

Nos. A09-1776 & A09-1778

State of Minnesota
In Court of Appeals

In re:

Individual 35W Bridge Litigation

**BRIEF OF APPELLANT
JACOBS ENGINEERING GROUP, INC.**

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Statement of Legal Issues

1. Is Jacobs entitled to dismissal of the third-party complaints against it on the ground that under the ten-year repose provision of MINN. STAT. § 541.051, it has no common liability with Defendant URS Corporation to the Plaintiffs?

Apposite Authorities

MINN. STAT. § 541.051

Spitzack v. Schumacher, 241 N.W.2d 641 (Minn. 1976)

Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979)

Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362 (Minn. 1977)

Estate of Ryan v. Heritage Trails Assocs., Inc., 745 N.W.2d 724 (Iowa 2008)

2. Is Jacobs entitled to dismissal of the third-party complaints against it because MINN. STAT. § 541.051 expressly extinguished any contribution and indemnity claims of Defendant URS Corporation prior to the amendment of the statute in 2007?

Apposite Authorities

MINN. STAT. § 541.051

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006)

Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988)

3. Where any contribution or indemnity claims were extinguished under MINN. STAT. § 541.051 long before the effective date of the 2007 amendments to the statute, as a matter of constitutional due process may they nonetheless be revived and asserted based on the 2007 amendments?

Apposite Authorities

MINN. STAT. § 541.051

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006)

Holen v. Minneapolis-St. Paul Metro. Airports Comm'n, 84 N.W.2d 282 (Minn. 1957)

Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957)

Camacho v. Todd & Leiser Homes, 706 N.W.2d 49 (Minn. 2005)

These issues were raised by Appellant Jacobs' Motion to Dismiss (*A.113*) and decided by the trial court in its Order dated August 28, 2009 (*Add.1*).

Statement of the Case

Plaintiffs in these cases commenced separate actions for damages arising out of the collapse on August 1, 2007, of the I-35W Bridge (“Bridge”) in Minneapolis. Plaintiffs sued Defendants URS Corporation (“URS”) and Progressive Contractors, Inc. (“PCI”) (collectively, “Defendants”). In partial response, Defendants commenced third-party contribution and indemnity actions against Jacobs Engineering Group Inc. (“Jacobs”) for design work performed in connection with the original construction of the Bridge in the 1960s by Sverdrup & Parcel and Associates, Inc. (“S&P”), which was acquired by Jacobs in 1999.

PCI was an active participant in the proceedings in the district court; but PCI has fully settled with Plaintiffs as well as the State of Minnesota (“State”), which had asserted its own claims against PCI and others. PCI has advised this Court that pursuant to its settlement, it will not be participating in this appeal. *A.260*. Although it is no longer a party to the appeal, it is referred to in this brief for the sake of completeness in describing the proceedings.

Defendants asserted claims against Jacobs for common law contribution and indemnity. After Jacobs filed a motion to dismiss in the four first-filed cases on the bases of the absence of common liability with Plaintiffs and its right to repose under MINN. STAT. § 541.051, PCI served and filed amended third-party complaints alleging a new theory of recovery: contractual indemnity based on a contention that PCI was a third-party beneficiary of the 1962 design services contract entered into between the State and S&P.

All the cases filed in Hennepin County relating to the Bridge collapse were assigned to Judge Deborah Hedlund. Jacobs originally served and filed a Rule 12 motion to dismiss all the claims against it on March 27, 2009. After PCI served its amended third-party complaints, Jacobs served and filed a renewed motion to dismiss on May 13, 2009. The motion was heard on June 12, 2009. Judge Hedlund denied Jacobs' motion to dismiss on August 28, 2009, and Jacobs filed its timely Notices of Appeal. (Two notices were filed because the trial court actions were partially consolidated into nine different categories; the motions to dismiss were filed in two of those categories, resulting in two separate notices of appeal.) The appeals were consolidated by Order of this Court dated October 1, 2009. *A.250*. On November 3, 2009, this Court entered its Order concluding that this Court does have jurisdiction over these appeals as a matter of right. *A.256*.

Statement of Facts

Because this appeal presents exclusively legal issues for consideration from the denial of a motion to dismiss, the facts are only relevant for background and for the dates applicable to the statute of repose issues presented.

Plaintiffs commenced 121 actions for damages arising out of the collapse on August 1, 2007, of the I-35W Bridge (“Bridge”) in Minneapolis. Plaintiffs sued Respondents URS Corporation (“URS”) and now-settled party Progressive Contractors, Inc. (“PCI”) (collectively, “Defendants”). *A.12.* In partial response, Defendants impleaded Jacobs Engineering Group Inc. (“Jacobs”) asserting contribution and indemnity claims for design work performed in connection with the original construction of the Bridge in the 1960s. *A.43, 64.* Design services were furnished to the State of Minnesota, as owner of the Bridge, by an engineering firm known as Sverdrup & Parcel and Associates, Inc. (“S&P”). *Add.2.* Jacobs acquired S&P in 1999. *Add.2.* S&P’s work on the Bridge ended on or before the substantial completion of the Bridge in 1967. *Add.2.*

The only other relevant facts relate to the effective date of the legislation at issue. Minnesota’s statute of repose for improvements to real property dates back to 1965, when MINN. STAT. § 541.051 was adopted. It has frequently been amended in ways not material to this appeal. In 2007, the Minnesota Legislature amended MINN. STAT. § 541.051 with respect to contribution and indemnity claims, and the scope and impact of these amendments is at issue here. After the enactment of the 2007 amendments, § 541.051 provides as follows with respect to the contribution and indemnity claims pertinent to this

appeal, with additions made by those amendments shown by underscoring, and deletions by strikeovers:

541.051 LIMITATION OF ACTION FOR DAMAGES BASED ON SERVICES OR CONSTRUCTION TO IMPROVE REAL PROPERTY.

Subdivision 1. **Limitation; service or construction of real property; improvements.** (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, ~~nor any action for contribution or indemnity for damages sustained on account of the injury,~~ shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury ~~or, in the case of an action for contribution or indemnity, accrual of the cause of action,~~ nor; in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

(b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).

* * *

Subd. 2. **Action allowed; limitation.** Notwithstanding the provisions of subdivision 1, paragraph (a), in the case of ~~an~~ a cause of action which accrues during the ninth or tenth year after substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the cause of action accrued, but in no event may such an action be brought more than 12 years after substantial completion of the construction. Nothing in this subdivision shall limit the time for bringing an action for contribution or indemnity.

* * *

EFFECTIVE DATE. This section is effective retroactive to June 30, 2006.

Summary of Argument

In 1999, Appellant Jacobs acquired Sverdrup & Parcel and Associates, Inc. (“S&P”), an engineering firm that had provided design work on the I-35W Bridge over the Mississippi River in Minneapolis in the 1960s. S&P’s work was completed before substantial completion of the bridge in 1967. Jacobs is now a third-party defendant in 121 actions for damages filed following the collapse of the Bridge on August 1, 2007. The claims against Jacobs on this appeal are brought by Defendant URS, asserting contribution and indemnity for tort claims asserted against it.

There is no dispute in this case that all claims against S&P, and thereafter Jacobs, were barred by Minnesota’s statute of repose for improvements to real property contained in MINN. STAT. § 541.051 long before—decades before—the August 1, 2007, collapse. Jacobs brought a motion to dismiss the claims against it, and that motion was denied. Because of its right to repose constitutes the equivalent to immunity from suit in Minnesota, Jacobs perfected its timely appeal as of right from this denial.

³ At the trial court, the 2007 amendments to this statute cited to 2007 MINN. LAWS, ch. 105, § 4. *Add.5*. The 2007 amendments to § 541.051 are actually contained in two separate laws: 2007 MINN. LAWS, ch. 140, art. 8, § 29 (House File No. 1208), signed into law by Governor Pawlenty on May 25, 2007 and 2007 MINN. LAWS, ch. 105, § 4 (Senate File No. 241), signed into law by Governor Pawlenty on May 21, 2007. *Add.10, 17*. The amendments in the two laws are identical *except* for the “EFFECTIVE DATE” language. The House File version states: “This section is effective retroactive to June 30, 2006” and the Senate File version states: “This section is effective retroactively from June 30, 2006.” *Add.12, 20*. Because the statutory history listed for § 541.051 by the Office of the Revisor of Statutes only identifies 2007 MINN. LAWS, ch. 140, art. 8, § 29 for the 2007 amendments, Jacobs cites the effective date language from that version. The difference in the effective date language between these two laws, however, does not have a substantive effect on Jacobs’ position as to how the effective date should be construed.

Jacobs is entitled to dismissal of the contribution and indemnity claims brought by URS for several reasons, but the fundamental reason is that Minnesota law allows contribution or common-law indemnity claims to be brought only where there is “common liability” to the plaintiff. URS’s claims are barred as a matter of law because any such “common liability” was extinguished under the repose statute.

URS argued in the trial court that the amendments of the repose statute in 2007 had the effect of resurrecting and authorizing the assertion of contribution and indemnity claims. The amendments did not eliminate the common liability requirement and, in any event, expressly had a very limited retroactive date—June 30, 2006. Only by torturing the statutory language could the statute be interpreted to revive the long-barred claims URS seeks to assert. Any interpretation of the statute to revive time-barred claims would violate Jacobs’ due process rights.

For these reasons, Jacobs is entitled to dismissal of URS’s contribution and indemnity claims as set forth in its third-party complaint.

Argument

I. Standard of Review

This appeal raises only questions of law presented to the trial court on a motion to dismiss. In reviewing a decision involving a motion to dismiss based on failure to state a claim upon which relief can be granted under Rule 12.02(e), the appellate court undertakes *de novo* review to determine the legal issue of whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted).

II. **Jacobs Is Entitled to Dismissal of the Third-Party Complaints Against It Because It Has No Common Liability with the Defendants to the Plaintiffs.**

“Common liability” to a plaintiff is a prerequisite for a viable contribution or common-law indemnity claim under long-established Minnesota law.⁴ In this case, Respondent URS’s claims for contribution-indemnity are barred as a matter of law because any conceivable *common liability* of Jacobs to Plaintiffs was extinguished decades ago under Minnesota’s statute of repose for improvements to real property, MINN. STAT. § 541.051.

A. **Common Liability Is an Essential Element of a Contribution Claim.**

The legal standard for contribution in Minnesota is well settled. “The doctrine of contribution is an equitable doctrine which requires that persons under a common burden share that burden equitably.” *Spitzack v. Schumacher*, 241 N.W.2d 641, 643 (Minn. 1976). Minnesota courts have interpreted this common burden to mean that the parties to a contribution claim share common liability. *Am. Auto. Ins. Co. v. Molling*, 57 N.W.2d 847, 849 (Minn. 1953) (“The very essence of the action of contribution is ‘common liability.’”). Indeed, “[i]t is well established that it is joint *Liability*, rather than joint or concurring *Negligence*, which determines the right of contribution.” *Spitzack*, 241 N.W.2d at 645 n.2 (citations omitted) (emphasis added).

⁴ Minnesota recognizes that indemnity claims are indistinguishable from contribution claims unless based on a contract, express or implied, and are subject to the same principles. *See, e.g., Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977). *See also* discussion *infra* at 15-17. In cases involving alleged joint liability based on comparative fault principles, the courts commonly refer to a single count of “contribution-indemnity.” *See, e.g., City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874, 876 n.3 (Minn. 1994). Respondent URS pled only common-law claims against Jacobs. PCI’s original third-party complaints did the same. PCI subsequently asserted third-party claims that included a claim for contractual indemnity. Those claims have been compromised and settled by PCI’s settlement out of the cases.

Common liability arises when both parties are liable to the injured party for part or all of the same damages. *Milbank Mut. Ins. Co. v. Village of Rose Creek*, 225 N.W.2d 6, 8-9 (Minn. 1974). Significantly, “[c]ommon liability ‘is created at the instant the tort is committed.’” *Spitzack*, 241 N.W.2d at 643 (quoting *White v. Johnson*, 137 N.W.2d 674 (Minn. 1965)).

As a result, a viable contribution claim requires two elements: (1) common liability of joint tortfeasors; and (2) payment by one tortfeasor of more than its fair share. *Spitzack*, 241 N.W.2d at 644 (holding that “an action for contribution rests upon a common liability of joint tortfeasors to an injured party and the payment of more than his share by one of the co-defendants”) (citing *Bunge v. Yager*, 52 N.W.2d 446, 450 (Minn. 1952)).

Minnesota courts have long held that the absence of common liability prevents a third-party plaintiff’s contribution claim. For example, in *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 167 (Minn. 1979), an airplane manufacturer was barred from bringing a contribution claim against the owner-pilot of a plane that crashed. As the Minnesota Supreme Court explained, because the owner-pilot had been adjudicated not liable to the plaintiff in a separate lawsuit, there could be no common liability of the manufacturer and owner-pilot to the injured plaintiff. In so ruling, the court rejected the manufacturer’s argument that Minnesota courts had “eliminated common liability as a prerequisite for contribution.” *Id.* at 168. Instead, the court held that:

Although we are aware that the requirement of common liability has been criticized, we have not eliminated it. We impose this requirement because *we believe that only a tortfeasor who is liable for a plaintiff’s loss* should be required to contribute to the payment for that loss.

Id. at 168-69 (emphasis added). See also *Friberg v. Fagen*, 404 N.W.2d 400 (Minn. Ct. App. 1987) (noting the importance of common liability and finding that because no common

liability existed between the third-party plaintiff and defendant at the time of an accident, the third-party plaintiff did not have a valid contribution claim).

Applying the *Hart* principles to this case (“that only a tortfeasor who is liable for a plaintiff’s loss should be required to contribute”), it is clear that Jacobs cannot be liable in contribution because Jacobs is not “a tortfeasor who is liable for” Plaintiffs’ losses.

B. Because MINN. STAT. § 541.051 Precludes Any Liability of Jacobs to Plaintiffs, It Precludes Common Liability with Defendants.

Minnesota Statutes § 541.051 provides as follows with respect to the ten-year repose period for Plaintiffs’ claims:

Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, . . . of the improvement to real property . . . , nor . . . shall such a cause of action accrue more than ten years after substantial completion of the construction.

MINN. STAT. § 541.051, subd. 1(a) (2008). Accordingly, the repose period began to run with respect to Jacobs upon “substantial completion of the construction” of the Bridge in the 1960s. As a consequence, the repose statute had extinguished any potential cause of action against Jacobs for the incident that occurred on August 1, 2007, decades before that date.

As noted in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006), “[t]he constitutional legitimacy of statutes of repose stems from their substantive, rather than procedural, nature: a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit).” Minnesota and a majority of other jurisdictions have thus held that statutes of repose may constitutionally

eliminate a cause of action even before it accrues. *Id.* (citing cases in other jurisdictions).⁵ In short, statutes of repose can bar recovery even before the cause of action accrues and irrespective of whether there has yet been injury to any party.

Common liability is not destroyed because of some event happening *after* a cause of action accrues. A defendant acquires a statute of limitations defense to a plaintiff's claim only some time *after* the cause of action accrued.⁶ Similarly, a covenant not to sue or a defense based on failure to give notice are defenses that a defendant may acquire *after* the plaintiff's claim accrues. A party who may have those defenses to a plaintiff's claim remains subject to a contribution claim by another defendant because the common liability that is a required element of a contribution claim was present when it matters—*i.e.*, at the time the tort occurred.

While the trial court acknowledged that a statute of repose “is a substantive rather than procedural limit,” *Add.7*, it failed to give proper effect to the significant distinction between procedural defenses and a defense based on the substantive limitations of a statute of repose. Instead, the trial court held that while the repose defense is not merely a

⁵ Importantly, from a “common liability” perspective, the *procedural* nature of statutes of limitation has led Minnesota courts to conclude that a defense to a cause of action based on the statute of *limitations* is a “technical” defense that does not extinguish common liability among defendants for the purposes of contribution. *Jones v. Fisher*, 309 N.W.2d 726, 729 (Minn. 1981). In contrast, a statute of repose is a *substantive* limitation that can prevent a cause of action from ever accruing at the time a particular injury occurs. Thus, statutes of repose clearly can eliminate the element of *common liability* that is essential to a viable contribution claim. *See, e.g., Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724 (Iowa 2008).

⁶ Minnesota courts require that a statute of limitations provide a plaintiff a reasonable time after the cause of action accrues to commence an action, so a limitations period will not expire before the accrual of the cause of action. *See, e.g., Weston*, 716 N.W.2d at 641.

“technical” one, it “does not go to the underlying merits of the claim.” *Add.7*. The latter point is not accurate, however, because a repose statute prevents a cause of action from even accruing once the period of repose commences. *See* MINN. STAT. § 541.051, subd. 1(a) (“[N]or in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.”); *Weston*, 716 N.W.2d at 641 (statute of repose “intended to eliminate the cause of action”). When the repose period begins, the possibility of liability to plaintiffs is cut off altogether; and the plaintiff never acquires a cause of action. Non-liability based on MINN. STAT. § 541.051, therefore, goes to the merits because, if the plaintiffs have never acquired any legally cognizable claim against Jacobs, they cannot establish the elements of such a claim; there can be neither legal duty nor breach of duty.

The trial court also cited “equitable principles” as a reason that “Plaintiffs’ lack of direct claims against Jacobs does not extinguish common liability.” *Add.7*. Minnesota courts, however, have never allowed recovery in contribution in the absence of common liability, even on equitable grounds. Indeed, there are many instances in which the courts have denied contribution claims even when the party against whom contribution is sought is alleged to be significantly at fault. *See, e.g., Conde v. City of Spring Lake Park*, 290 N.W.2d 164 (Minn. 1980) (absence of common liability prevented liquor vendor from seeking contribution from at-fault intoxicated person for injuries to intoxicated person’s family); *Ascherman v. Village of Hancock*, 254 N.W.2d 382 (Minn. 1977) (same); *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3, 5 (Minn. 1981) (absence of common liability prevents attorney liable for malpractice to client from seeking contribution from doctor whose treatment caused client’s injury); *Am. Auto Ins. Co.*, 57 N.W.2d at 850-52 (contribution action in car

accident case not allowed against negligent husband-driver because he was immune from liability to his injured passenger-wife); *Nelson v. Larsen*, 405 N.W.2d 455 (Minn. Ct. App. 1987) (driver not entitled to assert contribution against liquor vendor who served alcohol to intoxicated pedestrian struck and killed by driver because liquor vendor had no liability as a matter of law to voluntarily intoxicated person). Hence, any argument that “equity” requires allowing contribution claims to go forward against Jacobs in the absence of any common liability is completely at odds with Minnesota law.

The courts have shown some “elasticity” in defining common liability to encompass different legal theories upon which two or more defendants might be liable to a plaintiff. For example, a plaintiff injured or killed by an intoxicated driver might recover from the liquor vendor under the Dram Shop Act, and against the driver under the Wrongful Death Act or in negligence, *see, e.g., Jones v. Fisher*, 309 N.W.2d 726, 728-29 (Minn. 1981); or an employer immune from *tort* liability to its employee still has liability under the workers’ compensation laws and may be liable to contribution from a defendant whose liability to the plaintiff is in tort, *see, e.g., Peterson v. Little Giant Glencoe Portable Elevator Div. of Dynamics Corp.*, 366 N.W.2d 111, 116 (Minn. 1985); *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 688 (Minn. 1977). Not one among these cases, however, permitted a contribution claim to proceed against a party who, from the outset of the accrual of the plaintiff’s claims, had *no* liability to plaintiff under *any* theory. Here, it is undisputed that Jacobs has no liability to Plaintiffs under any theory. Thus, under Minnesota law, the contribution and common law indemnity claims against Jacobs must be dismissed.

The trial court's final reason for excusing the absence of common liability was that it was not a requirement for Defendants' indemnity claims. This conclusion, however, failed to account for how Minnesota courts have categorized and analyzed the requirements of different types of indemnity claims. It has been well-settled law since *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977), that a claim of indemnity based on comparative fault principles is indistinguishable from a contribution claim. Such a common law indemnity claim is therefore subject to the same requirements and limitations of a contribution claim. *Tolbert* identified the five limited situations in which a party could recover in indemnity:

(1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.

(2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.

(3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.

(4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.

(5) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.

Tolbert, 255 N.W.2d at 366 (quoting *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 372, 104 N.W.2d 843, 848 (1960)).

The court in *Tolbert* described category 4 as "a very different type from the others" because "[a]side from cases of contractual indemnity, the other rules concern parties seeking indemnity who are without personal fault, but who nevertheless are liable in tort." *Tolbert*, 255 N.W.2d at 366. However, Rule 4 "concerns parties who are themselves culpably

negligent but who nevertheless seek to avoid responsibility for the injury they have caused.” *Id.* at 366-67. Because Minnesota had adopted a comparative negligence statute, the court concluded that it was no longer appropriate or equitable for the “blunt instrument” of indemnity to be allowed in the circumstances of category 4 and that instead reallocation of loss in such situations would be limited to contribution based on relative fault. *Id.* at 367-68.

URS has not alleged any theory of “indemnity” liability against Jacobs other than of the kind identified in category 4, which after *Tolbert* is nothing other than a contribution claim. The trial court mistakenly held that the Defendants had sufficiently pled facts to go forward with a claim that they faced “derivative or vicarious” liability to Plaintiffs due to Jacobs, *i.e.*, a claim under category 1. This is undisputedly not the case for reasons articulated in the Minnesota Supreme Court case cited by the trial court in support of its analysis, *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001). *Add.8.* In *Engvall*, a defendant railroad company, sued by one of its employees for personal injuries under the Federal Employment Labor Act (“FELA”), asserted an indemnity claim against a product manufacturer. The product manufacturer obtained summary judgment in the trial court in its favor on the railroad company’s indemnity claim, but the Minnesota Supreme Court reversed. *Id.* at 571-72. The reason was that under FELA, the railroad had a non-delegable duty to the plaintiffs, such that it could have liability to the plaintiff even if the product manufacturer was found to be 100% at fault, and the railroad company not at fault for the plaintiff’s injuries. *Id.* at 572. In those circumstances, the court held that the railroad company could have liability to the plaintiff that was “entirely derivative or vicarious,” so that an indemnity claim under category 1 could be maintained. *Id.*

URS has neither pled nor argued below any facts that would entitle it to recover indemnity from Jacobs on a theory that it could have derivative or vicarious liability to Plaintiffs for the alleged fault of Jacobs. Plaintiffs have not pled against URS any claim based on a statutory or other source of nondelegable duty such as was present in *Engvall* under FELA, and URS does not contend otherwise. There is no conceivable circumstance in which URS could be found at trial to have 0% fault but nonetheless have liability to the Plaintiffs for any fault assigned to Jacobs. Hence, as a matter of law, it is impossible for the requirement of a category 1 indemnity claim to be met here: liability of URS to Plaintiffs that is “only a derivative or vicarious liability for damage” caused by Jacobs. *Tolbert*, 255 N.W.2d at 366. The trial court erred, therefore, in holding that URS could go forward with an indemnity claim. *See also, e.g., Computer Tool & Eng'g, Inc. v. N. States Power Co.*, 453 N.W.2d 569, 574 (Minn. Ct. App. 1990) (absence of common liability barred defendant’s cross-claim for contribution and indemnity).

Because any claim by URS against Jacobs must satisfy the requirements of a contribution claim, and because a viable contribution claim requires common liability to the Plaintiffs, there can be no doubt that Jacobs is entitled to dismissal of URS’s claims against it. The ten-year repose provision of § 541.051 that extinguished Plaintiffs’ claims against Jacobs precludes any common liability of Jacobs with URS to the Plaintiffs.

The Iowa Supreme Court recently addressed the effect of a statute of repose on the common liability requirement for contribution in circumstances strikingly similar to those presented here. In *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724 (Iowa 2008) (“*Ryan*”), the repose statute at issue related to product manufacturers and extinguished

claims against them fifteen years after a product was purchased or installed. The repose statute was amended years later to create an exception for contribution and indemnity claims by providing that the statute “shall not affect the time during which a person found liable may seek and obtain contribution and indemnity from another person whose actual fault caused a product to be defective.” *Id.* at 729 (quoting IOWA CODE § 614.1(2A)(a)). The case involved an injury occurring 26 years after installation of a chemical tank. The decedent’s heirs brought an action against several defendants, who in turn brought claims for contribution against the tank manufacturer.

The Iowa Supreme Court held that the direct defendants’ contribution claims against the tank manufacturer were barred because common liability, which is a necessary element for a successful contribution claim, did not exist. *Ryan*, 745 N.W.2d at 730-31. According to the court, since the tank manufacturer could not be found liable to plaintiffs for damages, there was no common liability between the tank manufacturer and the direct defendants. *Id.* The court also explicitly rejected the contention of defendants that the later amendments to the statute excepting contribution claims from the repose period eliminated the requirement of common liability. “When the legislature enacted [the amendments], it did not include any language in the statute that leads us to believe the legislature had any intent to modify or repeal the statutory requirements of [common liability].” *Id.* at 731. Thus, the contribution claims against the tank manufacturer were precluded as a matter of law. *Id.* at 730-31.

Given the fact that Minnesota’s substantive law is identical to Iowa’s in requiring common liability as a prerequisite to contribution or indemnity, the *Ryan* precedent should be particularly persuasive. The rule in both Minnesota and Iowa is not unique. Indeed,

numerous courts from other jurisdictions also have held that when a statute of repose bars a plaintiff's claim against a party, that party is not commonly liable with the other tortfeasors and should not be responsible for contribution. *See, e.g., Florence County Sch. Dist. No. 2 v. Interkal, Inc.*, 559 S.E.2d 866, 869 (S.C. Ct. App. 2002) (finding that the statute of repose at issue barred an action for contribution that arose more than thirteen years after the completion of the improvement to real property); *Thompson v. Walters*, 565 N.E.2d 1385, 1389 (Ill. App. Ct. 1991) (“A contribution action cannot be maintained against a party who is not subject to liability in tort. Sears is not liable to plaintiff under a strict liability theory because the statute of repose . . . extinguished the right of the plaintiff to bring such a suit against Sears [and, thus] defendants have no claim against Sears for contribution under a strict liability theory. To allow such an action would allow a plaintiff to accomplish indirectly what he is unable to do directly.”).

These principles leave no doubt about the effect of MINN. STAT. § 541.051 in eliminating common liability in this case. Because the statute extinguished any liability of Jacobs to Plaintiffs decades before the August 1, 2007, collapse, Jacobs has no common liability with URS to Plaintiffs. As a matter of law, the absence of *common liability* precludes any contribution or indemnity liability of Jacobs to URS.

C. The 2007 Amendments to MINN. STAT. § 541.051 Did Not Change or Eliminate the Common Liability Requirement.

As noted, in 2007, the Minnesota Legislature amended § 541.051 with respect to contribution and indemnity claims and made the amendments effective retroactive to June 30, 2006. The pertinent provision of the amendments eliminated the reference to

contribution and indemnity in § 541.051, subd. 1(a), which contains the provision for a ten-year repose period; and it revised subdivisions 1(b) and 1(c) to read as follows:

(b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).

~~(b)~~ (c) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, provided that in the case of an action for contribution or indemnity under paragraph (b), upon a cause of action 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.

MINN. STAT. § 541.051, subd. 1(b) & (c). *Add.19.*

The amendments were adopted to change the outcome in cases involving the circumstances presented in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006). In *Weston*, the defendant general contractor was sued two months before the ten-year repose period commenced. The then-existing version of § 541.051 defined accrual of a cause of action for contribution or indemnity to occur upon “final judgment, arbitration award, or settlement.” MINN. STAT. § 541.051, subd. 1(b) (2004). So, as in *Weston*, the plaintiffs’ injury might occur before the ten-year repose period commences, but a defendant’s contribution or indemnity claims might not accrue (*i.e.*, there may not be a “final judgment, arbitration award, or settlement”) until after the ten-year repose period has already extinguished any contribution or indemnity claims. The 2007 amendments eliminated this possibility by changing the definition of when a contribution or indemnity claim accrues and replacing the ten-year repose period for contribution and indemnity claims with a two-year

limitations period that commences to run from the date of accrual of the contribution or indemnity claim, rather than from the date of substantial completion.

Significantly, however, while the amendments changed the definition of accrual and the time period for *when* a contribution or indemnity claim could be commenced, it did nothing to change the substantive elements of a contribution or indemnity claim. Nowhere did the amendments eliminate or alter the requirement of common liability for such claims. Because Jacobs has no common liability with URS to Plaintiffs, whose claims against Jacobs were extinguished ten years after substantial completion of the Bridge, it does not matter when URS might timely *commence* a claim because it cannot as a matter of law *recover* on it. As discussed, the Iowa Supreme Court in *Ryan* reached the same conclusion. The court held that the exception created in the repose statute at issue there for contribution claims was an “exception to the time during which a person found liable may seek and obtain contribution” and that the “legislature did not intend to relieve a party seeking contribution from proving the *elements* of a contribution claim.” *Ryan*, 745 N.W.2d at 731 (emphasis added). The same result is required here.

III. MINN. STAT. § 541.051 Expressly Extinguished Any Contribution and Indemnity Claims of URS Against Jacobs Prior to the 2007 Amendments to the Statute.

A. Before Amendment in 2007, MINN. STAT. § 541.051, subd. 1(a) Provided for a Ten-Year Repose Period for Contribution and Indemnity Claims.

Prior to the 2007 amendments to the statute, MINN. STAT. § 541.051 contained the same ten-year bar for contribution and indemnity claims that applied (and still applies) to the direct claims of plaintiffs. It read as follows:

Subdivision 1. **Limitation; service or construction of real property; improvements.** (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

MINN. STAT. § 541.051 (2006).

There can be no question that prior to the enactment of the 2007 amendments to § 541.051, all contribution and indemnity claims arising out of design services furnished for the Bridge had long ago been extinguished. The trial court, however, relied on the 2007 amendments to § 541.051 to allow URS to proceed with its time-barred contribution and indemnity claims. *Add.5.* (“[W]hile Defendants’ claims for contribution and indemnity were barred by the previous version of Minn. Stat. § 541.051, the amended 2007 version removes the ten-year repose barrier to assertion of the claims.”). The stark consequence of the trial court’s interpretation of the 2007 amendments, if accepted in other cases, is that parties against whom potential claims for contribution or indemnity were extinguished years or (like here) decades *before* the June 30, 2006, retroactive effective date of the 2007 amendments will find that those claims have been suddenly revived. This is not a required or plausible interpretation of the 2007 amendments, particularly given that the Minnesota Supreme Court has made clear that the statute of repose under MINN. STAT. § 541.051 is a substantive

limitation on the acquisition of a cause of action, unlike statutes of limitations, which are procedural only. *See Weston*, 716 N.W.2d at 641. This Court should interpret the 2007 amendments as applying only to causes of action that had not been extinguished prior to the amendments' June 30, 2006, retroactive effective date.

B. The Effective Retroactive Date for the 2007 Amendments to MINN. STAT. § 541.051 Should Not Be Interpreted to Revive Contribution-Indemnity Claims Extinguished *Prior* to the June 30, 2006, Effective Date.

The only plausible—and only constitutionally valid—interpretation of the amendments is that they apply only to contribution and indemnity claims that had not been extinguished before the amendments' June 30, 2006, retroactive effective date. Any causes of action against Jacobs had, of course, been extinguished decades before this effective date. The question presented, therefore, is not whether the 2007 amendments were intended to operate retroactively. What this Court should decide is whether applying the amendments retroactively to the date chosen by the legislature—June 30, 2006—could possibly revive claims that had been extinguished long *before* that retroactive date. Such an interpretation would represent a sea change, impacting statewide potentially hundreds or thousands of parties who had acquired repose rights against contribution and indemnity claims under the former § 541.051, and who now face sudden revival of those potential liabilities.

Interpreting the amendments to allow contribution or indemnity claims to be brought at any time would eviscerate the purpose of the statute of repose. The purpose of § 541.051 was to provide a designer and other certain parties with freedom from liability and having to endure suits after the passage of ten years. *See Olmanson v. LeSueur County*, 693 N.W.2d 876, 882 (Minn. 2005) (“The statute limited the liability of these construction professionals by

establishing an outer time limit beyond which they could not be held liable for design and construction defects.”) (citation omitted); *Sullivan v. Farmers & Merchants State Bank of New Ulm*, 398 N.W.2d 592, 594 (Minn. Ct. App. 1986) (“The statute was enacted in 1965 to shield architects and builders from indeterminate prospects of liability on long-completed projects.”) (citation omitted). These and other important public policy goals underlying § 541.051 have been recognized with approval by the Minnesota Supreme Court:

The statutory limitation period is designed to eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it. By setting forth a * * * period of repose, the statute helps avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed. The lapse of time between completion of an improvement and initiation of a suit often results in the unavailability of witnesses, memory loss and a lack of adequate records. Another problem particularly crucial is the potential application of current improved state-of-the-art standards to cases where the installation and design of an improvement took place many years ago. Minn. Stat. § 541.051 (1980) was designed to eliminate these problems by placing a finite period of time in which actions against certain parties may be brought. We hold this objective is a reasonable legislative objective and should not be lightly disregarded by this court absent a clear abuse.

Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 454 (Minn. 1988) (footnote omitted). If the effective retroactive date of the 2007 amendments is construed as reviving contribution or indemnity claims barred before that date, then the purpose of the statute would be completely frustrated by making persons protected by the statute of repose liable for their acts during the repose period (and indeed liable in perpetuity for contribution or indemnity claims). This Court should not find such an absurd result. See MINN. STAT. § 645.17(1) (providing that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”); see also *State ex rel. South St. Paul v. Hetherington*, 61 N.W.2d 737

(Minn. 1953) (holding that a statute is not to be given an absurd construction if its language will reasonably bear any other construction). Indeed, the court can “disregard a statute’s plain meaning only in rare cases where the plain meaning ‘utterly confounds a clear legislative purpose.’” *Weston*, 716 N.W.2d at 639 (citations omitted).

The trial court relied on this Court’s decision in *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.* 749 N.W.2d 98 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008), to interpret the 2007 amendments as reviving previously expired contribution and indemnity claims. *Id.* That decision does not control this case, however. *U.S. Home* involved facts very similar to those in *Weston*, which the 2007 amendments were clearly passed to address.⁷ The plaintiff’s cause of action accrued and it commenced suit against a defendant before the passage of ten years from substantial completion of construction.⁸ *See id.* at 100. But by the time the defendant settled its claim with the plaintiff and filed a contribution action, the repose period had commenced. *Id.* at 100, 103. In the circumstances of *Weston* and *U.S. Home Corp.*, the prior version of § 541.051 made the availability of a contribution-indemnity claim largely a matter of fortuity based on when the plaintiff chose to file suit against a defendant; in those cases, the plaintiff’s cause of action accrued before the ten-year repose period had extinguished any claims. So by waiting to file suit, the plaintiff could effectively, through the passage of time, deprive the defendant of a contribution-indemnity claim that otherwise would have been available, but that “accrued” under the terms of the statute only

⁷ The June 30, 2006 retroactive effective date of the 2007 amendments is one day after the day the *Weston* opinion was filed. *See also infra* footnote 9.

⁸ In both *Weston* and *U.S. Home*, common liability existed between defendants because plaintiffs’ injury occurred before the repose period commenced, which would have, as in these cases, extinguished common liability.

after it had become barred by the repose period. The 2007 amendments remedied precisely that circumstance.⁹ In the instant cases, however, all claims of any kind had been extinguished decades before the Bridge collapse on August 1, 2007. The unavailability of contribution-indemnity claims is not due here to plaintiffs' decisions about when to sue. Hence, the 2007 amendments should not be interpreted to revive such claims. To the extent it is interpreted to revive long-ago extinguished claims, this Court should address the constitutional arguments discussed below that preclude giving effect to such an interpretation.

⁹ The legislative history on the amendments supports this interpretation of the amendments. The only discussion of the amendments found is from the May 16, 2007 House Floor Session Part 3 discussion on S.F. 241 (available online at http://www.house.leg.state.mn.us/htv/archivesHFS.asp?ls_year=85):

Starting @43:18

Rep. Joe Mullery:

All of these are correcting court decisions that misinterpreted what we thought and everybody thought the law was, and the first one the court ended up indicating that if a contractor was sued by a homeowner and it was in, let's say shortly before the end of the ten year period, they didn't have any time in which to sue their indemnifier like their insurance company or a sub and so this is just correcting that so that they have two years from the time that they're sued in which they can sue whoever's supposed to indemnify them and the last part is also a bill from the bar association which just corrects the posted foreclosure....

Starting @47:59

Rep. Tina Liebling:

Could you just clarify for me, are you shortening up a limitations period or expanding one or am I missing the point of what you're trying to do here?

Rep. Joe Mullery:

... We are expanding because right now after a court decision, which everyone I know in real estate law thinks, and construction law thinks, is wrong. What they held was if a contractor is sued by, let's say, the owner of the property just short of ten years, right now, after that court decision, they can't go after, they can't turn around and sue their indemnifier like an insurance company or a subcontractor that contributed to it. And so what we're doing is we're extending the period when that contractor who gets sued can sue the people that they think were liable for that which just seems just to allow that.

In addition, this Court's consideration of the legislature's intent in *U.S. Home Corp.* was essentially confined to ascertaining what is necessary for a statute to be given some retroactive effect, and whether this was accomplished through the 2007 amendments. As noted above, these are not controversial propositions. The retroactive intent is clear from the language providing a retroactive effective date "to June 30, 2006." There is no indication, however, that either the parties or this Court gave consideration to whether the amendments were intended to revive claims otherwise extinguished both *before and after* the retroactive effective date. An intent to revive claims long ago extinguished by the statute of repose would have been clear had the legislature used language it knew how to use and had used in the past, as shown in the asbestos abatement revival statute.¹⁰ It did not, however, employ such language, or anything like it. There is, in sum, no suggestion that the legislature intended the amendments to broadly sweep away rights of immunity to suit that had become vested years and even decades before the June 30, 2006, effective date. And this Court should not infer such intent. *See, e.g., H.D. v. White*, 483 N.W.2d 501, 502-03 (Minn. Ct. App. 1992) (rejecting interpretation of statutory amendments to statute of limitations for intentional torts that would constitute "a wholesale revival of claims long stale" when amendments did not require such a result).

¹⁰ For example, such intent is clear from the language employed by the legislature when it expressly "revived or extended" certain asbestos-related property damage claims, providing that they "may be begun" before a specified date. MINN. STAT. § 541.22, subd. 2 (cited in *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990)). In both instances, the legislative intent was clear about when cases based on revived claims could be commenced. Here, while the language of the 2007 amendments is clear that they are intended to apply retroactively, there is *no* indication that the amendments were intended to apply to causes of action that had expired *prior* to the retroactive effective date of June 30, 2006.

For all of the foregoing reasons, it is not necessary for the Court to reach and decide the constitutional question, *i.e.*, whether the 2007 amendments of § 541.051 violate Jacobs' federal and state constitutional Due Process rights by cancelling its accrued, vested right to repose. That question would be presented only if the 2007 amendments were interpreted to revive causes of action for contribution and indemnity extinguished prior to the effective date of the amendments. Jacobs' constitutional challenge is merely contingent and is limited only to challenging the unfair and illogical application of the amendments that URS seeks to impose on the facts of this case.

IV. Interpreting the 2007 Amendments to MINN. STAT. § 541.051 to Revive Time-Barred Contribution-Indemnity Claims Would Violate Jacobs' Due Process Rights.

As explained by the Minnesota Supreme Court in *Weston* and acknowledged by this Court in *U. S. Home Corp.*, there is a fundamental distinction between statutes of repose and statutes of limitation which has constitutional implications. *See, e.g., Weston*, 716 N.W.2d at 641-44; *U. S. Home Corp.*, 749 N.W.2d at 102.

As pointed out in *Weston*, statutes of repose “reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.” *Id.* at 641 (quoting 51 AM. JUR. 2D, *Limitation of Actions* § 18 (2000)). As such, statutes of repose promote certainty and finality in the law by allowing parties to plan and act with knowledge of whether liability might exist. *Id.* at 642 (citing *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. 2000)). In giving such finality, statutes of repose “create ‘a substantive right in those protected to be free from liability after the legislatively-determined period of time.’” *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005) (citing

and quoting 54 C.J.S. *Limitations of Actions* § 5 (2005)); see also *Yaeger v. Delano Granite Works*, 84 N.W.2d 363, 366 (Minn. 1957) (“It is recognized that vested rights include not only legal or equitable title to enforcement of a demand but include as well an exemption from new obligations created after the right vested.”).

This substantive-procedural distinction is important to the constitutional analysis because the Due Process Clause prohibits a legislature from abolishing “property” rights that have already accrued or vested, *i.e.*, from “depriv[ing] any person of property without due process of law.” U.S. CONST. Amend. XIV. Minnesota’s Due Process Clause is identical in scope to the federal clause. See, *e.g.*, *Sartori*, 432 N.W.2d at 453.

The Minnesota Supreme Court has consistently heeded the constitutional prohibition against retroactive legislation that seeks to divest previously vested property interests. See *Holen v. Minneapolis-St. Paul Metro. Airports Comm’n*, 84 N.W.2d 282, 287 (Minn. 1957) (“Retrospective or curative legislation is, of course, prohibited under U.S. Const. Amend. XIV, when it divests any private vested interest.”); *Wichelman v. Messner*, 83 N.W.2d 800, 816 (Minn. 1957) (“Retrospective legislation in general . . . will not be allowed to impair rights which are vested and which constitute property rights.”); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 356-57 (Minn. 1969) (“While the courts generally express varying degrees of distaste with retroactive laws, they are usually upheld as long as they do not interfere with vested legal rights.”); *Snortum v. Snortum*, 193 N.W. 304, 306 (Minn. 1923) (“If a right, which is vested before the passage of the act, is thereby taken away, then the act deprives the owners of their property without due process of law.”).

Decades ago, the United States Supreme Court recognized the same substantive-procedural distinction adhered to in *Weston*. In *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), the plaintiff failed to file suit against a railroad within the time prescribed by the Interstate Commerce Act, which both created and limited the plaintiff's cause of action. *Id.* at 635. Congress then enacted the Transportation Act which, if applied retroactively, would revive the plaintiff's claim. *Id.* at 634. The railroad argued that retroactive application of the Transportation Act was unconstitutional because reviving the plaintiff's expired cause of action amounted to a taking of the railroad's property without due process. *Id.* at 635.

In holding in favor of the railroad, the Court determined that "the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff." *Id.* at 636 (citations omitted). The Court explained that some limitations statutes "related to the remedy only" and did not invest a defendant with any right to be free from suit. *Id.* at 637. Accordingly, repeal or alteration of such "statutes of limitation" did not deprive a defendant of any property right in violation of the Due Process Clause. *Id.* at 636-37. That was the case, the Court noted, in *Campbell v. Holt*, 115 U.S. 620 (1885). In contrast, the Court acknowledged that another class of statutes "operate as a limitation on liability" and that the time limitation "constitute[s] part of the cause of action." *Id.* at 637. Retroactively amending such a statute to revive a liability that had already been extinguished under prior law "would...deprive [the] defendant of its property without due process of law." *Id.* Because the statute at issue in *Danzer* belonged to this latter class of statutes, the Court held that it

could not be applied retroactively to revive a cause of action consistent with Due Process.

Id.

The United States Supreme Court considered the issue again in *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945), *aff'g*, *Donaldson v. Chase Secs. Corp.*, 13 N.W.2d 1 (Minn. 1943).

In *Chase*, the Court reached a result different from *Danzer* because it determined that the statute at issue—one that retroactively revived a statute of limitations—“merely . . .

reinstate[d] a lapsed remedy” and did not infringe a defendant’s “right to immunity.” 325

U.S. at 312 n.8. The Court also reiterated the substantive-procedural distinction:

The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.

Id. at 314.

With one exception (involving asbestos claims),¹¹ Minnesota courts have adhered to the view that substantive, vested rights are constitutionally protected from retroactive legislation, while procedural rights (which do not implicate vested rights) may be modified by the legislature. *See, e.g., Wichelman*, 83 N.W.2d at 817 (recognizing that the “constitutional prohibitions against retrospective legislation do not apply to statutes of limitation”); *Peterson*, 173 N.W.2d at 357 (“It is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retroactive legislation.”) (citing *Donaldson v. Chase Secs. Corp.*, 13 N.W.2d 1 (Minn. 1943)); *Yaeger*, 84 N.W.2d at 366 (“It is true that a statute may be constitutionally retroactive where it relates to a remedial or procedural right but the statute in question as applied to the circumstances here relates to a substantive matter . . .”). And, of course, the Minnesota Supreme Court’s 2006 decision in *Weston* leaves no doubt that the “substantive-procedural” distinction remains a crucial one under current Minnesota law.

¹¹ *See Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 296-99 (D. Minn. 1990), cited in *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591-92 (Minn. Ct. App. 1994) (dictum). *Independent Sch. Dist. No. 197* addressed both the asbestos statute, MINN. STAT. § 541.22, as well as the repose statute, § 541.051. While the district court in *Independent Sch. Dist. No. 197* discussed whether the application of the asbestos revival statute “deprive[d] the defendant of property without Due Process of Law,” its discussion was unnecessary to its decision regarding the repose statute inasmuch as the court determined that the allegations of “fraud” precluded application of MINN. STAT. § 541.051 under the latter’s fraud exception. Moreover, the district court in *Independent Sch. Dist. No. 197* mixed, as courts too often do, its discussion concerning “revival” between statutes of limitations, *id.* at 296, and statutes of repose. *Id.* And while it expressed its preference for a distinctly minority view that statutes of repose do not create “substantive property rights,” *id.* at 297-98, the district court’s dictum in *Independent Sch. Dist. No. 197* is contrary to long-standing Minnesota law including, most recently, *Weston*, 716 N.W.2d at 641 (“The constitutional legitimacy of statutes of repose stems from their *substantive, rather than procedural, nature*: a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit).”) (emphasis added).

The trial court, however, wrongly ignored the important substantive-procedural distinction, as evidenced by its reliance of *Wschola v. Snyder*, 478 N.W.2d 225 (Minn. Ct. App. 1992) in rejecting Jacobs' constitutional argument. *Add.5.* *Wschola* involved a modification of a *statute of limitations* which revived claims that had become time barred under the previous limitations statute, 478 N.W.2d at 226-27, so it is no authority for the proposition that claims extinguished by a *repose* statute may validly be revived by a retroactive modification of the repose period. The trial court also pointed out that in *U.S. Home Corp.*, the court held that the defendant's repose right had not vested because final judgment had not been entered in its favor prior to the effective date of the 2007 amendments to § 541.051. *Add.6.* While it is true that *one way* in which a party acquires vested rights is through entry of a final non-appealable judgment in its favor on an issue, the cases discussed above have made clear that commencement of a substantive repose period in a party's favor is *another way* in which its rights become vested. While it appears that the party entitled to repose in *U.S. Home Corp.* did not argue this point, it is an important and dispositive one.

The trial court concluded finally that, even if Jacobs had a vested property interest in its repose rights, the legislature could revoke the right if it had "rational reasons" for doing so. *Add.6.* This holding, however, contradicts all the cases in which Minnesota courts have held that depriving a party of a vested right violates constitutional Due Process. These cases have not suggested that the constitutional violation is cured where the legislature has a rational basis for acting. *See, e.g., Camacho*, 706 N.W.2d at 55; *Yaeger*, 84 N.W.2d at 366; *Holen*, 84 N.W.2d at 287; *Donaldson*, 13 N.W.2d at 4; *Snortum*, 193 N.W. at 306. So no "rational basis" can justify depriving Jacobs of its vested right to repose.

Application of these principles to the facts of this case requires the conclusion that the legislature did not, in its 2007 amendments, revive the contribution-indemnity claims against Jacobs which now are advanced by URS. These claims had been extinguished decades before the enactment of these amendments. Any effort to revive them would unconstitutionally violate Jacobs' Due Process rights by taking from Jacobs its right to immunity from suit that had vested three decades, or more, before August 1, 2007.

Finally, courts around the country have accepted and applied the principle that statutes of repose confer vested rights that cannot constitutionally be revoked by a "revival" statute. *See, e.g., Sepmeyer v. Holman*, 642 N.E.2d 1242, 1245 (Ill. 1994) (legislature may not expressly revive time-barred cause of action; giving statute of limitation substantive nature under state law and finding that expiration of statute of limitations creates a vested right beyond legislative interference); *In re Alodex Corp. Secs. Litig.*, 392 F. Supp. 672, 680-81 (S.D. Iowa 1975) (retroactively enlarging applicable period under preexisting statute of repose to revive previously extinguished claim violates the due process clause), *aff'd*, 533 F.2d 372, 374 (8th Cir. 1976) (per curiam); *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992) ("[C]ourts have historically recognized that legislatures may by express provision make procedural law retroactive because no property rights are involved. A different rule applies, however, to substantive laws. They affect vested rights and are not subject to retroactive legislation that would constitute the taking of property without due process."); *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) (holding that to "revive a liability already extinguished [by repose] . . . would . . . deprive [defendants] of due process"), *rev. denied*, 325 S.E.2d 485 (N.C. 1985); *Allstate Ins. Co. v. Furgerson*, 766 P.2d 904,

907-08 (Nev. 1988) (statute of repose for suits against contractors and others for latent defects could not be applied to latent defect discovered before the enactment of the statute; retrospective application of the current statute would violate due process); *Gross v. Weber*, 112 F. Supp. 2d 923, 926 (D.S.D. 2000) (“[T]he South Dakota Supreme Court has made it clear, that notwithstanding the legislature’s intent, ‘legislation attempting to revive previously time-barred claims impermissibly interferes with a defendant’s vested rights and violates due process.’”)(quoting *Dotson v. Serr*, 506 N.W.2d 421, 423 (S.D. 1993); *Galbraith Eng’g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 (Tex. 2009) (refusing to interpret statutory amendments as reviving claims barred by statute of repose which “create a substantive right to be free from liability after a legislatively determined period”); *Haase v. Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963) (“[R]etroactive extension of the limitation period [in a statute of repose] after its expiration amount[s] to a taking of property without due process of law.”); *Sch. Bd. of Norfolk v. United States Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) (right of repose could not be abrogated by retroactive application of revival statute; case allowing retroactivity of statute of limitations distinguished because it did not involve a statute of repose that “grant[ed] a defendant [a right of] immunity from liability”).

This Court should follow the sound reasoning and results of these courts in finding that amended MINN. STAT. § 541.051 does not on its face—nor can it constitutionally—revive claims against Jacobs previously extinguished under the repose period contained in the statute.

Because Minnesota courts do recognize constitutional restrictions on deprivations of vested rights, such as immunity to suit under a statute of repose, the 2007 amendments to

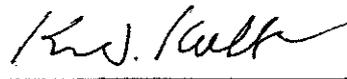
§ 541.051 cannot, consistent with constitutional Due Process, deprive Jacobs of the immunity to suit it acquired decades before the retroactive effective date of the amendments.

Conclusion

For all the foregoing reasons, the trial court decision should be reversed, and judgment of dismissal ordered.

Dated: December 7, 2009.

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 10,674 words. This brief was prepared using Microsoft Word 2003.

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