

Nos. A09-1776 & A09-1778

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State of Minnesota  
**In Court of Appeals**

In re:

Individual 35W Bridge Litigation

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

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## Introduction

Respondent URS Corporation (“URS”) cannot square its theory of contribution-indemnity liability against Appellant Jacobs Engineering Group Inc. (“Jacobs”) with the requirements of Minnesota law, so it instead improvises, chiefly by substituting for those requirements a focus on what it deems would be “fair” and “equitable” in the assertion of its claims. The absence of common liability of Jacobs with URS to the plaintiffs is, however, an insurmountable obstacle to URS’s claims. As discussed more fully below, URS relies on two inapposite lines of cases in an effort to get around the absence of common liability here. The first of those involves cases in which defendants have liability to the plaintiffs, but on different legal theories. The second consists of those in which a “technical” or “procedural” defense has eliminated liability of a defendant to the plaintiff. Neither of those scenarios is present here. By operation of the ten-year repose provision contained in MINN. STAT. § 541.051, it is undisputed that Jacobs has not at any time had liability to the plaintiffs under any theory—no causes of action ever arose because they had been eliminated in 1977, ten years after substantial completion of the I-35W Bridge (“Bridge”) and thirty years before they even could have accrued. Moreover, after the decision of the Minnesota Supreme Court in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006), it is beyond doubt that the repose provision contained in § 541.051 is a “substantive” limitation on liability, and not a mere “technical” or “procedural” defense, like a statute of limitations.

URS’s indemnity claim is based solely on principles of comparative fault and is thus indistinguishable from a contribution claim under settled law, and subject to the same requirement of common liability. This appeal can be decided and the claims against Jacobs

dismissed, therefore, on the sole ground that Jacobs has no common liability with URS to the plaintiffs. If the Court reaches the additional issues, however, relating to the interpretation and application of the 2007 amendments to the contribution and indemnity provisions of § 541.051, Jacobs should also prevail. The amendments should be interpreted so that, while retroactive to June 30, 2006, they did not revive claims that had been extinguished *before* that retroactive effective date. Any other conclusion would unconstitutionally deprive Jacobs of a vested right in immunity from suit that had been acquired decades before the amendments were enacted.

### **Argument**

#### **I. The Standard of Review for This Court Is *De Novo*, Where This Court Gives No Deference to the Trial Court's Decision on the Legal Issues.**

While URS devotes a section of its brief to the standard of review, it curiously cites only to authority on the trial court's standard for deciding a motion to dismiss. *See* Resp. Br. 10. Jacobs' opening brief correctly cites the appropriate standard of review on appeal of the trial court's order deciding purely legal issues—*de novo* review of the issues presented, in which the appellate court gives no deference to the trial court's decision. *See* App. Br. 8.

#### **II. Even Under Equitable Principles Common Liability Is Required for a Viable Contribution Claim.**

URS strives mightily to urge this Court to ignore the law and just reach an “equitable” result. Nothing argued, and certainly no authority cited, in URS's brief changes the fact that, under well-settled Minnesota law, contribution claims require common liability—not negligence—existing at the time the tort occurs. *Spitzack v. Schumacher*, 241 N.W.2d 641, 643 (Minn. 1976). URS cannot explain why this requirement should be

disregarded, except to argue repeatedly that applying it to URS would be unfair.<sup>1</sup> In doing so, URS cites not a single case that either eliminated the common liability requirement for contribution claims, or allowed contribution claims to go forward against a third-party defendant who had no liability to the plaintiff at any time or on any theory.<sup>2</sup> The reason for the absence of such authority is because contribution, even as an equitable doctrine, requires existence of common liability of joint tortfeasors to the plaintiff at the time the tort occurs. *Spitzack*, 241 N.W.2d at 643. The absence of this required element is fatal to URS's contribution claim in this case and URS's invocation of "equity" does not change this result. The law established by the Minnesota Supreme Court applies, not vague notions of equity.

URS can only advance its argument that equity should trump long-standing contribution requirements by providing an inaccurate and incomplete portrayal of Minnesota

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<sup>1</sup> URS repeatedly argues, as if established as fact, that it is not at fault in this case. *See, e.g.*, Resp. Br. 19 (stating that URS "was not responsible for the Bridge collapse, nor did it breach any duty"). In protesting its innocence, URS lays all blame of the Bridge collapse on Jacobs, which then allows URS to argue that it would be unfair to preclude its contribution claim against Jacobs. On this logic, every "innocent" defendant could bring a contribution claim to avoid such "unjust" results, notwithstanding Minnesota law.

<sup>2</sup> URS's reliance on *City of Willmar v. Short-Elliott-Henrickson, Inc.*, 512 N.W.2d 872 (Minn. 1994), to require disregard of common liability to allow claims for contribution and indemnity is unavailing. (Resp. Br. 20.) That case involved a bar to common liability based on a *statute of limitations* which, as a procedural bar or defense to common liability, does not bar actions for contribution or indemnity. *See Spitzack*, 241 N.W.2d at 643 (identifying procedural defenses, including statutes of limitation, that do not preclude contribution claims). Indeed, the court in *City of Willmar* based its decision precisely on this procedural nature of statutes of limitation. 512 N.W.2d at 875 ("[A] statute of limitations defense does not negate liability; it is only a procedural device that is raised after the events giving rise to liability have occurred, and which precludes the plaintiff from collecting on that liability.") (citing *Spitzack*). The instant case, of course, involves a *statute of repose*, which Minnesota courts characterize as a *substantive* limitation on liability. *See Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006); *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005).

contribution law. URS cannot escape the fact that the Minnesota Supreme Court has already *rejected* URS's contention that Minnesota courts do not require common liability as a prerequisite for contribution, and that the primary consideration for contribution claims is equity. *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 168-69 (Minn. 1979), explicitly rejected the argument that Minnesota courts had eliminated common liability as a prerequisite for contribution (cited at App. Br. 10). Ironically, URS cites *Hart* for the proposition that contribution is an equitable action, but then simply ignores the portion of the *Hart* decision that reaffirmed the necessity of common liability for contribution claims. (Resp. Br. 19.) URS similarly just ignores Jacobs' citation to *Friberg v. Fagen*, 404 N.W.2d 400 (Minn. Ct. App. 1987), where this Court precluded a contribution claim when the third-party plaintiff and defendant had no common liability to the plaintiff at the time of the tort. Yet, under URS's logic, *Friberg* was wrongly decided by requiring common liability because the equities alone should have allowed a contribution claim in that case. Not only would *Friberg* be wrongly decided, but *all* of the cases cited by Jacobs where a contribution claim was not allowed, even though the party against whom contribution was sought was alleged to be significantly at fault, were wrongly decided because of their "inequitable" results. *See* App. Br. 13-14 (citing *Conde v. City of Spring Lake Park*, 290 N.W.2d 164 (Minn. 1980); *Ascherman v. Village of Hancock*, 254 N.W.2d 382 (Minn. 1977); *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3 (Minn. 1981); *American Auto. Ins. Co. v. Molling*, 57 N.W.2d 847 (Minn. 1953)). But equity is hardly the malleable tool URS would invoke. URS does not contend that these cases are bad law or distinguishable from the circumstances here. Tellingly, it does not even address, much less refute, any of them in its brief. These cases conclusively demonstrate

that equity alone cannot and does not permit contribution claims to go forward in the absence of common liability.

No Minnesota court has ever used equity as expansively as URS wishes to stretch it here to allow contribution claims in the absence of common liability. Where the courts have shown some “elasticity” in allowing contribution is in defining common liability to encompass different *legal theories* upon which two or more defendants might be held jointly 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 his employee still has liability under the workers’ compensation laws and may be liable in contribution from a defendant whose liability to the plaintiff is in tort, *see, e.g., Peterson v. Little-Giant Glencoe Portable Elevator Div.*, 366 N.W.2d 111, 116 (Minn. 1985); *Lambertson v. Cincinnati Welding Corp.*, 257 N.W.2d 679, 688 (Minn. 1977). These cases are among those cited by URS in erroneously arguing that the requirement of common liability is sometimes excused in allowing a defendant to recover on a contribution claim. (Resp. Br. 19-21.) Not *one* among them, 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 (or at any time).<sup>3</sup> Here, it is

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<sup>3</sup> URS cites *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980), as supporting its argument that common liability is disregarded in favor of equity. (Resp. Br. 21.) *Anderson*, however, did not address the propriety of common liability or contribution. *Anderson* involved actions brought against parents of children whose injuries were allegedly in part due to the parents’ negligence. *Id.* at 596-97. The issue addressed in *Anderson* was whether the court should abolish the doctrine of parental immunity in favor of a “reasonable parent” standard. *Id.* at 597. The court did so, observing (as quoted by URS) that “[a] fundamental

undisputed that Jacobs has at no time had liability to the plaintiffs under any theory. Thus, under Minnesota law, URS is indisputably precluded from bringing a contribution claim against Jacobs.

Undeterred, URS still argues that common liability is not required, pointing to a quotation in this Court's decision in *Blomgren v. Marshall Mgmt. Servs., Inc.*, 483 N.W.2d 504, 506 n.2 (Minn. Ct. App. 1992), that the Minnesota Supreme Court "has, on equitable principles, allowed contribution in certain cases despite the absence of common liability." (Resp. Br. 20.) This Court in *Blomgren*, however, was citing to *Lambertson* for that observation. As noted already, *Lambertson* was a workers' compensation case in which the defendants did not have common liability *in tort*, but were nonetheless both liable to the plaintiff for his injuries, albeit on different legal grounds. 257 N.W.2d at 688. This Court in *Blomgren*, in determining that the defendant's contribution claim was viable, in fact found that the defendants were commonly liable to the plaintiff, even though that liability rested on different legal grounds. 483 N.W.2d at 507-08. Thus, contrary to URS's cite to the quoted language from *Blomgren*, neither *Blomgren* nor *Lambertson* allowed contribution claims without common liability, nor did either case eliminate the element of common liability. Rather, those cases merely established that common liability does not require that defendants be liable to the plaintiff under identical (or "common" as characterized in *Blomgren*) legal theories.

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concept of our legal system and a right guaranteed by our state constitution, is that a remedy be afforded to those who have been injured due to the conduct of another . . . Related thereto is the equitable doctrine of contribution, which requires that those who contribute to an injury bear liability in direct proportion to their relative culpability . . . These considerations are promoted by today's holding." *Id.* at 600. This case did not use equity to disregard the need for common liability in contribution claims.

URS similarly, and misleadingly, refuses to give full import to the court's decision in *Peterson v. Little-Giant Glencoe Portable Elevator Div.*, 366 N.W.2d 111 (Minn. 1985). URS argues that "[i]mportantly, common liability 'does not depend on whether or not a plaintiff can enforce recovery against two or more defendants.'" (Resp. Br. 21) (misquoting *Peterson*, 366 N.W.2d at 116.) The Minnesota Supreme Court in *Peterson* actually stated that common liability "does not depend *solely* on whether or not a plaintiff can enforce recovery against two or more defendants." 366 N.W.2d at 116 (quoting *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984)) (emphasis added). Again, *Peterson* was a workers' compensation case and because the defendants were both liable to the plaintiff, but on different theories, common liability existed for the contribution claim. *Id.* at 116 ("Glencoe has liability to the plaintiff in tort while Easterlund has liability to the plaintiff through the workers' compensation statute. Common liability, therefore, exists."). The *Peterson* decision does not thus stand for the proposition that liability to a plaintiff is not required for a contribution claim.

### **III. A Statute of Repose Is Not a Procedural Bar That Can Be Disregarded for Contribution Claims.**

URS argues that the statute of repose, which eliminated any liability between the plaintiffs and Jacobs, should be disregarded when deciding whether a viable contribution claim exists because repose does not go to the merits of the case. (Resp. Br. 21-24.) URS can only make this argument by failing to acknowledge the character and effect of the statute of repose under Minnesota law. Instead, URS essentially equates the repose statute to "technical" or "procedural" defenses like statutes of limitation, covenants not to sue, failure to give notice or personal immunities, that do not preclude contribution claims. (Resp. Br. 22.) In so arguing, URS completely disregards the Minnesota Supreme Court's decision in

*Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006). *Weston* confirmed and made definitive that statutes of repose are not “technical” or “procedural” defenses,” like statutes of limitation, covenants not to sue, or personal immunities, but instead are a *substantive* limitation on liability. *See id.* at 641. A statute of repose is fundamentally different from procedural and technical defenses because *it prevents a cause of action from even accruing* once the period of repose commences, or, in this case, ten years after substantial completion of construction in 1967. *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”).<sup>4</sup>

In these cases, plaintiffs undisputedly never acquired a claim or cause of action against Jacobs because the repose period commenced in 1977, thirty years before the collapse of the Bridge. Because no liability existed between Jacobs and plaintiffs when their injuries occurred, Jacobs has no, and has never had any, common liability with URS to the plaintiffs.

The repose statute therefore, is far from a “technical procedural rule” barring liability to plaintiffs. *Jones v. Fisher*, 309 N.W.2d 726, 730 (Minn. 1981). Instead, when the repose period begins (*viz.*, ten years after completion), the possibility of liability to the plaintiffs is cut off altogether and the plaintiffs never acquire a cause of action. Non-liability based on

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<sup>4</sup> URS does not even address other cases cited by Jacobs where courts 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* App. Br. 19 citing *Florence Co. Sch. Dist. No. 2 v. Interkal, Inc.*, 559 S.E.2d 866 (S.C. Ct. App. 2002) and *Thompson v. Walters*, 565 N.E.2d 1385 (Ill. App. Ct. 1991).

MINN. STAT. § 541.051, therefore, goes to the merits because, if the plaintiffs have never acquired any legally cognizable claim, they cannot establish the elements of such a claim; there can be neither legal duty nor breach of duty.

URS seeks to avoid these consequences by simply equating the “merits” of the alleged “liability” case against Jacobs (based on an incident which occurred in 2007) with the alleged negligent acts of Jacobs (in the 1960s), which require consideration by the jury. (Resp. Br. 22.) But this flies in the face of the “well established” principle 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 (emphasis added). URS’s complaint that the jury has not considered whether Jacobs was negligent in this case gets them nowhere in establishing *liability* of Jacobs to the plaintiffs—and *common liability* with URS—because the repose statute prevented such liability from ever arising.<sup>5</sup> Moreover, contrary to URS’s assertion that Jacobs’ repose defense does not arise out of Jacobs’ own acts or omissions (and thus relate to the merits) (Resp. Br. 22), the non-liability of Jacobs under MINN. STAT. § 541.051 derives from Jacobs’ own acts because it is only with reference to *what acts* were performed (here, the furnishing of design services) and *when* they were performed (*i.e.*,

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<sup>5</sup> The cases cited by URS further drive home the point that allegations about a defendant’s *negligence* are insufficient to establish the requirement of common liability. In *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984), a defendant was found negligent, but less so than the plaintiff, so there was no liability to plaintiff, and hence, no “common liability” with the other defendant seeking contribution. URS notes that non-liability was determined in those cases only after jury trial. (Resp. Br. 22.) But that is because the fault allocation in that case was a question for the trier of fact. The absence of common liability based on the statute of repose, in contrast, results in the question never getting to a jury because it presents purely a question of law.

substantial completion in 1967) that claims were extinguished—before they ever arose—and Jacobs’ non-liability was established as a matter of law.

URS raises a red herring by pointing out that this Court accepted this interlocutory appeal under the collateral order doctrine and argues that this somehow establishes the statute of repose as a mere technical defense unrelated to the merits that may be disregarded for determining common liability. (Resp. Br. 23-24.) URS is again wrong. Under the collateral order doctrine, the statute of repose is a legal issue that is *resolved* separately from the merits because it is a purely legal issue. R4.8. However, the statute of repose does affect the merits—*not* because a decision on the merits must be made (which would make it inappropriate for interlocutory appeal)—but because, as already discussed, the effect of the statute of repose is to eliminate any cognizable claim before it can even accrue. While URS asserts that a “complete defense on the merits” would in fact bar a contribution claim (Resp. Br. 23), it is difficult to think of a more “complete defense on the merits” than one that does not allow the merits to be asserted or exist at all. Indeed, both Jacobs and this Court recognized that the statute of repose is not a mere “defense” to liability; rather, the statute of repose altogether *eliminates* liability. A.257, R4.10.

#### **IV. URS’s Mischaracterization of Indemnity Legal Principles Does Not Save Its Claims in the Absence of Any Common Liability by Jacobs.**

URS seeks to avoid the consequences of the absence of common liability by offering a common law indemnity theory of recovery against Jacobs. This effort fares no better than its other arguments. URS alleges that, unlike contribution, “indemnity does not require common liability,” quoting from *Blomgren v. Marshall Mgmt. Servs., Inc.*, 483 N.W.2d 504, 506 (Minn. Ct. App. 1992). (Resp. Br. 24.) *Blomgren* then goes on in the next sentence to state

that “[i]ndemnity instead arises out of a contractual relationship, either express or implied by law, which requires one party to reimburse the other entirely.” *Id.* (internal quotations omitted).

URS, however, does not purport to rely on any contract, express or implied, to support an alleged claim for indemnity against Jacobs. Instead, URS puts forth a misleading and erroneous summary of Minnesota indemnity law, again seeking to rely on equity to overcome well-established legal principles. As it did at the trial court, URS quotes *City of Willmar v. Short-Elliott Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994), to argue that “[i]ndemnity applies when, among other situations, a party fails to discover or prevent another’s fault and, consequently, pays damages for which the other party is primarily liable.” (Resp. Br. 25.) As it did at the trial court, URS again neglects to mention that this type of indemnity is precisely that which the Minnesota Supreme Court has “eliminated . . . as a basis of indemnity.” *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 571 (Minn. 2001). Instead, Minnesota courts limit the reallocation of loss between defendants in this situation “to *contribution* based upon relative fault.” *Id.* (citing and quoting *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977) (emphasis added)). In other words, liability between defendants in such scenarios is limited to circumstances where there is *common liability*. URS’s other cited cases do not even involve the type of indemnity URS alleges in this case and do not address the issue of common liability for indemnity claims. *See* Resp. Br. 25 (citing *Farr v. Armstrong Rubber Co.*, 179 N.W.2d 64 (Minn. 1970) (indemnity sought where the defendant had only had derivative or vicarious liability for damage caused by the third-party defendant)

and *Zontelli & Sons, Inc. v. City of Nashwauk*, 373 N.W.2d 744 (Minn. 1985) (allowing contractual indemnity based on specific contract)).

Finally, URS fails to provide any substantive response to Jacobs' point that there is no conceivable circumstance under which URS could be found at trial to have 0% fault but nonetheless have liability to the plaintiffs for any fault assigned to Jacobs. *See* Resp. Br. 25. Rather, URS simply raises another straw-man argument by speculating that this might be (without explaining how) a possible outcome under Minnesota's amended comparative fault statute, MINN. STAT. §§ 604.01-.02, but admitting that no cases have actually found such a result. (Resp. Br. 25.) URS's citation to *Engvall* is even less unavailing and is particularly misleading. URS cites *Engvall* as a case in which a party was permitted to proceed on an indemnity theory because the jury might assign 100% liability to the third-party defendant. (Resp. Br. 25.) Again, what URS leaves out of the discussion is that the court in *Engvall* was merely recognizing one of the categories of indemnity liability arising from a contract, express or implied in law, *i.e.*, "where the one seeking liability has only a *derivative or vicarious liability* for damage caused by the one sought to be charged." *Id.* at 571-72 (emphasis added). As the case makes clear, the circumstances in *Engvall* permitted the possibility of such "derivative or vicarious" liability.<sup>6</sup> Nothing in any of the pleadings in these cases allege a theory under which URS could be held to have a derivative or vicarious liability for the actions of Jacobs, and conspicuously absent from URS's brief is any suggestion to the

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<sup>6</sup> The party seeking contribution in *Engvall* was a railroad that had a statutorily created absolute and non-delegable duty to the plaintiff. Hence, the court held that it was at least conceivable that the railroad could have a derivative or vicarious liability to plaintiff if the party against whom indemnity was sought were found to be 100% at fault. *Id.* at 572.

contrary. Hence, URS's common law "indemnity" claims remain nothing more than contribution claims, barred by the absence of common liability.

**V. URS Can Only Offer Assumptions and Speculation to Argue That the Legislature Intended to Eliminate the Common Liability Requirement for Contribution Claims.**

URS argues that the 2007 amendments to MINN. STAT. § 541.051 allow it to recover in contribution or indemnity regardless of the absence of common liability. (Resp. Br. 13-15.) The amendments, however, did nothing to change the required *elements* of contribution/indemnity claims; they address only *when* such claims accrue and can be brought. URS fails to identify any language in the 2007 amendments eliminating the common liability requirement for contribution claims. Instead, URS engages in an expansive reading of the amendments that is unsupported by any legislative history. The legislative history for the amendments is significant because the amendments were designed to address the factual situation in *Weston*, where liability between the plaintiff and third-party contribution defendant existed, but whether a contribution claim could be brought was based on the fortuity of when the plaintiff decided to file suit. *See* App. Br. 26 n.9. In contrast, URS's entire statutory interpretation argument is based on assumptions of what else the legislature "could have" done to address *Weston*. (Resp. Br. 14-15.) URS, however, cannot point to any legislative history that actually supports its assumption that the legislature intended to eliminate the common liability prerequisite for contribution claims. In contrast, Jacobs' interpretation is based on the actual legislative history and specific factual situation in *Weston* that the amendments were intended to address. *See* App. Br. 26. Based on the legislative history and purpose of the statute of repose, there is simply no

evidence that the legislature intended to eliminate the common liability requirement and essentially subject persons involved with improvements to real property to liability for contribution and indemnity in perpetuity.

URS also offers no reason to ignore other courts that have addressed similar issues. The Iowa Supreme Court's decision in *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724 (Iowa 2008), remains instructive because it addresses a strikingly similar situation. Faced with such pertinent caselaw, URS can only attempt to disparage the Iowa Supreme Court's conclusion in *Ryan* by attacking the court's analysis as being "rigid and formulaic" and that the court "may or may not have resolved that issue [of interpreting amendments to the statute of repose] correctly." (Resp. Br. 16-17.) URS does not contest that the amendments to the Iowa statute of repose are comparable to the 2007 amendments in Minnesota. Both sets of amendments related to eliminating any repose barriers for bringing contribution or indemnity claims. Compare *Ryan*, 745 N.W.2d at 729 (amended statute of repose "shall not affect the time during which a person found liable may seek and obtain contribution and indemnity from another") with MINN. STAT. § 541.051, subd. 2 (allowing contribution or indemnity claim "regardless of whether it accrued before or after the ten-year period referenced in paragraph (a)"). The Iowa Supreme Court refused to interpret the amendments to its statute of repose as eliminating the requirement of common liability for contribution claims. *Ryan*, 745 N.W.2d at 731. URS's only attempt to substantively distinguish *Ryan* is by pointing out that the common liability requirement for contribution in Iowa is by statute. (Resp. Br. 16.) URS fails to explain, however, why this

makes any difference or why it otherwise makes the court's reasoning inapplicable or irrelevant.

It is clear from the *Ryan* case that the legal principles and logic it relied on are the same that entitle Jacobs to dismissal of URS's claims under Minnesota law. Simply put, they are: (1) contribution requires common liability; (2) a statute of repose extinguishes that common liability; and (3) an amendment that changes the time when a contribution claim may be brought does not alter the required elements of that claim. URS raises no arguments and cites no law that changes these conclusions.

**VI. URS Presents No Evidence That the Legislature Intended the 2007 Amendments to Revive Contribution and Indemnity Claims That Had Been Extinguished Before the Retroactive Date.**

There is no dispute that the language of MINN. STAT. § 541.051 prior to the amendments in 2007 expressly subjected contribution and indemnity claims to the ten-year statute of repose, as well as direct claims. URS argues, however, that as a result of the 2007 amendments, which have a retroactive date to June 30, 2006, these previously extinguished contribution/indemnity claims were revived. (Resp. Br. 17-18.) Jacobs does not dispute that the legislature unambiguously provided that the amendments were to have a retroactive effect. But that uncontroversial point does not point to the unstated and illogical retroactive application of the amendments to causes of action that had been extinguished decades *prior* to the retroactive effective date.

In support of its interpretation of the effect of the amendments, URS points to *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002). (Resp. Br. 18.) *Gomon* does not support URS's argument. In *Gomon*, the issue was whether the legislature

had intended an amendment to the *statute of limitations* to be applied retroactively. The statute was not given an express retroactive effective date, but it provided that it applied to “actions commenced on or after” the effective date. *Id.* at 416. While the plaintiffs’ cause of action in *Gomon* had expired under the prior statute of limitations, the court held it had been revived because the language “actions commenced on or after” the effective date was a clear expression of legislative intent to retroactively revive the claim. *Id.* at 417. In contrast, in the instant case, 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.

URS also relies on this Court’s decision in *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.* 749 N.W.2d 98 (Minn. App. 2008), *rev. denied* (Minn. Aug. 5, 2008). (Resp. Br. 17.) As discussed in Jacobs’ opening brief, *U. S. Home* is not controlling here. (App. Br. 25.) In *U. S. Home*, it is clear from the reported facts that common liability existed between the two defendants and the plaintiff; that the plaintiff’s cause of action had accrued; and that plaintiff’s lawsuit had even been commenced *before* the expiration of ten years from substantial completion of construction. 749 N.W.2d at 100. Hence, the subcontractor against whom contribution/indemnity claims were asserted in that case simply did not have available to it a denial of liability based on the absence of common liability to plaintiff. URS can only respond by waving away these operative facts as “various insignificant differences.” (Resp. Br. 17.) Despite this attempt to ignore the specific situation addressed by *U. S. Home*, the fact remains that, unlike the instant case, common liability had existed at one time in *U.S. Home* and the unavailability of a contribution/indemnity claim was due to the plaintiff’s decision about when to sue. In addition, there is no indication in *U. S. Home* that this Court

was asked to consider whether the amendments were intended to necessarily revive claims otherwise extinguished both *before and after* the retroactive effective date. This Court should not infer such intent.

**VII. This Court Should Not Interpret the 2007 Amendments to MINN. STAT. § 541.051 to Deprive Jacobs of a Vested Right in Violation of Due Process.**

As an initial matter, URS mischaracterizes Jacobs' constitutional arguments on this appeal. Contrary to URS's contentions, Jacobs has never argued—either at the trial court or on appeal—that MINN. STAT. § 541.051 or its 2007 amendments should be declared unconstitutional. *See* Resp. Br. 26 (“Jacobs seeks to have this Court declare the 2007 amendments to MINN. STAT. § 541.051 unconstitutional.”). Jacobs has instead only argued against an unconstitutional *interpretation* or application of the 2007 amendments to the facts of these cases. *See* App. Br. 28 (“Interpreting the 2007 Amendments to MINN. STAT. § 541.051 to Revive Time-Barred Contribution-Indemnity Claims Would Violate Jacobs' Due Process Rights.”). In other words, Jacobs does not claim that the amended statute itself is unconstitutional; rather, the question is whether the way that statute will be interpreted is unconstitutional.<sup>7</sup>

There are many flaws in URS's analysis defending its unconstitutional interpretation of the amendments. First, its contention that a party does not acquire a vested right to immunity to suit upon expiration of a repose period flies in the face of settled Minnesota law. *See, e.g., Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005) (finding that

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<sup>7</sup> In fact, this Court has previously found that particular applications of MINN. STAT. § 541.051 are unconstitutional without deeming the statute itself unconstitutional. *See Brink v. Smith Cos. Constr., Inc.*, 703 N.W.2d 871 (Minn. Ct. App. 2005) (finding MINN. STAT. § 541.051 unconstitutional *as applied* to general contractor's third-party action against subcontractors).

statutes of repose create ‘a substantive right in those protected to be free from liability after the legislatively-determined period of time’”) (citation omitted). It also ignores (as URS does throughout its brief) the fundamental distinction—rising to constitutional significance—between statutes of repose, which are substantive limitations on acquiring a cause of action, and statutes of limitation, which are merely procedural limitations on the remedy. *See Weston*, 716 N.W.2d at 641. Indeed, URS relies on a number of cases involving *statutes of limitation*, which simply do not have the same constitutional status as statutes of repose.<sup>8</sup> In addition, regardless of the status of *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), URS does not challenge the validity of *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945), *aff’d*, *Donaldson v. Chase Secs. Corp.*, 13 N.W.2d 1 (Minn. 1943), which, as noted in Jacobs’ opening brief, recognized the same substance-procedural distinction between statutes of limitation and statements of repose for constitutional analysis as *Danzer*.

Second, URS’s contention that it does not matter to the constitutional question that Jacobs acquired a vested right is contradicted by a long-standing line of Minnesota cases, including *U.S. Home. U.S. Home*, 749 N.W.2d at 101 (“But the Fourteenth Amendment . . . prohibits the legislature from enacting retroactive legislation that divests a private vested interest”). *See also* App. Br. 29, 32, 33 (citing *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);

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<sup>8</sup> For example, in arguing that the statute of repose does not confer any vested right in Jacobs, URS cites *Wschola v. Snyder*, 478 N.W.2d 225, 227 (Minn. Ct. App. 1991), a case relied on by the trial court involving a *statute of limitations*, ignoring the distinction between repose and limitations statutes as to vested rights. (Resp. Br. 30-31.) This Court’s use of the word “repose” in the quote relied on by URS actually refers to repose provided by a statute of limitations, which was at issue in that case, not a statute of repose. URS also cites to *Lent v. Doe*, 47 Cal. Rptr. 2d 389 (Cal. Ct. App. 1995), another statute of limitations case. (Resp. Br. 35.)

*Peterson v. City of Minneapolis*, 173 N.W.2d 353 (Minn. 1969) and *Snortum v. Snortum*, 193 N.W. 304 (Minn. 1923)). URS does not even address these cases cited by Jacobs establishing that private vested rights cannot constitutionally be divested by retroactive laws.

URS instead raises a number of straw-man arguments in its attempt to eviscerate the character and effect of statutes of repose. First, URS argues that since the statute of repose is an affirmative defense, Jacobs cannot have a vested property interest in it. (Resp. Br. 31.) The issue, however, is not whether the statute of repose is an affirmative defense; the issue is whether the running of the repose period vests a private property right to be free from suit, which the Minnesota Supreme Court has already recognized. *See Camacho*, 706 N.W.2d at 55. URS then argues that since the existence or non-existence of a *cause of action* is not a vested right, and the legislature can retroactively eliminate causes of action for contribution and indemnity, then a statute of repose eliminating that cause of action cannot be a vested right. (Resp. Br. 31.) Whether a *cause of action* is a vested right simply has no bearing whether those claims could exist in the first place against a defendant who has received the benefit of the running of the statute of repose. Indeed, URS fails to cite any cases where the validity of a statute of repose depended on the cause of action at all.

URS also relies heavily on two non-Minnesota cases for its contention that there is no constitutional obstacle to reviving causes of action extinguished by a repose statute. (Resp. Br. 28-29) (citing *Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989) and *Shadburne-Vinton v. Dalkon-Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995)). Both cases, however, rejected the constitutional significance of the substance-procedure distinction and the vested immunity from suit arising from repose

statutes which the Minnesota courts, as discussed above, have endorsed. URS also relies on two other Minnesota cases decided long before *Weston* (Resp. Br. 27), but both contain only dictum on the point at issue. In *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 592 (Minn. Ct. App. 1994), the court expressly held that the legislature had *not* made the statutory amendment at issue retroactive. In *Indep. Sch. Dist No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 291-92 (D. Minn. 1990), the court held that the fraud exception to MINN. STAT. § 541.051 applied, so that the repose period did not bar the claim at issue in any event.

URS urges this Court follow the results in *Usery v. Turner Elkborn Mining Co.*, 428 U.S. 1 (1976) and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 US. 717 (1984) (Resp. Br. 34-35). However, that line of cases does not settle the repose issue. Unlike the situation here, where the running of the statute of repose created a private vested property right, the defendants in *Usery* and *Pension Benefit* had no legitimate expectations that rose to the level of a protected property right that the retroactive application of new legislation abrogated.<sup>9</sup> That is, the defendants did not have a property right in the prior state of the law before the new legislation was enacted. In contrast, here (as well as in *Danzer*), the defendant did acquire a protected property right once a statutory provision specifically extinguished a potential cause of action and thus granted the defendant with an outright immunity from suit.

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<sup>9</sup> In *Usery*, the Supreme Court rejected a due process challenge to legislation subjecting coal mine operators to liability for illnesses suffered by miners in connection with work done long before the legislation was enacted. In *Pension Benefit*, the Supreme Court upheld a statute imposing liability on employers for withdrawing from pension plans, including employers who withdrew before enactment of the statute.

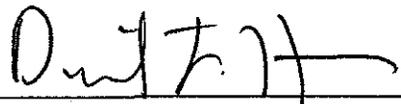
Because Minnesota courts do recognize constitutional restrictions on deprivations of vested rights, such as immunity to suit under a statute of repose, the 2007 amendments to § 541.051 cannot, consistent with constitutional Due Process, deprive Jacobs of the immunity to suit it acquired decades before 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: January 25, 2010.

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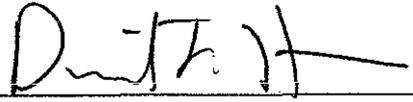
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**CERTIFICATE OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6,533 words. This brief was prepared using Microsoft Word 2003.

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