn. Stat. § 541.051, subd. 1(b) (2004); *Grothe v. Shaffer*, 305 Minn. 17, 23-24, 232 N.W.2d 227, 232 (1975). Therefore, when a homeowner sues a contractor and the contractor brings third-party claims for contribution and indemnity against another contractor, these claims have not technically accrued

because no liability has been incurred. *See Weston*, 716 N.W.2d at 640 n.2. The lack of accrual has no impact in a nonconstruction-defect case because section 541.051 and its ten-year repose period do not apply.

But a different situation arises in construction-defect cases because *Weston* held that the ten-year repose period applies to contribution and indemnity actions arising out of subdivision 1. Section 541.051 "does not permit such accrual to be deemed by law to have occurred at some point prior to payment." 716 N.W.2d at 639. After *Weston*, a contribution or indemnity action arising out of subdivision 1 and brought in a construction-defect case was barred if it "ha[d] not accrued (i.e. where the principal claim has not been paid) and ha[d] not been brought within the 10 years from the completion of construction," even though a homeowner had up to 12 years to sue. *Id.* at 640. This holding points to the equal protection violation: equally liable co-contractors face different lengths of exposure to liability for the same construction defects.

In a footnote, *Weston* notes that the Rules of Civil Procedure "permit the joinder of third-party claims for contribution and indemnity at the time the third-party plaintiff is initially sued even though the third-party plaintiff's claims had not matured." *Id.* at n.2. Zimmerman Stucco argues that an equal protection violation does not exist because had Lundgren followed this advice, it could have timely pursued its contribution and indemnity claims. (Resp't Br. 16-17.) This is unpersuasive for two reasons. First, this "ability to sue" is a due process concern – not an equal protection issue – and *Weston* did not involve any equal protection challenge to section 541.051. 716 N.W.2d at 644. Second, the statute of repose controls over a rule of civil procedure, meaning that

Lundgren could not rely on joinder before the ten-year repose period expired, as *Weston* suggests, to overcome *Weston*'s holding that a contribution and indemnity action is barred if it accrues (i.e. is paid) more than ten years after substantial completion of construction. *See id.* at 641 (noting that the statute of repose is substantive); *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 471 (Minn. App. 2006) (stating that a rule of civil procedure that conflicts with a substantive statute does not prevail over the statute).

Despite *Weston*'s dicta, joinder of Zimmerman Stucco is not the focal point of an equal protection inquiry. Instead, equal protection hinges on Lundgren's exposure to liability for construction defects compared to the exposure faced by its co-contractors. Under Minn. Stat. § 541.051 (2004) and *Weston*, Lundgren's contribution and indemnity claims only survived if they accrued within ten years of substantial completion. Importantly, accrual was defined as paying a settlement or an award, *not* as being sued by the homeowner. Therefore, co-contractors like Zimmerman Stucco that were not sued by the homeowner but could be held liable for construction defects faced exposure to liability for only ten years. *See Weston*, 716 N.W.2d at 640. Lundgren, as the party sued by the homeowner, faced exposure to liability for up to 12 years. Minn. Stat. § 541.051, subd. 2 (2004) (allowing homeowners up to 12 years to sue). In general then, the contractor that a homeowner chose to sue was liable for construction defects for up to 12 years, but an equally liable co-contractor not sued by the homeowner was liable only for ten years (and only then if the sued contractor paid the homeowner within those ten years).

This distinction shows the flaw in Zimmerman Stucco's argument that the statute was constitutional under an equal protection analysis. Zimmerman contends that there was no disparate treatment between contractors because "all have the same exposure to suit" and were "equally subject to a lawsuit arising out of the improvement to real property." (Resp't Br. 15, 16.) But exposure to *liability*, not "exposure to suit," is the determinative factor for equal protection purposes. Contractors shared the same exposure to a lawsuit but had different lengths of liability, even though they were equally liable.[3] This unequal treatment stems from the accrual definition provided by Minn. Stat. § 541.051, subd. 1(b) (2004), as applied by *Weston*. And it has no rational relation to section 541.051's purpose of limiting stale claims.

IV. LUNDGREN CAN MAINTAIN ITS CONTRIBUTION AND INDEMNITY ACTIONS AGAINST ZIMMERMAN STUCCO THAT ARE BASED ON AN UNDERLYING ACTION FOR BREACH OF STATUTORY WARRANTY UNDER SUBDIVISION 4 BECAUSE ZIMMERMAN HAS COMMON LIABILITY FOR THE BREACH. IN ANY EVENT, IF THE 2007 AMENDMENT DOES NOT APPLY, THE APPLICABLE 2002 VERSION HAS NO REPOSE PERIOD.

Zimmerman Stucco argues that subdivision 1 applies to Lundgren's contribution and indemnity claims based on breach of statutory warranty. (Resp't Br. 17.) It also

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[3] The 2007 amendment to section 541.051 remedies this equal protection violation by redefining accrual and eliminating the repose period applicable to contribution claims under subdivision 1. A cause of action for contribution and indemnity under subdivision 1 now accrues "upon the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition." 2007 Minn. Laws ch. 105, § 4. Again, Lundgren's contribution and indemnity claims against Zimmerman Stucco are timely under the 2007 amendment.

claims that "all subdivision 4 does is apply the 541.051 limitation and repose periods" to statutory-warranty claims, evidenced in part by the heading of the subdivision. (Resp't Br. 17-18.) But nothing in the language of subdivision 1 applied its limitations and repose periods to subdivision 4. *See* Minn. Stat. § 541.051, subds. 1 and 2 (2004). The reverse was also true: subdivision 4 made no reference to subdivision 1. *Id.*, subd. 4. In fact, subdivision 4 provided its own limitations period, which indicated that the legislature intended the two subdivisions to operate independently. Furthermore, Minnesota courts have refused to incorporate one subdivision of section 541.051 into other subdivisions. *See Olmanson v. LeSueur County*, 693 N.W.2d 876, 884 (Minn. 2005); *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 359 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). And the heading to subdivision 4 had no bearing on its applicability because it is not part of the statute. Minn. Stat. 645.49 (2006) ("The headnotes printed in boldface type before sections and subdivisions ... are not part of the statute."). Zimmerman's argument ignores the plain language of subdivision 1 and 4 and precedent that refused to incorporate the statute's subdivisions into each other.

This Court's recent decision in *Sletto v. Wesley Construction, Inc*, 733 N.W.2d 838 (Minn. App. 2007), strengthens Lundgren's argument that no statute of repose applied to contribution and indemnity claims based on breach of warranty under subdivision 4. *Sletto* held that the 2002 version of subdivision 4 applied to an underlying breach-of-statutory-warranty claim that accrued before August 1, 2004, but was brought after August 1. *See id.* at 843-44 (holding that the 2004 version could not be applied retroactively). The 2002 version provided that section 541.051 "shall not apply to actions

based on breach of the statutory warranties ... provided such actions shall be brought within two years of the discovery of the breach." *Id.* at 842 (quoting Minn. Stat. § 541.051, subd. 4 (2002)).

In this case, the homeowner's underlying warranty claim was brought on May 4, 2004, and the 2002 version of subdivision 4 applies. The language of the 2002 version of section 541.051 exempts statutory-warranty claims from subdivision 1's repose period, and no repose period applies to warranty claims. *Koes*, 636 N.W.2d at 358-59. The only time limitation on pre-August 2004 statutory-warranty claims is that they must be brought within two years of discovery. *Id.* Therefore, because the ten-year repose period does not apply to the underlying statutory-warranty claims, *Sletto* and *Koes* support Lundgren's argument that its contribution and indemnity claims based on that breach cannot barred by the ten-year repose period.

Zimmerman Stucco also contends that Lundgren cannot maintain contribution and indemnity actions based on an underlying breach-of-statutory-warranty claim because Zimmerman is not a "vendor" under the warranty statutes. (Resp't Br. 18.) Even though this is true, Zimmerman can still be liable to Lundgren for contribution and/or indemnity based on a breach-of-warranty claim. The Minnesota Supreme Court's decision in *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872 (Minn. 1994) (*City of Willmar II*), directs this conclusion. In *City of Willmar II*, the plaintiff's claims against the defendants were either settled or dismissed on summary judgment. Only one claim remained – the defendant engineer's cross-claim for contribution and indemnity against Clow Corporation, the manufacturer. *Id.* at 874. Clow argued that "it should not be held

liable in contribution or indemnity for a breach of warranty claim when it cannot be held liable to the plaintiff for that very same breach of warranty." *Id.*

The Supreme Court rejected Clow's argument. It noted that contribution and indemnity are causes of action independent from those brought in the underlying lawsuit. *Id.* "[C]ontribution-indemnity is not based on contract or tort, although either may secondarily be involved, but on one party paying more than its fair share of a common liability. Common liability exists when both parties are liable to the plaintiff for the same damages, even though their liability may depend on different legal theories." *Id.* The Court further reasoned that the contribution and indemnity claims were not brought by the plaintiff but rather were brought by the defendant engineer, "which, by paying more than its fair share of a common liability shared with another, has sustained an injury different in kind from the plaintiff City's injury." *Id.* at 875.

Following *City of Willmar II*, if Zimmerman Stucco is even partially responsible for Lundgren's statutory-warranty breach, the parties share common liability for that breach. Lundgren incurred an injury when it settled the homeowner's breach-of-statutory-warranty claim and paid more than its share of the common liability. It then sued Zimmerman Stucco for contribution and indemnity based, in part, on the settlement of that claim. This injury was different in kind from the homeowner's statutory-warranty injury. Lundgren can therefore maintain its contribution and indemnity actions against Zimmerman Stucco based on the statutory-warranty breach, even though Zimmerman – like the third-party defendant in *City of Willmar II* – is not liable to the plaintiff for that breach.

CONCLUSION

The amended 2007 version of Minn. Stat. § 541.051 applies to this case. Under that amendment, Lundgren's claims for contribution and indemnity are not barred by the repose period applied by *Weston*. Lundgren's claims are timely under the new statute and are entitled to proceed against Zimmerman Stucco. If the amended statute does not apply, the arguments advanced by Zimmerman Stucco regarding the 2004 statute are not persuasive. *Calder* is inapposite. Zimmerman Stucco focuses its equal protection defense on contractors' exposure to a lawsuit when exposure to liability is the relevant factor. Finally, Lundgren can pursue contribution and indemnity claims against Zimmerman Stucco even though Zimmerman is not liable to a homeowner. The Court should reverse and remand this case for trial.

Dated: July 26, 2007

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CERTIFICATION OF BRIEF LENGTH

I certify that this reply conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a reply produced with a proportional font. This brief was prepared using Microsoft Word 2003 SP2. The length of the brief is 4,366 words.

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