

Nos. A09-1776 & A09-1778

STATE OF MINNESOTA
IN SUPREME COURT

In Re: Individual 35W Bridge Litigation

**BRIEF AND ADDENDUM OF
APPELLANT URS CORPORATION**

David F. Herr (#4441)
James Duffy O'Connor (#80780)
Kirk O. Kolbo (#151129)
Keiko L. Sugisaka (#266152)
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8200

Attorneys for Respondent Jacobs
Engineering Group Inc.

Jocelyn L. Knoll (#022988X)
George Eck (#25501)
Eric A. O. Ruzicka (#0313373)
Colin Wicker (#0340030)
Dorsey & Whitney LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
(612) 340-2600

Attorneys for Appellant URS Corporation

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES¹

1. Is the statute of repose a defense that defeats common liability and prevents URS Corporation (“URS”) from bringing a claim for contribution even though repose is an affirmative defense unrelated to the acts, omissions, or culpability of Jacobs Engineering Group Inc. (“Jacobs”)?

This issue was raised in the district court in Jacobs’ motion to dismiss URS’s third-party complaints and URS’s response thereto. In its order denying Jacobs’ motion, the district court held that Jacobs’ statute of repose defense against direct claims did not extinguish common liability because it is “unrelated to Jacobs’ acts, omissions, or culpability.” ADD07. Jacobs preserved the issue for appeal by bringing an interlocutory appeal. The court of appeals reversed the district court, holding Jacobs’ statute of repose defense against direct claims defeated URS’s contribution claim because it is a personal defense based upon a public policy of immunity, even though the defense is not related to Jacobs’ acts, omissions, or culpability. ADD23-24. URS petitioned this Court for further review, which was granted.

Apposite Authority: *Horton v. Orbeth, Inc.*, 342 N.W.2d 112 (Minn. 1984); *Jones v. Fisher*, 309 N.W.2d. 726 (Minn. 1981); *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977).

¹ In its Order granting review, this Court also approved an additional issue on cross-appeal. In accordance with the sequence of briefing set out in Minn. R. Civ. App. P. 131.01, subd. 5(d), Jacobs will raise that issue in its brief and URS will respond in turn.

2. Does the ten-year statute of repose in paragraph (a) of Minn. Stat. § 541.051, subd. 1, which prevented plaintiffs from bringing direct claims against Jacobs, bar URS from prosecuting a contribution claim against Jacobs, even though subd. 1(b) of that statute provides claims for contribution may be brought “notwithstanding paragraph (a)” and “regardless” of whether such claims accrue before or after that ten-year period?

This issue was raised in the district court in Jacobs’ motion to dismiss and URS’s response. The district court denied Jacobs’ motion, holding that “[t]he plain language of the statute allows Defendants’ claims for contribution.” ADD04. Jacobs then preserved the issue for appeal by bringing an interlocutory appeal. On appeal, the court of appeals held that, because of the immunity provided by that statute of repose, the common liability rule prevented URS from bringing claims for contribution against Jacobs. The court of appeals reasoned that the phrase “notwithstanding paragraph (a)” does not alter the common law elements of a contribution claim, ADD19-20, but did not discuss the phrase “regardless of whether it accrued before or after the ten-year period referenced in paragraph (a)” from subd. 1(b) or explain how that phrase was consistent with its holding. URS petitioned this Court for further review, which was granted.

Apposite Authority: Minn. Stat. § 541.051; *Johnson v. Cook County*, 786 N.W.2d 291 (Minn. 2010); *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379 (Minn. 1999).

STATEMENT OF THE CASE

Respondent Jacobs is the engineering company responsible for the design flaw that caused the collapse of the 35W Bridge. URS, the State of Minnesota, and Progressive Contractors Incorporated (“PCI”), a contractor that was working on the Bridge when it collapsed, have all settled with the victims of the collapse, but Jacobs has not contributed to any of the settlements, and it seeks to avoid all liability for the property damage, personal injury, and death caused by its professional negligence. This case is about whether Minnesota law allows Jacobs to escape its fair share of responsibility, or instead allows URS to seek contribution from Jacobs for the damage caused by its negligence.

The 35W Bridge, which was designed and built in the 1960s, collapsed on August 1, 2007. The 122 cases arising out of the collapse were filed in Hennepin County and assigned to Judge Deborah Hedlund. Victims of the collapse brought their claims for personal injury, property damage, and wrongful death against URS, an engineering company that was conducting a fatigue and fracture study of the 35W Bridge at the time of the collapse, and PCI.² The victims were unable to sue Jacobs because of the statute of repose set forth at Minn. Stat. § 541.051, subd. 1(a). URS, however, brought claims for contribution against Jacobs, relying in part on Minn. Stat. § 541.051, subd. 1(b), which

² PCI later entered into *Pierringer* settlement with the victims and the State of Minnesota. PCI is, therefore, no longer a party to the litigation or this appeal.

was amended in 2007 to eliminate the statute of repose on claims for contribution and indemnification.³

Jacobs responded to URS's claims by bringing a motion to dismiss under Minn. R. Civ. P. 12.02(e). Jacobs argued: (1) it had no common liability with URS because of the statute of repose in Minn. Stat. § 541.051, subd. 1(a) barring the victims from bringing direct claims against Jacobs; (2) the 2007 amendments to Minn. Stat. § 541.051 did not allow for claims that would have been barred under the previous version of the statute; and (3) it would violate Jacobs' due process rights if the 2007 amendments did have the effect of allowing URS to bring claims which would have been barred under the prior version of the statute. URS, in response, argued: (1) it had common liability with Jacobs because the statute of repose was not the sort of defense that destroys common liability; (2) it was allowed to bring its claims under the plain language of the 2007 amendments to Minn. Stat. § 541.051, which the legislature expressly stated were to be applied retroactively; and (3) the 2007 amendments did not violate due process. The district court denied Jacobs' motion, and Jacobs responded by bringing an interlocutory appeal. On appeal, the court of appeals reversed the district court. The court of appeals based its decision on the common liability element of a contribution claim and did not, therefore, reach the constitutional issues briefed by the parties. ADD13-25. However, in the related interlocutory appeal involving the State of Minnesota's claims against Jacobs, the

³ The full text of the current version of Minn. Stat. § 541.051 is reproduced in the Addendum at pages ADD31-32. The full text of the prior version is also in the Addendum at page ADD33.

court of appeals held the 2007 amendments to Minn. Stat. § 541.051 did not violate due process. A150-151.

STATEMENT OF FACTS⁴

I. Jacobs' Professional Negligence Results in the Collapse of the 35W Bridge

During the early 1960s, engineering firm Sverdrup & Parcel and Associates, Inc. (“Sverdrup”) designed the 35W Bridge for the State of Minnesota. A021. As a result of a series of mergers and name changes, Jacobs is the successor to Sverdrup. A020-21. Sverdrup contracted to design the Bridge in accordance with the then-current version of the Standard Specifications for Highway Bridges issued by the American Association of State Highway Officials (“AASHO”).⁵ A021-22. Those specifications established the allowable stresses for the steel used in highway bridges, like the 35W Bridge, and provided that bridges’ “gusset plates shall be of ample thickness to resist shear, direct stress, and flexure, acting on the weakest or critical section of maximum stress.” A022. The allowable stresses provided for in the AASHO specifications depend, in part, on the thickness and grade of the steel used in the bridge. A022. So, for example, a given level of design stress could be acceptable for a thick steel plate with a considerable capacity to resist that stress but not acceptable for a thinner plate made of the same grade of steel that has less capacity to resist that stress. Tragically, Sverdrup designed the 35W Bridge with gusset plates at the U10 node that were half as thick as was required under the AASHO

⁴ Because this appeal is from a motion to dismiss, the facts are taken from the pleadings.

⁵ AASHO is now known as AASHTO, the American Association of State Highway and Transportation Officials.

specifications, and that were not, therefore, of ample thickness to resist shear, direct stress, and flexure. A022. As a result, Sverdrup was professionally negligent in failing to design the Bridge in compliance with the applicable specifications. A022-23.

On August 1, 2007, the 35W Bridge collapsed into the Mississippi River. The collapse was caused by a failure of the inadequately designed U10 gusset plates. The collapse was the direct result of Sverdrup's professional negligence in designing the 35W Bridge. A023. Thirteen people died in the collapse, and many more were injured. A004.⁶

II. URS's Study of the 35W Bridge

At the time of the collapse, URS was engaged in a fatigue and fracture study of the 35W Bridge. A001, A004. URS performed its work under three separate contracts with the Minnesota Department of Transportation. A009, A012-13. The project began in 2003 and was ongoing at the time of the collapse. A001, A004. Although URS was not hired to check whether the Bridge had been correctly designed and the focus of URS's study was not gusset plates, the victims who sued URS after the collapse claimed, among other things, that URS should have discovered the flaw in Sverdrup's design of the gusset plates. A014.

III. The 2007 Amendments to Minn. Stat. § 541.051

Section 541.051 of the Minnesota Statutes, titled "Limitation of action for damages based on services or construction to improve real property," establishes the

⁶ URS has included one of the plaintiffs' complaints in the appendix as a sample. The other complaints contain similar allegations.

statutes of limitation and repose applicable to claims arising out of the defective or unsafe condition of improvements to real property. In May 2007, before the Bridge collapsed, the Minnesota legislature amended Minn. Stat. § 541.051. The amendments were passed in two separate session laws, both of which were signed by the governor. The changes to the language in Minn. Stat. § 541.051 were the same in both, but one law provided that the amendment was “effective retroactively from June 30, 2006,” and the other provided that it was “effective retroactively to June 30, 2006.” 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29. In addition to the usual prospective effect accorded statutory changes, the 2007 amendments to 541.051 thus apply retroactively from June 30, 2006, to May 2007 and from June 30, 2006, indefinitely into the past.

Prior to the 2007 amendments, the statute of repose in paragraph (a) of subdivision 1 of Section 541.051 applied to claims for contribution and indemnity, as well as direct claims. See *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 636-37 (Minn. 2006). The 2007 amendments eliminated the statute of repose for contribution and indemnity claims and affirmatively provided that, “[n]otwithstanding paragraph (a),” (which prevents the accrual of direct claims after a ten-year repose period), contribution or indemnity claims “may be brought” within two years of their own accrual (defined, as applicable here, as “upon . . . commencement of the action against the party seeking contribution or indemnity”), “regardless” of whether they accrued “before or after” the ten-year repose period applicable to direct claims for damages. 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29; codified at Minn. Stat. § 541.051.

IV. The Litigation

Between November 2008 and August 2009, various victims of the 35W Bridge collapse and the trustees for the next-of-kin of persons who died in the collapse sued URS and PCI, bringing claims for personal injury, wrongful death, and property damage. Insurance companies with subrogation claims and corporations that had property destroyed in the collapse also brought claims against the two companies, as did the State of Minnesota. All the plaintiffs claimed URS was professionally negligent for, among other things, not discovering Sverdrup's error in the design of the bridge. URS, in turn, made claims for contribution and indemnification against PCI and Jacobs. URS filed and served its third-party complaints and cross-claims by August 2009, well within the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(b).

Jacobs responded to URS's third-party complaints by bringing a motion to dismiss under Minn. R. Civ. P. 12.02(e).⁷ On August 28, 2009, the district court denied Jacobs' motion. Jacobs then brought an appeal under a claim of right pursuant to the collateral order doctrine and Minn. R. Civ. App. P. 103.03(j), and, in the alternative, petitioned the court of appeals for discretionary review under Minn. R. Civ. App. P. 105. After asking for and receiving informal memoranda from the parties regarding jurisdiction, the court of appeals concluded Jacobs had a right to an immediate interlocutory appeal. A134-137.

⁷ The motion was only made with regard to the earliest group of plaintiffs, those represented by the Schwebel, Goetz, and Sieben, PA firm, which were consolidated by the district court into two categories for pre-trial purposes. However, the legal issues related to the sufficiency of URS's contribution claims in the cases brought by the later group of plaintiffs, those represented by a consortium of law firms, are identical.

Jacobs also petitioned this Court for accelerated review under Rule 118 of the Minnesota Rules of Civil Appellate Procedure, which petition was denied.

On appeal, Jacobs made three primary arguments: (1) URS did not have a claim for contribution because the statute of repose barred plaintiffs from bringing claims against Jacobs, which Jacobs claimed extinguished common liability; (2) the 2007 amendments to Minn. Stat. § 541.051 had not changed the law in such a way as to allow URS to bring claims that would have been barred under the previous version of the statute, despite the retroactive language in the session laws amending the statute; and (3) if the 2007 amendments did allow URS to bring contribution claims that would have been barred under the previous version of the statute, such a change in the law violated Jacobs' due process rights. URS responded, in short: (1) it did have a claim for contribution because the statute of repose was not the sort of defense going to a party's acts, omissions, or culpability that destroys common liability; (2) the plain language of the 2007 amendments to Minn. Stat. § 541.051 did allow URS to bring its claims;⁸ and (3) the change in Minnesota's statute of repose did not violate Jacobs' due process. The court of appeals reversed the district court. ADD11.

⁸ Jacobs discussed the issue in terms of whether the 2007 amendments had retroactively "revived" URS's claims. That suggests URS had claims that lapsed under the previous version of the statute and were then rejuvenated by the amendment. That is incorrect. Prior to the collapse of the 35W Bridge and the subsequent litigation, URS never had any claims against Jacobs. URS's claims first arose when it was sued after the bridge collapse, and those claims are allowed under the version of the statute then (and now) in force.

The court of appeals concluded URS does not have a claim for contribution because the statute of repose in Minn. Stat. § 541.051, subd. 1(a), prevents the victims from having claims against Jacobs, even though Minn. Stat. § 541.051, subd. 1(b), provides that a claim for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought within two years of accrual, “[n]otwithstanding paragraph (a)” and “regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).” The court of appeals did not address the “regardless” clause, but reasoned that the “notwithstanding” clause had not changed the elements of a contribution claim, and concluded the statute of repose barring the victims’ claims prevented URS and Jacobs from having common liability because the statute of repose is a defense in the nature of a personal immunity, even though this Court explained in *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984) that defenses extrinsic to a tort itself, such as “personal immunity,” do not extinguish common liability. Given the ruling, it did not reach the constitutional issues in this appeal.

V. The Settlement

URS and all the remaining plaintiffs with claims against URS eventually entered into a settlement agreement. A158-173.⁹ The settlement, which involved minors and wrongful death plaintiffs, had to be approved by the district court, which approval was granted on October 5, 2010. A157. Although it contains several terms, the essence of the settlement agreement is relatively straightforward: the plaintiffs released their claims in

⁹ URS had previously entered into a *Pierringer* settlement with the State of Minnesota, and some subrogation plaintiffs had earlier voluntarily dismissed their claims.

exchange for a payment. A159-162. It was not a *Pierringer* settlement. See *Frey v. Snelgrove*, 269 N.W.2d 918, 920 n.1 (Minn. 1978) (listing the elements of a *Pierringer* settlement). Although Jacobs was primarily responsible for the collapse of the 35W Bridge, Jacobs did not contribute to the settlement, did not reimburse URS for the funds URS spent settling the claims, and did not otherwise provide or fund any compensation for the death, injury, and damage resulting from its failure to correctly design the 35W Bridge. In a section entitled, “Preservation of URS’ Claims and Plaintiffs’ Cooperation,” the settling parties agreed that URS was not releasing Jacobs, which was not a party to that settlement or any other, and provided for the preservation of URS’s claims against Jacobs.¹⁰ A163.

SUMMARY OF ARGUMENT

Jacobs is the company responsible for the design error that caused the collapse of the 35W Bridge. Nonetheless, it contends equity requires that URS, which plaintiffs claimed should have discovered the 40-year-old latent flaw in Jacobs’ design, not be able to seek contribution from Jacobs.

Jacobs’ argument is based on its view of the so-called “common liability” requirement. In essence, Jacobs claims it cannot be liable for contribution because it is not directly liable to plaintiffs. But, Jacobs’ argument fails for two complimentary reasons: (1) it misconstrues Minnesota’s equitable remedy of contribution and the

¹⁰ URS brings these facts to the Court’s attention only because Jacobs suggested in its response to URS’s petition for review that URS might have given up its claims against Jacobs as part of the settlement with the plaintiffs. As the facts show, it did not.

common liability requirement for that remedy; and (2) it is not consistent with Minn. Stat. § 541.051, which explicitly provides that URS's claims for contribution "may be brought," and that they may be brought both "notwithstanding" the bar on the plaintiff's direct claims and "regardless" of the fact that URS's claims accrued more than ten years after the 35W Bridge was built.

This Court has repeatedly recognized that while common liability is an element of the equitable cause of action of contribution, it can exist between entities even when one entity has a complete defense to claims from the injured plaintiff. In its most recent and comprehensive explanation of the distinction between those defenses that destroy common liability and those which do not, *Horton v. Orbeth, Inc.*, 342 N.W.2d 112, 114 (Minn. 1984), this Court explained that defenses that do not arise out of the defendant's acts or omissions do not destroy common liability. Jacobs' statute of repose defense arises solely from the passage of time. It is unrelated to the Jacobs' acts, omissions, and culpability, and does not, therefore, extinguish common liability. The court of appeals mistakenly based its opinion on the similarity between personal immunities and the statute of repose when it found in Jacobs' favor. This Court, however, specifically indicated in *Horton* that personal immunities are precisely the sort of defense that do not destroy common liability. 342 N.W.2d at 114. Jacobs has common liability with URS, and the court of appeals should have upheld the decision of the district court.

The court of appeals' decision is also contrary to the plain language of Section 541.051, subd. 1(b). Plaintiffs were unable to sue Jacobs because of the ten-year statute of repose in Minn. Stat. § 541.051, subd. 1(a). However, paragraph (b) of that same

subdivision specifically provides that claims for contribution or indemnity “may be brought” “[n]otwithstanding paragraph (a),” which contains the statute of repose, and “regardless” of whether such claims accrue before or after the ten-year repose period. The legislature thus specifically contemplated and allowed claims for contribution, like URS’s, which accrue and are brought after the ten-year period for repose has run. The court of appeals misinterpreted the “notwithstanding” clause and, despite being briefed on the subject, ignored the “regardless” clause. The outcome thwarts the legislature’s intent, as expressed in the plain language of the statute. This Court should reverse the court of appeals and affirm the district court’s denial of Jacobs’ motion to dismiss.

ARGUMENT

I. Standard of Review

When reviewing a decision on a motion to dismiss brought pursuant to Minn. R. Civ. P. 12.02(e), the question before this Court is whether the complaint sets forth a legally sufficient claim for relief. *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citing *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997)). The standard of review is, therefore, *de novo*. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The facts pled in URS’s complaint are to be accepted as true and all reasonable inferences must be construed in favor of URS. *Id.*¹¹ A claim

¹¹ Jacobs argued in its response to URS’s petition for review that the statement, “Jacobs is responsible for the design flaw that led to the collapse of the 35W Bridge” was “merely an allegation.” This Court, however, is considering a motion to dismiss, so “mere” allegations must be accepted as true. At trial, URS will present ample evidence proving the point, including the testimony of professional engineers with expertise in bridge design and the forensic analysis of collapsed structures.

prevails against a motion to dismiss if it is possible for the court to grant relief on any evidence that is consistent with the claimant's theory. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000). "Statutory construction is also a legal issue reviewed de novo." *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).

The "primary objective in interpreting statutory language is to give effect to the legislature's intent as expressed in the language of the statute." *Pususta v. State Farm Ins. Cos.*, 632 N.W.2d 549, 552 (Minn. 2001). The Court only looks outside of the statutory text to ascertain legislative intent if the statute's language is ambiguous. *Erdman v. Life Time Fitness, Inc.*, 788 N.W.2d 50, 56 (Minn. 2010) (citing *Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1998)). Words and phrases are to be construed according to their plain and ordinary meanings, *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000), and "[w]henver it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

II. URS Has A Claim for Contribution Against Jacobs Under Minnesota's Common Law

A. Contribution Under Minnesota Law

The basic question underlying the issues accepted for review by this Court is whether URS has pled a claim for contribution against Jacobs that can survive a 12.02(e) motion to dismiss. "When one tortfeasor has paid or is about to pay more than his equitable share of damages to an injured party, he has an interest in obtaining indemnity or contribution from his fellow tortfeasors." *Lambertson v. Cincinnati Corp.*, 257

N.W.2d 679, 686 (Minn. 1977). “[C]ontribution and indemnity are independent causes of action; they are venerable equity actions and part of our state’s common law.” *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). They are, “variant common-law remedies used to secure restitution and fair apportionment of loss among those whose activities combine to produce injury.” *Lambertson*, 257 N.W.2d at 685.

The remedies differ in their effect: contribution requires the parties to share the burden of the settlement or judgment based on their relative fault whereas indemnity requires one party to fully reimburse the other. *Id.* at 686. The elements of each equitable cause of action also differ. Indemnity, for instance, does not require common liability. *See United States v. J&D Enterprises*, 955 F. Supp. 1153, 1157 (D. Minn. 1997) (quoting *Hermeling v. Minnesota Fire & Cas. Co.*, 548 N.W.2d 270, 273 n.1 (Minn. 1996) (overruled on other grounds)).

Traditionally, Minnesota recognized five situations in which indemnity was allowed. *Henrickson v. Minnesota Power & Light Co.*, 104 N.W.2d 843, 848 (Minn. 1960) (listing five categories). The fourth category was cases in which “the one seeking indemnity has incurred liability merely because of a failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.” *Id.* URS has such a claim: plaintiffs alleged URS was negligent for failing to discover the design error in the 35W Bridge that caused the collapse, URS denied that allegation based on the actual scope and quality of its work for MnDOT but ultimately entered into a reasonable

settlement with the plaintiffs to avoid the risks and costs of trial, and URS now seeks reimbursement from Jacobs, the party responsible for the design error.

In *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977), this Court partially overruled *Henrickson* (and various earlier cases) and determined that claims fitting in that fourth category were better addressed using “contribution based upon relative fault.” That way, each party whose negligence caused a plaintiff’s injury would “bear the cost of compensating plaintiff in proportion to its relative culpability.” *Id.* at 368. Consistent with *Tolbert*, URS is seeking Jacobs’ contribution to the settlement with plaintiffs based on Jacobs’ relative culpability for causing the collapse of the 35W Bridge.

B. URS’s Contribution Claim Survives its Settlement with Plaintiffs

In its response to URS’s petition for review, Jacobs suggested the settlement between URS and the plaintiffs might somehow bar URS from pursuing its claim against Jacobs.¹² Jacobs is mistaken. Minnesota law is structured so as to encourage parties to enter into reasonable settlements. URS did not have to take the cases brought by the plaintiffs to trial, which would have further delayed compensating innocent victims of the collapse, in order to preserve its right to contribution from Jacobs.¹³ “[A] party who

¹² The settlement was entered into well after Jacobs brought its motion to dismiss and, accordingly, was not a basis for either of the lower courts’ decisions. Any issues Jacobs may have with the terms of the settlement would be most appropriately addressed by the district court in the first instance. URS only discusses the settlement in this brief because Jacobs already attempted to raise the issue before this Court and may attempt to do so again.

¹³ Under Minn. Stat. § 541.051, subd. 1(c), one of the events that can trigger accrual of a

seeks contribution ‘need not make payment pursuant to a judgment, but may settle by a fair or provident payment and then seek contribution from other joint tortfeasors for their fair share of the settlement price.’” *Roemhildt v. Gresser Cos., Inc.*, 729 N.W.2d 289, 298 (Minn. 2007) (quoting *Employers Mut. Cas. Co. v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 50 N.W.2d 689, 693 (Minn. 1951)).¹⁴ URS specifically reserved its claims against Jacobs in the settlement with the plaintiffs, A163, and the reasonableness of URS’s settlement and the extent to which URS paid more than its equitable share of plaintiffs’ damages are issues for the district court to resolve on remand at trial or in response to an appropriate motion.

C. URS Has Common Liability With Jacobs

Contribution “is a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties.” *Jones v. Fisher*, 309 N.W.2d 726, 730 n.4 (Minn. 1981) (quoting *Lambertson*, 257 N.W.2d at 688). “[T]he equitable doctrine of contribution . . . requires that those who contribute to an injury bear liability in direct proportion to their relative culpability.” *Anderson v. Stream*, 295 N.W.2d 595, 600 (Minn. 1980). As an equitable action, the “rules governing its use should promote the

contribution claim is payment of a settlement, demonstrating the legislature’s understanding that entering into a settlement agreement with a plaintiff does not bar a defendant from bringing a contribution claim.

¹⁴ *Pierringer* settlements are an exception. In a *Pierringer* settlement, the settling party settles for its share of the fault, so it has, by definition, paid its equitable share of the loss and has no contribution claim based on the settlement. *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 855-56 (Minn. Ct. App. 2005). URS entered into a *Pierringer* settlement with the State of Minnesota. The settlement with the individual plaintiffs was not, however, a *Pierringer* settlement.

fair and just treatment of the parties.” *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 169 (Minn. 1979).

The two elements of a contribution claim are (1) common liability and (2) payment of a disproportionate share of the injured party’s judgment or recovery. *Jones*, 309 N.W.2d. at 728-30; *but see Lambertson*, 257 N.W.2d at 688 (stating that contribution, as an equitable remedy, “should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability.”) Below, the court of appeals mistakenly concluded URS does not have common liability with Jacobs because the individual victims cannot recover damages from Jacobs as a result of the statute of repose in Section 541.051, subd. 1(a). The court of appeals misinterpreted both the common law and, as is discussed in greater detail in Section III below, Minn. Stat. § 541.051.

“[W]hat constitutes ‘common liability’ is not susceptible of a single precise definition.” *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984). Indeed, “common liability” is something of a misnomer: there often is common liability between parties who are not both liable to a plaintiff. Common liability “does not depend solely on whether or not a plaintiff can enforce recovery against two or more defendants.” *Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp. of Am.*, 366 N.W.2d 111, 116 (Minn. 1985) (quoting *Horton*, 342 N.W.2d at 114). Indeed, this Court has held on numerous occasions that various defenses that remove a third-party defendant’s direct liability to a plaintiff do not destroy common liability.

In *Jones*, this Court explained that “defenses that do not go to the merits of a case . . . do not extinguish common liability.”¹⁵ 309 N.W.2d at 729. The *Jones* opinion listed some examples of defenses held in earlier cases not to extinguish common liability, including covenants not to sue, the running of the statute of limitations,¹⁶ and failure to provide statutory notice. *Id.* Later, in *Horton*, this Court gave a slightly longer list and provided some additional explanation illuminating they types of defenses that do and do not go to the merits of a case:

We have held that certain technical defenses, defenses that do not go to the merits of the case, do not extinguish common liability even though they eliminate one defendant's direct obligation to compensate the plaintiff. *Jones v. Fisher*, 309 N.W.2d 726, 729 (Minn. 1984). In such instances it is a factor *extrinsic* to the tort itself (*e.g.*, failure to provide statutory notice, covenant not to sue, personal immunity, or the running of the statute of limitations) by which liability is avoided. The acts or omissions of the excused defendant were otherwise sufficient to subject the defendant to liability.

342 N.W.2d at 114 (emphasis in original).

The test established by this Court is, therefore, whether the excused defendant's acts or omissions were otherwise sufficient to subject that defendant to liability. That test is met here. But for the statute of repose, Jacobs' acts and omissions were sufficient to subject it to liability. Jacobs may point out, as it did repeatedly in the courts below, that

¹⁵ In its memorandum of law submitted to the court of appeals regarding whether it had a right to an interlocutory appeal, Jacobs contended that its statute of repose defense is “a question of immunity” to be “resolved completely separate from the merits of the underlying claim.” A124.

¹⁶ A defense, which, while procedural, is similar to the running of the statute of repose in many respects, one of which is important here: in each case, the defense is based solely on the passage of time, not the acts or omissions of the defendant.

statutes of repose are matters of substantive law, not procedural law, but it is evident from *Horton* that just because a legal defense is “substantive” does not mean common liability is extinguished. The opinion in *Horton* lists covenants not to sue (which are contractual in nature) and personal immunities as examples of defenses that do not extinguish common liability, both of which are matters of substantive law. *Id.* The substantive nature of the statute of repose is thus not determinative, nor is the complete shield to direct liability it offers. Even without considering Minn. Stat. § 541.051, subd. 1(b), which is discussed in Section III below, URS has common liability with Jacobs under existing Minnesota law.

A straightforward application of the *Horton* standard shows Jacobs’ statute of repose defense to plaintiffs’ direct claims does not prevent Jacobs and URS from having common liability. Jacobs has argued the plaintiffs have no cause of action against it, and never have because the statute of repose prevented their claims for professional negligence from ever accruing. To use the language from *Horton*, Jacobs is arguing it has no direct obligation to compensate the victims of the collapse. 342 N.W.2d at 114. However, the *Horton* standard is whether Jacobs’ “acts and omissions” are “otherwise sufficient” to subject it to liability. *Id.* (emphasis added). If it were not for the statute of repose, Jacobs’ professional negligence in designing a bridge that collapsed because the design called for gusset plates only half as thick as required under the applicable professional and contractual standards would clearly subject it to liability. Jacobs’ acts are “otherwise sufficient” to subject it to liability and there is, therefore, common liability between Jacobs and URS under Minnesota law.

This result is consistent with Minnesota's public policy of holding parties responsible for the harm they cause. Contribution and indemnity are "used to secure restitution and fair apportionment of loss among those whose activities combine to produce injury." *Lambertson*, 275 N.W.2d at 685. That public policy of a fair apportionment of loss is reflected in the comparative fault statutes at Minn. Stat. §§ 604.01-02, and has been the basis for this Court's decisions in cases like *Tolbert* and *Lambertson*. Under the inflexible and inequitable version of common liability and contribution urged by Jacobs, however, the party responsible for the collapse of the 35W Bridge will escape all liability, leaving others (URS and the State of Minnesota) to pay for the harm Jacobs actually caused. This Court should reject Jacobs' position, reverse the court of appeals, and allow URS to recover from Jacobs based on Jacobs' share of the fault.

D. The Court of Appeals Applied the Wrong Standard in Determining Which Defenses Extinguish Common Liability

In its opinion, the court of appeals, relying largely on *White v. Johnson*, 137 N.W.2d 674 (Minn. 1965), concluded that "a personal defense that is based upon a well-established public policy of immunity may defeat a contribution claim even though the defense is not related to the defendant's acts, omissions, or culpability." ADD23.¹⁷ The court of appeals mistakenly thought personal immunities do not defeat common liability

¹⁷ Jacobs has also repeatedly claimed, sometimes citing to *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3, 4 (Minn. 1981), that the distinction between defenses that do and do not extinguish common liability is whether liability existed at the moment a tort occurred.

because those immunities apply the moment a tort is committed and do not arise later. ADD22-23. But that is not the correct test. The standard set forth in *Horton*, this Court's most recent and comprehensive discussion of common liability and the defenses which do and do not extinguish it, governs and not the inconsistent and earlier statements in *Vesely* and *White*. URS has common liability with Jacobs because Jacobs' acts and omissions are otherwise sufficient to make it liable. *See Horton*, 342 N.W.2d at 114. It is the nature of Jacobs' defense that counts, not when it arose.

E. Because The Statute of Repose is an Affirmative Defense, it Does Not Cut Off Liability Unless it is Pled

Jacobs did, in fact, face potential liability once the 35W Bridge collapsed. A statute of repose is merely an affirmative defense under Minnesota law. *See State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 885 (Minn. 2006); *see also Integrity Floorcovering, Inc., v. Broan-Nu Tone, LLC*, 503 F.Supp.2d 1136, 1139 (D. Minn. 2007) (*citing Aquila Inc.* for the proposition that a statute of repose is an affirmative defense under Minnesota law). Affirmative defenses are waived if not pled. *Rehberger v. Project Plumbing Co.*, 205 N.W.2d 126, 127 (Minn. 1973). Because the statute of repose is an affirmative defense, and can be waived if not pled, it is not a matter of subject matter jurisdiction, which cannot be waived. Other states which, like Minnesota, treat a statute of repose as an affirmative defense have concluded that the statute of repose has no effect on the court's jurisdiction. *See, e.g., Dunton v. Whitewater W. Recreation, Ltd.*, 942 P.2d 1348, 1350-51 (Colo. App. 1997) (finding that a statute of repose was not jurisdictional and, therefore, could be waived if not raised as an affirmative defense); *see*

also *Sisk v. J.B. Hunt Transport, Inc.*, 81 P.3d 55, 62-63 (Okla. 2003) (distinguishing statute of repose from a jurisdictional limitation period). As the foregoing cases illustrate, even parties with sound affirmative defenses face potential liability.

F. Common Liability Was Not Traditionally Required of Defendants Seeking Reimbursement Because They Failed to Discover or Prevent the Negligence of Another

Before 1977 a party in URS's position would have had a claim against Jacobs for indemnification, not contribution. See *Tolbert*, 255 N.W.2d at 366-68. The typical case fitting in the fourth category of indemnification claims identified in *Hendrickson* was a party, like URS, blamed for failing "to discover or prevent the negligence or misconduct of another." *Id.* at 367. Parties bringing such indemnification claims did not have to prove common liability, as common liability is not an element of an indemnification claim. See *J&D Enterprises*, 955 F. Supp. at 1157.

In *Tolbert*, this Court decided, for sound public policy reasons, that claims involving a failure to discover the negligence of another should be resolved using "contribution based upon relative fault." 255 N.W.2d at 367. After *Tolbert*, the courts could apportion fault between two potentially negligent defendants and did not have to assign all of the liability to either the party responsible for the original mistake or the party that did not discover that mistake. The *Tolbert* Court did not, however, discuss whether a defendant who is potentially liable for failing to discover the errors of another should have to prove the element of "common liability" in order to obtain appropriate reimbursement from the party responsible for the original cause of the underlying injury. If the version of the common liability rule urged by Jacobs and accepted by the court of

appeals is the law in Minnesota, this Court's decision in *Tolbert* to move toward a legal regime of comparative fault, in which defendants each pay their equitable portion, will have had the inadvertent effect of shielding some defendants who would have been wholly liable under the earlier rule from ever having to pay for harm they cause.

If this Court were to generally accept the interpretation of the common liability requirement urged by Jacobs, it should hold that parties like URS, which face liability for failing to discover the negligence of others, nonetheless do not have to prove common liability. Such a holding would be consistent with Minnesota's traditional common law doctrines and with the public policy of holding each party accountable based on its degree of fault, which was, after all, the basis for the decision in *Tolbert* to transform such claims for indemnification to claims for contribution.

Minnesota courts have traditionally recognized that those parties that are initially or primarily negligent have an equitable obligation to reimburse others facing liability for failing to discover or correct that initial negligence. Jacobs should not be allowed to use the "flexible, equitable remedy" of contribution, the point of which is to "secure restitution and fair apportionment of loss among those whose activities combine to produce injury," *Lambertson*, 257 N.W.2d at 685, in order to escape all responsibility and liability for the great harm caused by its professional negligence. This Court should reverse the court of appeals and hold that URS pled a valid claim for contribution and is entitled to go forward and prove that claim at the district court.

III. URS is Entitled to Pursue its Contribution Claim Against Jacobs Under Minn. Stat. § 541.051, subd. 1(b)

A. The Prior Version of Minn. Stat. § 541.051 Contained A Statute of Repose Which Applied to Contribution Claims

Prior to May 2007, Section 541.051, subd. 1(a)-(b), provided that:

(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) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

Minn. Stat. § 541.051 , subd. 1(a)-(b) (2006) (emphasis added), amended by 2007 Minn. Laws, ch. 105, §4; 2007 Minn. Laws, ch. 140, art. 8 § 29. Prior to the 2007 amendments, the two-year statute of limitations and the ten-year statute of repose for claims arising out of the defective or unsafe condition of an improvement to real property also applied to third-party claims for contribution or indemnity. Actions for contribution or indemnity had to be brought within two years of accrual and within ten years of substantial completion of the project, and contribution and indemnity claims only accrued upon payment of a judgment or settlement. *Id.* Under that statutory scheme, potential

defendants sued late in the ten-year period had little time to initiate a contribution claim and could even be barred from bringing the claim before it ever accrued.

B. The *Weston* Case Demonstrated the Inequity Resulting from the Prior Version of Minn. Stat. § 541.051

In *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006), this Court considered a case in which a general contractor was sued by a homeowner in the last months of the ten-year repose period. The ten-year period ran before the general contractor's claims for contribution and indemnification against its subcontractors were brought, or apparently ever even accrued (as accrual of such claims did not occur until payment of judgment or settlement). *Id.* at 637-640. The general contractor was left bearing all of the liability, even though some or all of the property damage might well have been caused by its subcontractors. This Court, while acknowledging the outcome was prejudicial to the general contractor, held the plain language of the statute required the district court to enter summary judgment on the general contractor's claims. *Id.* at 645. Subsequently, the Minnesota legislature amended Section 541.051.

C. The Legislature Responded to *Weston* by Amending Section 541.051

In May 2007, before the Bridge collapsed, the Minnesota legislature amended Section 541.051. The amendment was retroactive to and from June 30, 2006, the date of the *Weston* decision. 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29.¹⁸ As amended, Section 541.051, subd. 1(a) reads:

¹⁸ In *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417-420 (Minn. 2002), this Court addressed a change to a statute of limitations and held the plaintiff was allowed to bring a claim that had been barred under the previous version of the statute

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, 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, 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.

The 2007 amendments affirmatively removed any references to claims for contribution and indemnity from paragraph (a) of subdivision 1. Accordingly, the statutes of limitation and repose in paragraph (a) no longer apply to contribution or indemnity claims. Instead, paragraph 1(a) now governs only direct actions. URS's claims are not, therefore, barred by a statute of repose.

Claims for contribution or indemnity are now governed by a new paragraph (b) the legislature added to subdivision 1 as part of the 2007 amendments. The new paragraph provides:

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).

because the legislature indicated the amended statute was to apply retroactively. The 2007 amendments to Section 541.051 have been in force since before the bridge collapse, so their application to URS's claims, which first arose after the collapse when URS was sued, is not "retroactive." See also note 8, *supra*. However, the rule from *Gomon* would require application of the current version of the statute to URS's claims if retroactivity were at issue.

Minn. Stat. § 541.051, subd. 1(b) (emphasis added).¹⁹ Claims for contribution and indemnification still have a two-year statute of limitations (beginning from their accrual), but they do not have a statute of repose.

In addition to removing contribution and indemnity claims from paragraph (a), which removed the statute of repose for those claims, the legislature also affirmatively provided such a claim “may be brought . . . regardless of whether it accrued before or after the ten-year period referenced in paragraph (a)” and “[n]otwithstanding paragraph (a).” URS’s claims for contribution may, therefore, be brought and “regardless” of the fact that URS’s claims accrued well after the running of the ten-year repose period barring direct claims and “[n]otwithstanding” the statute of repose in paragraph (a).

D. The 2007 Amendments to Minn. Stat. § 541.051 Allow for Accrual of Contribution and Indemnity Claims After the Statute of Repose Has Run for Direct Claims

The amended statute also contains a new definition of when a cause of action for contribution or indemnity accrues. Previously, contribution and indemnification claims only accrued upon payment of a judgment, arbitration award, or settlement. Minn. Stat. § 541.051, subd. 1(b) (2006) (amended 2007). In its current form, the statute provides a different definition of accrual for contribution and indemnity claims:

¹⁹ The statute in both its current and prior form refers to actions for “contribution or indemnity,” reflecting the legislature’s recognition that the two are separate causes of action and not, as Jacobs argued to the district court, a single cause of action known as “contribution-indemnity.” If there were such a hybrid cause of action, however, it would seem common liability would not be an element for claims of the sort asserted by URS here, regarding liability based on failing to discover the negligence of another. *See pp. 23-24, supra.*

... in the case of an action for contribution or indemnity under paragraph (b), 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(c).

Contribution and indemnity thus accrue either when the underlying action is started or when a final judgment, award, or settlement is paid, whichever is earlier. *Id.* The cause of action may then be brought within two years of that accrual, regardless of whether accrual happens before or after the ten-year repose period has run for the direct actions. URS's claims for contribution and indemnity are allowed under the current version of Section 541.051.

In this case, the plaintiffs began their first lawsuits against URS in November 2008, seeking damages for injuries that arose out of the unsafe and defective condition of an improvement to real property, the Bridge. *E.g.*, A001-18. Less than two years after the commencement of those suits, URS brought its contribution and indemnity claims against Jacobs. *E.g.*, A019-27. The ten-year statute of repose established in paragraph (a) of Section 541.051 barred any direct claim by the plaintiffs against Jacobs from accruing, but URS was explicitly allowed to bring its claims against Jacobs within two years of their accrual "regardless" of the fact that the repose period for direct actions had already run and "notwithstanding" the ten-year repose period for direct claims. Minn. Stat. § 541.051, subd. 1(a)-(b).

In its attempt to escape the plain language of the current version of Minn. Stat. § 541.051, Jacobs argued below that the amended statute should be narrowly interpreted

so that it only remedies the particular situation presented in *Weston*. If, however, the Minnesota legislature had only wanted to fix the specific problems created by the definition of when a claim accrues, it could have passed a limited amendment that merely changed that definition. Instead, in addition to altering the accrual definition (in paragraph (c)), the legislature revised paragraph (a) and created a new paragraph (b), which specifically allows contribution and indemnification claims to be brought without regard for the statute of repose applicable to direct claims. Further, if the legislature had only wanted to narrowly fix the problem of a defendant who is sued late in the repose period and has little or no time in which to bring in third-party defendants, it could have followed this Court's implicit suggestion and only amended Section 541.051 to make it similar to a Wisconsin law that frees contribution and indemnity claims from the statute of repose only "if the underlying injury action is brought late in the repose period." 716 N.W.2d at 639-640. Instead, the legislature made all the changes described, and did so in plain terms.

The 2007 amendments to Section 541.051 were clearly passed in response to *Weston*, but, just as clearly, the legislature chose to substantially alter the statute to effect a broad change that does more than merely fix the precise problem experienced by the defendant in *Weston*. This Court should "apply the statute's plain meaning." *Larson v. State*, __ N.W.2d __, 2010 WL 4643074, *2 (Minn. 2010).

E. Jacobs' Reliance on Iowa Law to Avoid the Effects of the 2007 Amendments to Minn. Stat. § 541.051 is Misplaced

Below, Jacobs relied on the Iowa Supreme Court's decision in *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724 (Iowa 2008) in arguing the plain meaning of Minn. Stat. § 541.051, subd. 1(b), can be ignored. Obviously, however, *Ryan* is not binding. Nor is it particularly persuasive. The Iowa Supreme Court's formulaic analysis of whether to allow a contribution claim to proceed should not guide this Court because it is not consistent with the flexible and equitable nature of contribution in Minnesota. Moreover, the Iowa Supreme Court was faced with a different question than is faced by this Court.

In Iowa, common liability is a statutory requirement, not an element of an equitable action as it is in Minnesota. *See Ryan*, 745 N.W.2d at 730-31 (discussing and quoting Iowa's contribution statute); *City of Willmar*, 512 N.W.2d at 874 (contribution is equitable action and part of Minnesota's common law). In *Ryan*, the Iowa Supreme Court was not construing a flexible remedy that is to be applied with reference to the underlying equities. Instead, it was considering a statutory requirement, which must be applied based on the clearly expressed intention of the legislature even if the result is inequitable. Further, the Iowa Supreme Court was faced with a potential conflict between two Iowa statutes, one requiring common liability and another excepting claims for contribution from the statute of repose. 745 N.W.2d at 731. In essence, the Iowa Supreme Court had to decide whether the more recently adopted statute had implicitly created an exception or partial repeal of another, and concluded that an exception or

partial repeal would need to be particularly explicit. The Iowa Supreme Court may or may not have resolved the issue correctly based on Iowa statutory law, but the Iowa Supreme Court's holding in *Ryan* has no bearing on the 2007 amendment to Minn. Stat. § 541.051 or on Minnesota's equitable rule of common liability.

F. The Legislature Struck a Reasonable Balance Between Competing Public Policy Interests When it Amended Section 541.051

In its opinion, the court of appeals discussed the public policy reasons for the statute of repose. ADD16-17, ADD24. There are legitimate and rational reasons that motivated the legislature when it established a statute of repose for work done on improvements to real property, as this Court recognized in *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 452-454 (Minn. 1988), when it held that Section 541.051 does not violate the due process and remedies clauses of the Minnesota Constitution. Statutes of repose are, however, legislative creations, not constitutional requirements, and before it was amended, Section 541.051 had the prejudicial effect of granting repose to some defendants at the expense of other defendants, as this Court recognized in *Weston*. 716 N.W.2d at 645. The legislature is free to create statutes of repose, repeal them, and amend them, so long as it has a rational basis for doing so.

Jacobs has written movingly in its previous briefs and memoranda of law regarding the importance of repose. Undoubtedly, it will do so again. There are, however, public policy interests on both sides. URS, like other defendants seeking contribution and indemnification, has an interest in being equitably reimbursed by at-fault parties. Complete repose for Jacobs here would be at URS's expense. It is for the

legislature, not the courts, to balance those competing interests in redress and repose when enacting statutes of limitation and repose. *See Lent v. Doe*, 47 Cal.Rptr.2d 389, 394-95 (Cal. Ct. App. 1995) (holding in a case involving a retroactive change in the statute of limitations applicable to sexual abuse claims that it was for the California legislature to resolve the competing policy considerations of repose and redress).

In the 2007 amendments to Section 541.051, the Minnesota legislature weighed the interests in repose and redress and struck a rational balance. Any individual contributor to an improvement to real property is “off the hook” concerning arguable defects after ten years if no other person ever has to face potential liability regarding those defects. But if another actor does something that involves those defects and an injury occurs for which that later actor is sued, then that more recent actor can seek contribution or indemnity from the original contributor as well, “notwithstanding” the passage of time and “regardless” of the statute of repose applicable to direct claims, so that all responsible actors fairly share the responsibility. Section 541.051 is thus a reasonable balancing of the competing interests in repose and redress reminiscent of this Court’s holding in *City of Willmar* that a statute of limitations defense to direct claims did not extinguish common liability:

As a practical matter, a party may lose the protection afforded by the statute of limitations against a plaintiff’s claim when there are other defendants who do not have a statute of limitations defense to plaintiff’s claims; but equity deems it more important that a defendant not evade its liability at the literal expense of a codefendant.

512 N.W.2d at 875.

As a practical matter, Jacobs has lost some of the protection of the statute of repose as a result of the 2007 amendments to Minn. Stat. § 541.051. Jacobs avoided direct liability to the victims but may have to contribute to URS's settlement with the victims. It was not for the court of appeals, however, to undo the effect of that legislative amendment and favor the prior legislative policy of complete repose over the current policy, as expressed in the statute, of favoring equity among defendants above complete repose.²⁰

G. Section 541.051 Requires the Courts to Ignore the Bar on Direct Claims Against Jacobs When Deciding Whether URS Can Bring a Claim for Contribution

Jacobs, like URS, would be liable to the plaintiffs but for the ten-year statute of repose in paragraph (a) of § 541.051, subd. 1. Without that statute of repose, there would be “common liability” between Jacobs and URS under even the most literal understanding of the phrase.

Section 541.051, subd. 1(b), provides that, “[n]otwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe

²⁰ The 2007 amendments did not violate due process. Jacobs had no “vested right” in the prior statute of repose. See *Holen v. Minneapolis-St. Paul Metro. Airports Comm’n*, 84 N.W.2d 282, 287 (Minn. 1957); see also *Olsen v. Special Sch. Dist. No. 1*, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988) (a “right is not ‘vested’ unless it is something more than a mere expectation, based on an anticipated continuance of present laws”). Moreover, “[a]bsent a fundamental right or suspect class, minimal judicial scrutiny is appropriate.” *Essling v. Markham*, 335 N.W.2d 237, 239 (Minn. 1983). Under that standard, if a law “is rationally related to achievement of a legitimate governmental purpose, it should be upheld.” *Id.* The 2007 amendments to Minn. Stat. § 541.051 are constitutional because they do not involve any suspect class or fundamental right and are rationally related to the legitimate governmental objective of allowing defendants to seek contribution or indemnification from other at-fault parties.

condition of an improvement to real property may be brought” Thus, by the Legislature’s command, whether or not a contribution claim “may be brought” is to be determined “notwithstanding paragraph (a).” Accordingly, when determining whether the elements of a contribution claim are present, the court must do so “notwithstanding” the immunity conferred by paragraph (a).

When construing the language of a statute, words and phrases must be given “their plain and ordinary meaning.” *Johnson v. Cook County*, 786 N.W.2d 291, 293 (Minn. 2010); *see also* Minn. Stat. § 645.08(1). Minn. Stat. § 541.051 subd. 1(b) provides the paragraph is to be read “[n]otwithstanding paragraph (a),” which directly precedes it. “The word ‘notwithstanding’ has been interpreted to mean ‘in spite of’ or ‘without prevention or obstruction from or by.’” *LaBrosse v. Comm’r of Public Safety*, 387 N.W.2d 649, 651 (Minn. Ct. App. 1986); *see also In re Capitol American Life Ins. Co. Fixed Indem. Policy Forms*, No. C4-98-1266, 1999 WL 185197, *2 (Minn. Ct. App. April 6, 1999) (*citing* The American Heritage Dictionary 1238 (3d ed. 1996)) (“[T]he definition of notwithstanding is ‘in spite of’ or ‘although.’”). Based on a plain and ordinary reading of this phrase in the context of the entire statute, paragraph (b) of § 541.051, subd. 1, is to apply “without prevention or obstruction” from or “in spite of” paragraph (a) of that subdivision.

Further, § 504.051, subd. 1(b), permits a contribution or indemnity claim to be brought “regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).” “Regardless” means “in spite of everything” or “anyway.” American Heritage College Dictionary 1149 (3d ed. 1997). Thus, the

final phrase of § 541.051, subd. 1(b), indicates that contribution claims may be brought “in spite of” the ten-year repose period in paragraph 1(a). Applying the plain and ordinary meaning of “notwithstanding” and “regardless,” Section 541.051, subd. 1(b), affirmatively permits contribution claims even if a defendant is protected against direct claims by the passing of the ten-year repose period.

The court of appeals acknowledged the “notwithstanding” language in subd. 1(b), but ruled that because it did not alter the elements of a contribution cause of action, it played no role in this case. ADD19-20. That analysis is clearly incorrect: The Legislature did not alter the elements—the question of “common liability” is still at issue—it just said that the immunity conferred by paragraph (a) is not to be considered when analyzing those elements. Thus, if there would be common liability without the immunity conferred by “paragraph (a),” as there would be here, then there would still be common liability “notwithstanding” that conferred immunity.

Further, the court of appeals did not give any effect to the “regardless” clause in paragraph (b). Minn. Stat. § 541.051, subd. 1(b), provides that an action for contribution or indemnification “may be brought . . . regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).” “Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). So, even if “[n]otwithstanding paragraph (a)” merely indicates that the statute of repose in paragraph (a) does not apply to contribution and indemnification claims (something that was already clear from the

manner in which the statute was amended), the “regardless” clause must still be given its own effect.

Furthermore, the legislature affirmatively stated claims for contribution and indemnification “may be brought” without any repose period of their own, and without regard to whether they accrue before or after the ten-year repose period applicable to direct claims. Accrual itself was also redefined, so contribution and indemnification claims now accrue upon the earlier of either commencement of the suit or payment of a settlement, judgment, or award. Minn. Stat. § 541.051, subd. 1 (c).

The legislature specifically contemplated and provided for claims for contribution and indemnity that would accrue and could be brought more than ten-years after the completion of the project. Under Jacobs’ theory (and that of the court of appeals), however, a claim for contribution could never accrue more than ten years after completion of the project because the statute of repose will have run against direct claims, thus cutting off common liability once ten years has passed. Jacobs’ interpretation of Minn. Stat. § 541.051, subd. 1(b), and the common liability requirement make the “before or after the ten-year period” language in the “regardless” clause a nullity.

Section 541.051, subd. 1(b), must be interpreted so that the “regardless” clause has an effect. The statute explicitly contemplates and provides for the accrual of claims even after the ten-year repose period has run, and states that such claims “may be brought” within two years of such a post-repose period accrual. So, the statute should be

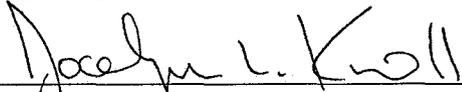
interpreted to allow contribution claims, like URS's, to accrue and be brought after the repose period has run.

CONCLUSION

The Minnesota Legislature expressed its intent in the clear language of Minn. Stat. § 541.051, subd. 1(b), that contribution claims “may be brought” “[n]otwithstanding” and “regardless” of the ten-year repose period for direct claims. Jacobs’ affirmative defense against direct claims (the statute of repose) does not extinguish common liability as it does not spring from Jacobs’ acts or omissions, merely from the passage of time. Jacobs should not be allowed to escape paying its share of the settlement with the victims of the collapse of the 35W Bridge collapse. This Court should reverse the court of appeals.

Dated: December 16, 2010

DORSEY & WHITNEY LLP

By 

Jocelyn L. Knoll #022988X
George Eck #25501
Eric A. O. Ruzicka #0313373
Colin Wicker #0340030
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

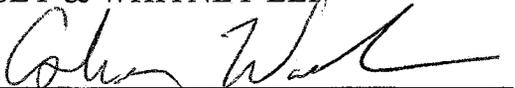
Attorneys for Appellant URS Corporation

CERTIFICATION 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. The length of this brief is 9,861 words. This brief was prepared using Microsoft Word 2003.

Dated: December 16, 2010

DORSEY & WHITNEY LLP

By 

Jocelyn L. Knoll #022988X

George Eck #25501

Eric A. O. Ruzicka #0313373

Colin Wicker #0340030

Suite 1500, 50 South Sixth Street

Minneapolis, MN 55402-1498

Telephone: (612) 340-2600

Attorneys for Appellant URS Corporation