

Nos. A10-87 and A10-89

State of Minnesota
In Court of Appeals

In re Individual 35W Bridge Litigation.

On Appeal of Order Dated and filed: September 23, 2009
and as amended and filed on: December 23, 2009

Trial Court File Nos. (Hennepin County):
MASTER FILE NO. 27-CV-09-7519
Schwebel Personal Injury: 27 CV 09-7274
Schwebel Wrongful Death: 27 CV 08-28245

BRIEF OF APPELLANT JACOBS ENGINEERING GROUP INC.

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Statement of Legal Issues

Each of the issues set forth below was raised by Appellant Jacobs' Motion to Dismiss (A.152) and decided by the trial court in its Orders dated September 23, 2009 (Add.1) and December 23, 2009 (Add.22).

1. Is Jacobs entitled to dismissal of the State of Minnesota's cross-claim against it because MINN. STAT. § 541.051 expressly extinguished the State's claims prior to the amendment of the statute in 2007?

The trial court held that it was not, and denied Jacobs' motion to dismiss.

Apposite Authorities

MINN. STAT. § 541.051

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

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

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

The trial court held that these extinguished claims could be asserted, and denied Jacobs' motion to dismiss.

Apposite Authorities

MINN. STAT. § 541.051

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

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

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

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

3. If MINN. STAT. §§ 3.7391–7395 were interpreted to permit the State to assert a reimbursement claim against Jacobs, would the statute impair Jacobs' contractual rights in violation of the United States and Minnesota Constitutions?

The trial court held that the statute would not impair Jacobs' rights and denied Jacobs' motion to dismiss

Apposite Authorities

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983)
Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740, 750-51 (Minn. 1983)
Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868, 872 (Minn. 1986)
Yaeger v. Delano Granite Works, 84 N.W.2d 363, 366 (Minn. 1957)

4. Is Jacobs entitled to dismissal of the State of Minnesota's cross-claim against it because the state has no right to reimbursement from Jacobs for voluntary payments it made pursuant to MINN. STAT. § 3.7393.

The trial court held that it was not, and denied Jacobs' motion to dismiss.

Apposite Authorities

Samuelson v. Chicago, R.I. & P.R. Co., 178 N.W.2d 620 (Minn. 1970)
United States Fid. & Guar. Co. of Baltimore, MD v. Citizens' State Bank of Antelope, 201 N.W. 431 (Minn. 1924)

5. Is Jacobs entitled to dismissal of the State of Minnesota's cross-claims because its releases from Plaintiffs preclude any liability of Jacobs to the State.

The trial court held that it was not, and denied Jacobs' motion to dismiss.

Apposite Authorities

Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978)
Bunce v. A.P.I., Inc., 696 N.W.2d 852 (Minn. Ct. App. 2005)
Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989)

Statement of the Case

Plaintiffs commenced 121 separate actions for damages arising out of the August 1, 2007, collapse of the I-35W Bridge (“Bridge”) in Minneapolis. *A.1*. Plaintiffs sued Defendants URS Corporation (“URS”) and Progressive Contractors, Inc. (“PCI”). *A.12*. In partial response, URS and PCI commenced third-party contribution and indemnity actions against Appellant, Jacobs Engineering Group Inc. (“Jacobs”), for design work performed in connection with the original construction of the Bridge in the 1960s by Sverdrup & Parcel and Associates, Inc. (“S&P”), which was acquired by Jacobs in 1999. *A.55-56* and *A.65-66*. All the cases filed in Hennepin County relating to the Bridge collapse were assigned to Judge Deborah Hedlund.

PCI also filed a third-party action against Respondent State of Minnesota (“State”). *A.64-66*. The State, in turn cross-claimed against Jacobs for: 1) common law contribution and indemnity;³ 2) contractual contribution and indemnity⁴ based on a 1962 contract for the design of the bridge; and 3) statutory reimbursement. *A.127-129* and *A.147-149*. The State also asserted claims for contribution and indemnity against URS.

Jacobs moved to dismiss the third-party actions brought by URS and PCI. That motion was denied by the district court on August 28, 2009 (*Add.26*) and Jacobs filed two

³ The State’s common law contribution and indemnification claim derived solely from PCI’s claims against the State. PCI has entered into a Pierringer-type settlement with the State and Plaintiffs. Thus, the State no longer has common law contribution or indemnity claims against Jacobs.

⁴ In Count VIII of its cross-claim the State improperly styles its cause of action “Contractual Contribution and Indemnity.” Since contribution is a common law cause of action, not a contractual cause of action, Jacobs will refer to Count VIII as contractual indemnity.

appeals from the denial of that motion and separate petitions for discretionary review. Jacobs raised the identical issue of the applicability of the statute of repose in MINN. STAT. § 541.051 in those appeals. This Court consolidated those appeals by Order dated October 1, 2009. *A.293*. By Order dated November 3, 2009, this Court determined that those appeals were immediately appealable as of right and those appellate proceedings are pending before this Court. (A-09-1776 & A-09-1778). *A.303*. By further Order dated November 3, 2009, this Court denied the petitions for discretionary review as moot because it had accepted jurisdiction over the appeals as a matter of right. *A.305*. On November 12, 2009, PCI notified the parties and this Court that it had settled and would not be participating in these appeals. *A.311*.

Jacobs served and filed a Rule 12 motion to dismiss the State's cross-claims on July 27, 2009. *A.152*. The motion was heard on August 10, 2009. Judge Hedlund denied Jacobs' motion to dismiss by Order dated September 23, 2009. *Add.2*. Because of the district court's consolidation of the bridge cases, Jacobs filed notices of appeal in the lead wrongful death and lead personal injury cases and separate petitions for discretionary review. *A.264* and *A.276*. The appeals were consolidated by this Court on October 8, 2009. *A.299*. By Order dated November 10, 2009, this Court remanded to the district court for an order specifically ruling on the application of Jacob's statute of repose defense to the State's contractual indemnity claim. *A.308*. The Order provided that once the district court ruled on that remanded issue, Jacobs was permitted to file new appeals as of right. On November 24, 2009, this Court denied the petitions for discretionary appeal as premature in light of the

November 10 remand order, but did not preclude Jacobs from filing new petitions for discretionary review. *A.310.*

On December 23, 2009, the district court entered an order on the remanded issue, amending its September 23, 2009, order. *Add.22.* In the December 23, 2009, order, the district court incorporated its previous August 28, 2009, order (*Add.22*) denying Jacobs' motion to dismiss the claims of PCI and URS, and also denying Jacobs' motion to dismiss against the State on the additional ground that the statute of repose in MINN. STAT. § 541.051 did not apply to the State's contractual indemnity claim because the contract forming the basis for the State's claim was executed prior to the enactment of MINN. STAT. § 541.051. *Id.* Jacobs appeals from both the September 23, 2009 and December 23, 2009, orders and has filed separate petitions for discretionary review (*A.276*) of any issues not deemed appealable as of right. This brief addresses all issues for which Jacobs seeks review decided by the trial court when it denied Jacobs' motion to dismiss.

Statement of Facts

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

Plaintiffs commenced 121 actions for damages arising out of the collapse on August 1, 2007, of the I-35W Bridge (“Bridge”) in Minneapolis. *A.1.* Plaintiffs sued URS Corporation (“URS”) and now-settled party Progressive Contractors, Inc. (“PCI”) *A.12.* PCI and URS impleaded Jacobs Engineering Group Inc. (“Jacobs”). *A.55-56* and *A.65-66.* PCI also impleaded the State of Minnesota (“State”). The State cross-claimed against Jacobs. *A.118* and *A.138.*

All claims against Jacobs are premised on the design work performed in connection with the original construction of the Bridge in the 1960s. *A.118-119* and *A.139.* Design services were furnished to the State, as owner of the Bridge, by an engineering firm known as Sverdrup & Parcel and Associates, Inc. (“S&P”). *Add.4.* Jacobs acquired S&P in 1999. *Id.* S&P’s work on the Bridge ended on or before the substantial completion of the Bridge in 1967. *Id.* When Jacobs acquired S&P in 1999 all claims relating to the Bridge were gone, as the repose period under the statute had passed over a decade earlier.

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

amendments is at issue here. After the enactment of the 2007 amendments, § 541.051 provides as follows with respect to the contribution and indemnity claims, with additions made by those amendments shown by underscoring, and deletions by strikeovers:

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

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

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

* * *

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

* * *

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

2007 Minn. Laws, ch. 140, art. 8, § 29, at 122-23.⁵

Summary of Argument

In 1999, Appellant Jacobs acquired Sverdrup & Parcel and Associates, Inc. (“S&P”), an engineering firm that had provided design work to the State on the I-35W Bridge over the Mississippi River in Minneapolis in the 1960s. S&P’s work was completed before substantial completion of the bridge in 1967. Jacobs is a third-party defendant in numerous actions for damages filed following the collapse of the Bridge on August 1, 2007. The State has cross-claimed against Jacobs for contractual indemnity and statutory reimbursement in those actions. The cross-claims are the subject of this appeal.

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

⁵ For the 2007 amendments to this statute, the trial court cited to 2007 Minn. Laws, ch. 105, § 4. *Add.36*. The 2007 amendments to § 541.051 are actually contained in two separate laws: 2007 Minn. Laws, ch. 140, art. 8, § 29 (House File No. 1208), signed into law by Governor Pawlenty on May 25, 2007 (*Add.44, 46*) and 2007 Minn. Laws, ch. 105, § 4 (Senate File No. 241), signed into law by Governor Pawlenty on May 21, 2007. *Add.36, 41*. The amendments in the two laws are identical *except* for the “EFFECTIVE DATE” language. The House File version states: “This section is effective retroactive to June 30, 2006” (*Add.45*) and the Senate File version states: “This section is effective retroactively from June 30, 2006.” *Add.37*. Because the statutory history listed for § 541.051 by the Office of the Revisor of Statutes only identifies 2007 Minn. Laws, ch. 140, art. 8, § 29 for the 2007 amendments, Jacobs cites the effective date language from that version. The difference in the effective date language between these two laws, however, does not have a substantive effect on Jacobs’ position as to how the effective date should be construed.

repose constitutes the equivalent to immunity from suit in Minnesota, Jacobs is entitled to this appeal of right from this denial.

Jacobs is entitled to dismissal of the cross-claims brought by the State for several reasons. Foremost, the ten-year statute of repose found in MINN. STAT. § 541.051 is a complete bar to the State's cross-claims because it extinguished any possible claims arising from the design of the bridge decades ago. The district court ruled that the amendments of the repose statute in 2007 had the effect of resurrecting and authorizing the assertion of contribution and indemnity claims. However, only by torturing the statutory language, and by ignoring the statute's express retroactive date of June 30, 2006, could the statute be interpreted to revive the long-barred claims. Moreover, interpreting the 2007 amendments to MINN. STAT. § 541.051 as reviving claims that previously had been extinguished would unconstitutionally deprive Jacobs of a vested right in violation of the Due Process clauses found in both the United States and Minnesota Constitutions. Likewise, interpreting the 2008 Victims' Compensation Fund legislation arising out of the I-35W Bridge collapse to permit the State's claims for reimbursement against Jacobs would similarly violate Jacobs' Due Process rights and also impair contractual rights under the 1962 design contract in violation of the United States and Minnesota Constitutions. Further, the State's claims for reimbursement pursuant to the 2008 Victims' Compensation Fund are barred because its payments to Plaintiffs were voluntary. Finally, the State's claims are barred under the terms and principles underlying the "Pierringer" releases the State obtained in exchange for its settlement payments.

For these reasons, Jacobs is entitled to dismissal of the State's cross-claims.

Argument

I. Standard of Review.

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

II. The State's Cross-Claims Are Barred by MINN. STAT. § 541.051.

A. The State's Cross-Claims Against Jacobs Have Been Barred by MINN. STAT. § 541.051 For Decades Prior to the Bridge's Collapse.

The State's cross-claims against Jacobs are barred by the ten-year statute of repose contained in Minnesota Statutes § 541.051. Originally enacted in 1965, § 541.051 clearly and consistently mandated a statute of repose for claims, including claims for indemnity and contribution, for property damage, personal injury and wrongful death arising out of improvements to real property. Thus, any claims, including the State's contractual indemnity claim and statutory reimbursement claim, against Jacobs related to the design of the Bridge were extinguished decades ago and the State's cross-claims against Jacobs must be dismissed. Moreover, the statute expressly applies broadly to extinguish causes of action arising in "tort, contract or otherwise." There is no exception for claims based on contractual indemnity

agreements,⁶ or for statutory reimbursement. Proper application of the statute of repose mandates the dismissal of the State's cross-claims in their entirety.

In 2007, the legislature amended § 541.051 with respect to the accrual and timely commencement of actions for contribution and indemnity, by removing the ten-year statute of repose for contribution and indemnity claims and replacing it with the following provision:

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).

MINN. STAT. § 541.051, subd. 1(b) (2008). The legislature made the amendments retroactive to June 30, 2006. The amendments did nothing to change the fact that any claims against Jacobs had long been extinguished. The district court nonetheless relied on the 2007 amendments to § 541.051 to allow the State to proceed with its long-extinguished contractual indemnity claims. *Add.22*. (“[W]hile Defendants’ claims for contribution and indemnity were barred by the previous version of MINN. STAT. § 541.051, the amended 2007 version removes the ten-year repose barrier to assertion of the claims.”)⁷

⁶ In the district court, the State relied (*A.203*) on a completely inapposite Ohio Court of Appeals case, *Richards v. Gold Circle Stores*, 501 N.E.2d 670, 674 (Ohio Ct. App. 1986). That case involved a repose statute that applied to tort, but not contract, *i.e.*, contractual indemnity claims, which were governed by a separate and longer limitations period. *Id.* at 673-74. The repose provisions of § 541.051, however, have been expressly held to apply to claims for contractual indemnity. *See Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 796-97 (Minn. 1987).

⁷ This portion of the district court's ruling was made in its August 28, 2009, order denying Jacobs motion to dismiss the third party complaints of defendants URS and PCI. *Add.30*. The district court incorporated that order in its December 23, 2009, order denying Jacob's motion to dismiss the State's cross-claims. *Add.22*. In none of its orders did the

The stark consequence of the district court's interpretation of the 2007 amendments, if accepted in other cases, is that parties against whom potential claims for contribution or indemnity were extinguished years or (like here) decades *before* the June 30, 2006, retroactive effective date of the 2007 amendments will find that those claims have been suddenly revived. This is not a required or plausible interpretation of the 2007 amendments, particularly given that the Minnesota Supreme Court has made it clear that the statute of repose under § 541.051 is a substantive limitation on the acquisition of a cause of action, unlike statutes of limitations, which are procedural only. *See Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 641 (Minn. 2006). This Court should interpret the 2007 amendments as applying only to causes of action that had not been extinguished prior to the amendments' June 30, 2006, retroactive effective date.

Moreover, the district court's interpretation of the 2007 amendments to § 541.051 defeat the very purpose of the statute of repose—eliminating the possibility of perpetual exposure to claims. The Minnesota Supreme Court has repeatedly upheld the validity of § 541.051. *See, e.g., Weston* 716 N.W.2d at 643-45; *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453-54 (Minn. 1988); *Calder v. City of Crystal*, 318 N.W.2d 838, 843-44 (Minn. 1982). It has explicitly accepted as legitimate and reasonable the legislature's policy determination

to eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it. By setting forth a * * * period of repose, the statute helps avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed. The lapse of time between completion

district court provide a reason for refusing to dismiss the State's statutory reimbursement claims based on the statute of repose.

of an improvement and initiation of a suit often results in the unavailability of witnesses, memory loss and a lack of adequate records. Another problem particularly crucial is the potential application of current improved state-of-the-art standards to cases where the installation and design of an improvement took place many years ago. Minn. Stat. § 541.051 (1980) was designed to eliminate these problems by placing a finite period of time in which actions against certain parties may be brought. We hold this objective is a reasonable legislative objective and should not be lightly disregarded by this court absent a clear abuse.

Sartori, 432 N.W.2d at 454 (footnote omitted); *see also Olmanson v. LeSueur County*, 693 N.W.2d 876, 882 (Minn. 2005) (“The statute limited the liability of these construction professionals by establishing an outer time limit beyond which they could not be held liable for design and construction defects.”) (citation omitted); *Sullivan v. Farmers & Merchants State Bank of New Ulm*, 398 N.W.2d 592, 594 (Minn. Ct. App. 1986) (“The statute was enacted in 1965 to shield architects and builders from indeterminate prospects of liability on long-completed projects.”) (citation omitted). The statute has been upheld on a variety of grounds, including that it “serves the public policy concerns of reliability and availability of evidence after long periods of time,” and the ability of parties “to plan their affairs without the potential for unknown liability.” *Weston*, 716 N.W.2d at 642 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. 2000) (upholding ten-year repose statute in favor of product manufacturer).

Given that these considerations are the basis for upholding the validity of a *ten-year* repose statute, they apply with all the more force in the case of a failure occurring *forty* years after substantial completion of construction. Indeed, a cursory review of the pleadings alone illustrates that this is a textbook case for application of the statute. The State has had long and continuous ownership and control of the Bridge, and it has also contracted with others to make modifications, inspect, maintain, repair, evaluate, and consult about the Bridge in

the decades that have passed long after the furnishing of the design for the original construction.⁸

The need for statutes of repose derives precisely from the long expected life of improvements to real property: a determination that the original designer or contractor should be immune from liability after the long passage of time because too many other factors can intervene to cause failure. The repose statute is based on a conclusion that, after a decade of use, “failures are ‘due to reasons not fairly laid’” at the door of the party in whose favor the statute operates and are instead “due to wear and tear or other causes.” *Weston*, 716 n.W.2d at 642. In the case of structures, repose statutes also reflect the conclusion that long life spans make them susceptible to deterioration and negligent maintenance completely outside the control of the original designer. See Michael J. Vardaro & Jennifer E. Waggoner, Note, *Statutes of Repose—The Design Professional’s Defense to Perpetual Liability*, 10 ST. JOHN’S J. LEGAL COMMENT. 697, 713 (1995). The legislature created a statute of repose with a “bright line bar” to liability commencing ten years after substantial completion and that explicitly and independently extinguished claims for contribution and indemnity. The statute extinguished the State’s claims in 1977, thus the State’s cross-claim must be dismissed.

⁸ By way of example only, it is undisputed that: the State made modifications to the Bridge after its original construction, including adding concrete to the deck. (A.13.) The State contracted with URS to perform consulting and evaluation services over a four-year period, from 2003 up to and including the date of the collapse. (A.12.) It contracted with PCI in May 2007 to perform a variety of repairs, and, on the date of the collapse, PCI had loaded the bridge with, among other things, more than a half million pounds of sand and gravel. A.58, 59.

B. Neither the 2007 Amendments to MINN. STAT. § 541.051, Nor the 2008 Victims' Compensation Fund Legislation Revives the State's Claims, Which Were All Barred by MINN. STAT. § 541.051 Prior to the Bridge's Collapse.

While the 2007 amendments to MINN. STAT. § 541.051 made changes in the law with respect to the accrual and timely commencement of actions for contribution and indemnity, nothing contained in the 2007 amendments suggests any intention to *revive* causes of action that had been extinguished decades before the June 30, 2006 retroactive effective date of the amendments.⁹ Because they were extinguished long before the effective date of the 2007 amendments, all of the State's claims against Jacobs are barred. The claims were extinguished by the terms of the statute that explicitly applied to bar both the State's claim for contractual indemnity and for statutory reimbursement. *See Weston*, 736 N.W.2d at 638-40. Hence, the State's cross-claims fail to allege any cause of action upon which relief can be granted.

The only plausible, and only constitutionally valid, interpretation of the amendments is that they apply only to contribution and indemnity claims that had not been extinguished before the amendments' June 30, 2006, retroactive effective date. Any causes of action against Jacobs had, of course, been extinguished decades before this effective date. The

⁹ The one instance when the Minnesota Legislature *did* revive causes of action that arguably had been extinguished under the repose statute involved the unique general public health and safety issues presented by the presence of asbestos in various buildings. *See* MINN. STAT. § 541.22 ("Limitation on Asbestos Claims"). This legislation, first adopted in 1987, expressly provided that actions to remove, correct or ameliorate "an asbestos problem" that were otherwise barred by a specified date were "revived or extended." MINN. STAT. § 541.22, subd. 2. No such "revival" language is contained in the 2007 amendments to MINN. STAT. § 541.051. *See Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990).

question presented, therefore, is not whether the 2007 amendments were intended to operate retroactively. Rather, the question presented to this Court, is whether applying the amendments retroactively to the date chosen by the legislature—June 30, 2006—could possibly revive claims that had been extinguished long *before* that retroactive date. Such an interpretation would represent a sea change, impacting potentially hundreds or thousands of parties who had acquired repose rights against contribution and indemnity claims under the former § 541.051, and who now face sudden revival of those potential liabilities.

If the effective retroactive date of the 2007 amendments is construed as reviving contribution or indemnity claims barred before that date, then the purpose of the statute would be completely frustrated by making persons protected by the statute of repose liable for their acts during the repose period (and indeed liable in perpetuity for contribution or indemnity claims). This Court should not find such an absurd result. *See* MINN. STAT. § 645.17(1) (providing that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”); *see also State ex rel. South St. Paul v. Hetherington*, 61 N.W.2d 737 (Minn. 1953) (holding that a statute is not to be given an absurd construction if its language will reasonably bear any other construction). For instance, the district court’s interpretation of the 2007 amendments would pave the way for contribution and indemnity suits against the successors to James J. Hill’s Great Northern Railway for injuries arising out of defects in the 1883 Stone Arch Bridge or suits against the successors to Cass Gilbert for injuries arising out of defects in the 1905 Minnesota State Capitol. The legislature cannot be presumed to have intended that the 2007 amendments have such patently absurd results. Indeed, the court can “disregard a statute’s plain meaning only in rare cases where the plain

meaning ‘utterly confounds a clear legislative purpose.’” *Weston*, 716 N.W.2d at 639 (citations omitted).

The 2007 amendments to § 541.051 were not intended to revive long-extinguished causes of action. They were enacted to remedy the unique situation presented in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006).¹⁰ In *Weston*, the defendant general contractor was sued two months before the ten-year statute of repose period expired. Under the then existing version of the repose statute, a claim for contribution did not “accrue” until there had been payment of a final “judgment, arbitration award or settlement.” MINN. STAT. § 541.051, subd. 1(b) (2002). Therefore, the general contractor was barred from bringing a contribution claim against its subcontractor because the action against the subcontractor did not accrue until after the statute of repose had already barred the claim.. The 2007 amendments were intended solely to address the arguably unfair outcome to the general contractor, and others similarly situated, created by the old definition of when a claim for contribution “accrues.”

The district court relied on this Court’s decision in *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008), *rev. denied*, (Minn. Aug. 5, 2008), a case very similar to *Weston*, to interpret the 2007 amendments as reviving previously expired contribution and indemnity claims. *Add.30*. That decision does not control in this case. In *U.S. Home Corp.*, a homeowner sued her general contractor for construction defects before the passage of ten years from substantial completion of the construction. *See* 749 N.W.2d at

¹⁰ The June 30, 2006 retroactive effective date of the 2007 amendments is one day after the day the *Weston* opinion was filed. The selection of this date was not a coincidence. *See* Transcript of May 16, 2007 House Floor Session Part 3 discussion on S.F. 241. *Add.47*.

100. After settling with the plaintiff, the general contractor brought an action for contribution/indemnity against one of its subcontractors. However, because the plaintiff chose to commence her suit, so close to the end of the ten year repose period, the repose period had commenced and the contractor was barred from bring a contribution/indemnity claims against its subcontractor.

In both *Weston* and *U.S. Home Corp.*, the timeliness of a defendant's contribution/indemnity claim was governed by the fortuity of when the plaintiff chose to commence its action. In both those cases, the plaintiff's action had accrued before the ten-year repose period had extinguished any claims. So by waiting to file suit, the plaintiff could, through the passage of time deprive the defendant of a contribution/indemnity claim that otherwise would have been available, but that "accrued" under the terms of the statute only after it had been become barred by the repose period. The 2007 amendments to § 541.051 remedied the unfairness resulting from a plaintiff's decision to commence litigation at the "eleventh hour." In contrast, in this litigation, all claims of any kind had been extinguished decades before the bridge collapse on August 1, 2007. The unavailability of contractual indemnity and statutory reimbursement is not due to Plaintiffs' decisions about when to sue. Hence, the 2007 amendments should not be interpreted to revive such claims.¹¹

¹¹ The Texas Supreme Court recently had occasion to consider whether legislative amendments in that state were intended to revive claims that had been extinguished under the state's ten-year statute of repose for improvements for real property. See *Galbraith Engineering Consultants, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009). The court concluded that the consequences of interpreting the amendments to revive expired claims "would defeat the recognized purpose for statutes of repose, that is, the establishment of a definite end to the potential for liability." *Id.* at 868. Hence, the court held that the legislature had intended only for the amendments to apply to procedural statutes of limitations, not to statutes of repose, which "create a substantive right to be free from liability after a legislatively determined

In addition, this Court's consideration of the legislature's intent in *U.S. Home Corp.* was essentially confined to ascertaining what is necessary for a statute to be given some retroactive effect, and whether this was accomplished through the 2007 amendments. As noted above, these are not controversial propositions. The retroactive intent is clear from the language providing a retroactive effective date "to June 30, 2006." There is no indication, however, that either the parties or this Court gave consideration to whether the amendments were intended to revive claims otherwise extinguished both *before and after* the retroactive effective date. An intent to revive claims long ago extinguished by the statute of repose would have been clear had the legislature used language it knew how to use and had used in the past, as shown in the asbestos abatement revival statute.¹² It did not, however, employ such language in 2007, or anything like it. There is, in sum, no suggestion that the legislature intended the amendments to broadly sweep away rights of immunity to suit that had become vested years and even decades before the June 30, 2006, effective date. This Court should not create that result in the absence of any expression of that intent. *See, e.g., H.D. v. White*, 483 N.W.2d 501, 502-03 (Minn. Ct. App. 1992) (rejecting interpretation of

period." *Id.* Similar reasoning supports the conclusion that the Minnesota Legislature did not intend the 2007 amendments to § 541.051 to apply to causes of action extinguished before its effective date.

¹² For example, such intent is clear from the language employed by the legislature when it expressly "revived or extended" certain asbestos-related property damage claims, providing that they "may be begun" before a specified date. MINN. STAT. § 541.22, subd. 2 (cited in *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990)). In both instances, the legislative intent was clear about when cases based on revived claims could be commenced. Here, while the language of the 2007 amendments is clear that they are intended to apply retroactively, there is *no* indication that the amendments were intended to apply to causes of action that had expired *prior* to the retroactive effective date of June 30, 2006.

statutory amendments to statute of limitations for intentional torts that would constitute “a wholesale revival of claims long stale” when amendments did not require such a result).

Further, the State’s statutory reimbursement claim fails because the 2008 Victims Compensation Fund legislation is insufficient to revive the State’s long extinguished claims. Any claims against Jacobs were extinguished long before the collapse of the Bridge or the enactment of the Compensation Fund legislation on which the State relies. Contrary to the State’s assertions, the general authorizing language of that legislation (“Notwithstanding any statutory or common law to the contrary”) is plainly insufficient to revive an expired cause of action. Such a revival would constitute a retroactive application of the law, and as the State conceded in the district court (*A.203*), under MINN. STAT. § 645.21 “[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.” Nothing in the legislation purporting to create the State’s statutory reimbursement claim against Jacobs pronounces that it is to have retroactive effect. Hence, Compensation Fund legislation does not revive long-ago expired claims against Jacobs.

C. The State’s Contractual Indemnity Claim Against Jacobs Is Barred by MINN. STAT. § 541.051 Because Substantial Completion of the Bridge Occurred After the Enactment of the Statute.

The State’s contractual indemnity claim against Jacobs is barred by the ten-year statute of repose contained in MINN. STAT. § 541.051 regardless of when S&P entered into its contract with the State for design services related the bridge. The district court however, found that the statute of repose does not apply because the contract for design services with the State was executed in 1962, prior to the enactment of § 541.051. However, by its express terms, the operative event under the statute of repose is the prescribed period after

“substantial completion of construction.” Minnesota adopted its repose statute in 1965. The substantial completion of construction of the bridge occurred in 1967, two years after the adoption of the statute of repose. It is irrelevant that Jacobs entered into its contract with the State in 1962.

The Minnesota Supreme Court has repeatedly applied a later version of § 541.051 to bar actions where substantial completion of construction occurred many years before the effective date of the applicable statute. *See, e.g., Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 451 (Minn. 1988) (applying 1980 version of § 541.051 to bar claim arising from defect in improvement substantially completed in June 1965); *Calder v. City of Crystal*, 318 N.W.2d 838, 841-42 (Minn. 1982) (applying 1980 amended version of § 541.051 to bar city’s contribution-indemnification claims arising from injury caused by defective drainage system substantially completed in 1958); *cf. Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 444, 445 (8th Cir. 1989) (federal court applying Minnesota law finds 1980 version of § 541.051 barred claims arising from 1959 improvement).¹³

For all of these reasons, the Court need not reach and decide the constitutional questions, *i.e.*, whether the 2007 amendments of § 541.051 violate Jacobs’ federal and state constitutional Due Process rights by cancelling its accrued, vested right to repose and whether allowing a claim based on the 2008 Victims’ Compensation Fund legislation, would impair Jacobs’ contractual rights in violation of the federal and state constitutions. Those

¹³ In the trial court, the State attached significance (*A.203*) to the fact that the indemnity agreement had no “time limit” and that actions for breach could be brought after termination of the agreement. However, the “time limit” for commencing such actions is furnished by the repose statute.

questions would be presented only if the 2007 amendments were interpreted to revive causes of action extinguished prior to the effective date of the amendments. Jacobs' constitutional challenge is limited only to challenging the constitutionally unfair and illogical application of the amendments that the State seeks to impose in this case.

III. Interpreting the 2007 Amendments to MINN. STAT. § 541.051 or the 2008 Victims' Compensation Fund Legislation to Revive Time-Barred Indemnity Claims Would Violate Jacobs' Due Process Rights.

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

Statutes of repose "create 'a substantive right in those protected to be free from liability after the legislatively-determined period of time.'" *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005) (quoting 54 C.J.S. *Limitations of Actions* § 5 (2005)). This substantive-procedural distinction is important to the constitutional analysis because the Due Process Clause prohibits a legislature from abolishing "property" rights that have already accrued or vested, *i.e.*, from "depriv[ing] any person of property without due process of law." U.S. CONST. amend. XIV. Minnesota's Due Process Clause is identical in scope to the federal clause. *See, e.g., Sartori*, 432 N.W.2d at 453.

The Minnesota Supreme Court has consistently heeded the constitutional prohibition against retroactive legislation that seeks to divest previously vested property interests. *See Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 84 N.W.2d 282, 287 (Minn. 1957)

“Retrospective or curative legislation is, of course, prohibited under U.S. CONST. amend. XIV, when it divests any private vested interest.”); *Wichelman v. Messner*, 83 N.W.2d 800, 816 (Minn. 1957) (“Retrospective legislation in general . . . will not be allowed to impair rights which are vested and which constitute property rights.”). With one exception (involving asbestos claims),¹⁴ Minnesota courts have adhered to the view that substantive, vested rights are constitutionally protected from retroactive legislation, while procedural rights (which do not implicate vested rights) may be modified by the legislature. *See, e.g., Wichelman*, 83 N.W.2d at 817 (recognizing that the “constitutional prohibitions against retrospective legislation do not apply to statutes of limitation”); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 357 (Minn. 1969) (“It is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retroactive legislation.”) (citing *Donaldson v. Chase Secs. Corp.*, 13 N.W.2d 1 (Minn. 1943)); *Yaeger*, 84 N.W.2d at 366 (“It is true that a statute may be constitutionally retroactive where it relates to a remedial or procedural right but the statute in question as applied to the circumstances here relates to a substantive matter . . .”). And, of course, the Minnesota Supreme Court’s 2006 decision in *Weston* leaves no doubt that the “substantive-procedural” distinction remains a crucial one under current Minnesota law.

¹⁴ *See Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 296-99 (D. Minn. 1990), cited in *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591-92 (Minn. Ct. App. 1994) (dictum). The case addressed both the asbestos statute, MINN. STAT. § 541.22, as well as the repose statute, § 541.051. While the court discussed whether the application of the asbestos revival statute “deprive[d] the defendant of property without Due Process of Law,” this portion of the opinion was unnecessary to its decision regarding the repose statute inasmuch as the court determined that the allegations of “fraud” precluded application of § 541.051 under the latter’s fraud exception.

The trial court, however, wrongly ignored the important substantive-procedural distinction, as evidenced by its reliance of *Wschola v. Snyder*, 478 N.W.2d 225 (Minn. Ct. App. 1991), in rejecting Jacobs' constitutional argument. *Add.30.* *Wschola* involved a modification of a *statute of limitations* which revived claims that had become time barred under the previous limitations statute, 478 N.W.2d at 226-27, so it is no authority for the proposition that claims extinguished by a *repose* statute may validly be revived by a retroactive modification of the repose period. The trial court also pointed out that in *U.S. Home Corp.*, the court held that the defendant's repose right had not vested because final judgment had not been entered in its favor prior to the effective date of the 2007 amendments to § 541.051. *Add.31.* While it is true that *one* way in which a party acquires vested rights is through entry of a final non-appealable judgment in its favor on an issue, the cases discussed above have made clear that commencement of a substantive repose period in a party's favor is *another* way in which its rights become vested. While it appears that the party entitled to repose in *U.S. Home Corp.* did not argue this point, it is an important and dispositive one.

The trial court concluded finally that, even if Jacobs had a vested property interest in its repose rights, the legislature could revoke the right if it had "rational reasons" for doing so. *Add.31.* This holding, however, contradicts all the cases in which Minnesota courts have held that depriving a party of a vested right violates constitutional Due Process. These cases do not suggest that the constitutional violation is cured where the legislature has a rational basis for acting. *See, e.g., Camacho*, 706 N.W.2d at 55; *Yaeger*, 84 N.W.2d at 366; *Holen*, 84 N.W.2d at 287; *Donaldson*, 13 N.W.2d at 4; *Snortum v. Snortum*, 193 N.W. 304, 306 (Minn. 1923). No "rational basis" can justify depriving Jacobs of its vested right to repose.

Application of the principles to the facts of this case requires the conclusion that the legislature did not, in its 2007 amendments, revive extinguished indemnity claims against Jacobs. These claims had been extinguished decades before the enactment of the amendments. Any effort to revive them would unconstitutionally violate Jacobs' Due Process rights by taking from Jacobs its right to immunity from suit that had vested three decades, or more, before August 1, 2007. The same conclusion is required to the extent the 2008 Victims' Compensation Fund legislation purports to revive extinguished claims against Jacobs through its provisions allowing for reimbursement for payments made by the State to Plaintiffs.

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.

IV. If MINN. STAT. §§ 3.7391–3.7395 Is Interpreted to Permit the State to Assert A Reimbursement Claim Against Jacobs, the Statute Impairs Jacobs' Contractual Rights in Violation of the United States and Minnesota Constitutions.

Both the United States and Minnesota Constitution prohibit state laws "impairing the obligation of contracts." U.S. CONST. art. I, § 10, cl. 1; Minn. Const. art. I, § 11. In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), the United States Supreme Court developed a three-part test to analyze Contract Clause challenges and determine if a state law unconstitutionally impairs a contract. 459 U.S. at 411-12. Minnesota has adopted the same three-part test. See *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983). Under that test, "[t]he initial question is whether the state

law has, in fact, operated as a substantial impairment of a contractual obligation.” *Id.* at 750. If so, “the [S]tate, at the second step, must demonstrate a significant and legitimate public purpose behind the legislation.” *Id.* at 751. Finally, “the legislation must be reasonably and appropriately tailored to accomplish the asserted public purpose.” *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 439 (Minn. Ct. App. 1992) (citing *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986)). In addition, courts apply increased scrutiny to the legislation at issue where, as here, the impairment is severe and the State is a party to the impaired contract. *See Christensen*, 331 N.W.2d at 750-51. Under this three-part test, MINN. STAT. §§ 3.7391–7395 is unconstitutional to the extent that it permits the State to assert its claims against Jacobs, as the statute then impairs a contractual obligation that was central to the 1962 Contract—namely immunity from tort indemnity, based on the State’s sovereign immunity.

A. The Reimbursement Provisions of MINN. STAT. §§ 3.7391–3.7395 Substantially Impair Rights under the 1962 Design Contract with the State.

In 1962, when S& P entered into a contract with the State to design the I-35W Bridge, the State enjoyed absolute sovereign immunity from suit in tort.¹⁵ This sovereign immunity conferred on S& P both a substantive contractual right and a defense—namely, the contractual right to be free from liability to the State for contribution, indemnity or other reimbursement on a tort claim, and, vicariously, the defense of sovereign immunity should a plaintiff assert a tort claim against the State. The State’s sovereign immunity thus became a material term of the 1962 Contract—indeed, a contractual obligation. It is well-settled under

¹⁵ The State partially abrogated this sovereign immunity in 1976 with the enactment of MINN. STAT. § 3.736.

longstanding law that “the laws in force at the time a contract is made enter into its obligation.” *Wunderlich v. Nat’l Sur. Corp.*, 24 F. Supp. 640, 647 (D. Minn. 1938), *rev’d on other grounds*, 111 F.2d 622 (8th Cir. 1940) (quoting *Oshkosh Waterworks Co. v. City of Oshkosh*, 187 U.S. 437, 439 (1903)). The State cannot now voluntarily abrogate its sovereign immunity under MINN. STAT. §§ 3.7391–7395 and bring its claims against Jacobs without substantially impairing the 1962 Contract.¹⁶

It is well settled under Minnesota law that a contractual right vests when all liabilities have been determined and fixed under the law in effect at the time the contract was formed. *See Yaeger v. Delano Granite Works*, 84 N.W.2d 363, 366 (Minn. 1957); *Zueblke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 725 (Minn. Ct. App. 1995). As the Minnesota Supreme Court has held, the subsequent repeal of the law fixing liability cannot affect that vested right:

When a right has arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it, it becomes vested and the repeal of the statute does not affect it or the action for its enforcement.

Yaeger, 84 N.W.2d at 366. Vested rights include “exemption from new obligations created after the right vested.” *Id.* Therefore, when liability is fixed under law, a party’s “vested right in such determined liability may not be destroyed by legislation which imposes a new obligation or an additional liability.” *Id.*; *Zueblke*, 538 N.W.2d at 725-26. Any such

¹⁶ Even if Minnesota’s partial waiver of sovereign immunity contained in MINN. STAT. § 3.736 subd. 4(e) were held applicable to the 1962 Contract, for all the same reasons discussed in Part V herein, it would be an unconstitutional impairment of contract for the State to recover from Jacobs an amount in excess of the \$1 million cap that § 3.736 subd. 4(e) places on the State’s tort liability.

legislation is presumptively unconstitutional under the Contract Clause: “[A]ny statute which purports to alter a substantial term of the contract which was in effect at the time the controlling event occurred . . . impairs the obligation of such contract and is therefore unconstitutional.” *Yaeger*, 84 N.W.2d at 366.

The trial court ignored this well-established precedent, and instead found—without any legal authority—that “Sverdrup/Jacobs has no vested interest in or contractual right to Minnesota’s sovereign immunity law or statute of repose remaining static.” *Add.12*. But contrary to the trial court’s claim, S& P/Jacobs *does* have a vested right both to immunity from State claims of contribution-indemnity in tort under the 1962 Contract and to the protections of the statute of repose. Indeed, the prevailing law of sovereign immunity in force when the 1962 Contract was executed limited S& P’s liability for contribution and indemnity in tort to the State at zero. That fact formed part of the contractual expectations of the parties. The right to zero tort liability, which included the right to be exempt from new obligations or additional liabilities, became vested at that moment. Under Minnesota law, MINN. STAT. §§ 3.7391–7395 cannot destroy that vested right and impose liability where none had been possible before and had not been part of the objective understandings and expectations of the contracting parties.¹⁷ The State cannot constitutionally shift its liabilities—voluntarily incurred with the enactment of MINN. STAT. §§ 3.7391–7395—onto Jacobs.

¹⁷ Because the *Yaeger* decision was handed down before the adoption of the *Energy Reserves* three-part test, it addresses only the first part of that test. Nevertheless, its holding continues to define what constitutes “substantial impairment.” *See, e.g., Zuehlke*, 538 N.W.2d at 725-26 (applying *Yaeger* to its Contract Clause analysis after *Energy Reserves*).

Under longstanding precedent, vested contractual rights that cannot be taken away by legislative acts include defenses to claims affecting substantial, as opposed to procedural, rights that are contemplated by the contract: “A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice.” *Pritchard v. Norton*, 106 U.S. 124, 132 (1882).

Here, the central contractual defense is that of sovereign immunity, which S& P enjoyed through its 1962 Contract with the State. Because the State could raise this defense against any plaintiff asserting a claim in tort against it, S& P was protected from any subsequent contribution or indemnity claim in tort from the State. The State cannot take this or any other defense away by passing a law declaring that it is “entitled” to recovery “[n]otwithstanding any statutory or common law to the contrary.” MINN. STAT. §3.7394, subd. 5. This legislative dictate substantially and severely impairs Jacobs’ vested rights and defenses.

B. MINN. STAT. §§ 3.7391–3.7395 Lacks a Significant and Legitimate Public Purpose Sufficient to Overcome the Substantial Impairment It Inflicts on Jacobs’ Rights under the 1962 Contract.

Once the Court finds substantial impairment, as it should here as a matter of law, the burden shifts to the State to justify the statute at issue in the second and third parts of the *Energy Reserves* three-part test. See *Christensen*, 331 N.W.2d at 751. To satisfy the second part, the State must show that the statute has a “significant and legitimate public purpose.” *Id.* The State, however, cannot sufficiently justify MINN. STAT. §§ 3.7391–7395 to overcome the severe impairment the statute inflicts on Jacobs’ contractual rights.

“The greater the impairment of a contract, the higher the standards will be for a statute under the second and third elements of the three-part *Energy Reserves* test.” *Midwest Family*, 486 N.W.2d at 439; *see also Christensen*, 331 N.W.2d at 750 (“The severity of the impairment increases the level of scrutiny to which the legislation is subjected.”). One measure of the severity of impairment is the liability exposure the statute imposes on a contracting party, particularly in light of the level of exposure that party faced prior to the enactment of the statute. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978) (finding “severe disruption of contractual expectations” because the statute at issue nullified a party’s contractual obligations and imposed “a completely unexpected liability in potentially disabling amounts”); *Jacobsen*, 392 N.W.2d at 874 (finding substantial impairment because the statute at issue created liability for exercising a contract right where none had previously existed). As in *Allied Structural Steel* and *Jacobsen*, Jacobs now faces the State’s claims for millions of dollars in liability exposure arising in tort, whereas before the enactment of MINN. STAT. §§ 3.7391–7395, Jacobs had the benefit of the State’s immunity from suit in tort. Such a shift constitutes severe impairment and requires heightened judicial scrutiny.

In addition, courts consider whether the State is itself a party to the impaired contract in determining whether to subject the statute at issue to heightened scrutiny: “This three-part test is applied with more scrutiny when the state seeks to impair a contract to which it is a party than when it regulates a private contract since ‘complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.’” *Christensen*, 331 N.W.2d at 751 (quoting *United States Trust Co. v. New*

Jersey, 431 U.S. 1, 26 (1977)). This Court put it more bluntly in *Zuehlke*: “[C]ourts should closely scrutinize state statutes affecting public contracts to make certain that a state is not attempting to escape from its own financial obligations.” *Zuehlke*, 538 N.W.2d at 727.

Avoiding the financial obligations it voluntarily assumed is exactly what the State is attempting to do in Subdivision 5 of MINN. STAT. § 3.7394. The State is free to assume any financial obligation it wishes; it is not free, however, to shift that obligation onto “any” third party, including those whose contracts with the State, such as the 1962 Contract, did not contemplate indemnity for tort liability.

In short, given that Jacobs now faces millions of dollars in liability exposure where it had no exposure under the 1962 Contract for tort indemnity; and given that the State is a party to the 1962 Contract and seeks in part through the statute at issue to avoid its financial obligations, the impairment is indeed severe and, under well-established Minnesota and federal law, this Court should apply heightened scrutiny to MINN. STAT. §§ 3.7391–7395 in the second and third parts of the *Energy Reserves* three-part test.

“To withstand constitutional challenge, a statute which impairs the obligations of a contract must be for a public, as opposed to a private, purpose.” *Midwest Family*, 486 N.W.2d at 440 (citing *Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc.*, 142 F. Supp. 469, 471 (D. Minn. 1956)). “Public purpose” has generally been defined as “remedying of a broad and general social or economic problem.” *Jacobsen*, 392 N.W.2d at 874; *Energy Reserves*, 459 U.S. at 411-12. Otherwise stated, the statute at issue must impose “a generally applicable rule of conduct designed to advance ‘a broad societal interest’ and [have] only an incidental effect of

impairing contractual obligations.” *Zuehlke*, 538 N.W.2d at 727 (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983)).

Here, MINN. STAT. §§ 3.7391–7395 enunciates only two purposes: (1) to compensate victims of the I-35W Bridge collapse; and (2) to avoid “the uncertainty and expense of potentially complex and protracted litigation.” MINN. STAT. § 3.7391, subd. 2. Neither of these purposes can be said to remedy “a broad and general social or economic problem” or advance “a broad societal interest.” Indeed, the statute narrowly focuses on a singular event and makes no provisions for any similar future events. The compensation goes to a small number of individuals, who would have retained, and in fact still do retain, the tort system’s remedies for their losses. The liability caps set forth in MINN. STAT. § 3.736 would have protected the State’s economic interests, so no serious argument can be made that by volunteering millions of dollars of payments in excess of the immunity cap the State was furthering the public’s economic interests. Instead, the unarticulated purpose of the statute is to shift the cost of compensation onto a few third parties, which, in Jacobs’ case, can be done only by eviscerating the protections it has through the provisions of the 1962 Contract with the State.

Contrary to the trial court’s unsupported finding, the stated and unstated purposes of MINN. STAT. §§ 3.7391–7395 cannot overcome the severe impairment the statute inflicts on the contractual rights of Jacobs. *Id.* 12-13. *See, e.g., Allied Structural Steel*, 438 U.S. at 247 (finding no legitimate public purpose sufficient to overcome severe impairment inflicted by the Minnesota Private Pension Benefits Protection Act, which the Court determined was not enacted to protect a “broad societal interest” but rather a “narrow class”); *Jacobsen*, 392

N.W.2d at 874-75 (ruling unconstitutional retroactive application of the Minnesota Beer Brewers and Wholesalers Act, which has “all the earmarks of narrow special interest legislation devoid of any broad public purpose.”).

C. Even If MINN. STAT. §§ 3.7391–3.7395 Had A Significant and Legitimate Public Purpose, It Is Not Tailored to Accomplish It.

The third part of the *Energy Reserves* three-part test requires that a statute’s asserted public purpose, even if legitimate, must be “reasonably and appropriately tailored” to that purpose. *Midwest Family*, 486 N.W.2d at 439. The trial court claims that the legislation is “tailored appropriately” given the “catastrophic and unique impact of the collapse.” *Add.13*. But it is clear on its face that MINN. STAT. §§ 3.7391–7395 is not so tailored—even if it had a significant and legitimate public purpose, which, as discussed above, it does not. If the purpose of the legislation is to compensate Plaintiffs over and above the limits of the State’s immunity caps, this could easily have been accomplished in the absence of the entirely self-serving provisions of the legislation allowing the State to recover those excess payments from third parties. Moreover, to the extent that a genuine purpose of the legislation was to avoid the “uncertainty and expense” of litigation, it is tailored to accomplish precisely the opposite, as evidenced by the State’s filing of numerous cross-claims, all of which will be vigorously contested. The legislation at issue is not reasonably and appropriately tailored if it ignores decades of common law to reach its stated outcome.

MINN. STAT. §§ 3.7391–7395 cannot pass constitutional muster under the *Energy Reserves* three-part test to the extent that it permits the State’s claims against Jacobs. Hence, if the Court reaches the constitutional issue, it must invalidate the legislation as applied to Jacobs.

V. The State Has No Right to Reimbursement from Jacobs for Voluntary Payments It Made Pursuant to MINN. STAT. § 3.7393.

As long recognized by the Minnesota Supreme Court, a voluntary payment by one who is under no legal duty to pay does not give rise to reimbursement rights against others who may be legally liable. *See Samuelson v. Chicago, R.I. & P.R. Co.*, 178 N.W.2d 620, 624 (Minn. 1970) (right to contribution or indemnity arises in favor of a defendant who, not acting as a volunteer, enters into a settlement with the plaintiff); *United States Fid. & Guar. Co. of Baltimore, MD v. Citizens' State Bank of Antelope*, 201 N.W. 431, 433-34 (Minn. 1924) (finding no right of reimbursement where company made voluntary payment but had no legal obligation to do so).

Here, the State's payments to Plaintiffs under MINN. STAT. § 3.7393 were voluntary. First, by enacting MINN. STAT. §§ 3.7391–7395, the State agreed—on a one-time basis and with respect to an event that had already occurred—to pay more than its statutory liability limits under MINN. STAT. § 3.736. *See* MINN. STAT. § 3.7393, subd. 11(b) (waiving in these cases the \$1 million cap on the State's liability for claims arising out of a single occurrence). The State's decision to waive these long-standing statutory liability limits evinces the voluntary nature of the payments.

In addition, as part of MINN. STAT. §§ 3.7391–7395, the State specifically and unequivocally acknowledged that it had no legal duty to make *any* payments to the Plaintiffs: “The establishment of the special compensation process under § 3.7393 and the emergency relief fund, and an offer of settlement or a settlement agreement . . . *does not establish a duty of the state, a municipality, or their employees to compensate survivors.*” MINN. STAT. § 3.7394, subd. 1 (emphasis added). Because the State's payments to Plaintiffs under § 3.7393 were made

voluntarily and in the absence of any legal duty to Plaintiffs, the State has no claim against Jacobs for indemnity or reimbursement. See *United States Fid. & Guar. Co. of Baltimore, MD*, 201 N.W. at 433-34.

The indemnity provision of the 1962 design contract does not alter the consequences of the State's voluntary payments. Under Article VIII, § 2(b) of the 1962 Contract, S&P agreed to indemnify, save and hold harmless the State from "any and all claims, demands, actions or causes of action" arising out of or by reason of S&P performance of the work under the Contract. By definition, a "claim," "demand," "action," or "cause of action" involves the assertion of a legal right or proceedings. See, e.g., *Vaubel Farms, Inc. v. Shelby Farmers Mut.*, 679 N.W.2d 407, 412 (Minn. Ct. App. 2004) ("action" confined to judicial proceedings); *Carolina Holdings Midwest, LLC v. Copouls*, 658 N.W.2d 236, 242 (Minn. Ct. App. 2003) ("claim" is right to payment); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 574 N.W.2d 468, 471 (Minn. Ct. App. 1998) ("cause of action" gives right to judicial redress).

The trial court wrongly relied on *Northland Insurance Co. v. Ace Doran Hauling & Rigging Co.*, 415 N.W.2d 33 (Minn. Ct. App. 1987) to support its conclusion that the State's payments were not voluntary. *Add.17*. However, the trial court failed to acknowledge the clear distinction drawn in *Northland* between a situation in which a party pays a disputed obligation, and one in which a party pays an obligation for which there is no legally cognizable claim. 415 N.W.2d at 39. Where a party has no legal obligation to pay a claim it is acting voluntarily and indemnification and subrogation are not available remedies. Here, the Plaintiffs had no legal right to obtain payment from the State. See MINN. STAT. § 3.7394 (state has no duty to compensate survivors). Had the State decided to pay the Plaintiffs

nothing, the Plaintiffs would have had no legal recourse against the State in excess of the \$1,000,000 aggregate limit contained in MINN. STAT. § 3.736, subd. 4. Because the State's payments under the Victims' Compensation Fund legislation were not based on a claim, demand, action or cause of action, the payments did not trigger the indemnity provisions of the 1962 Contract.

VI. The State's Releases from Plaintiffs Preclude Any Liability of Jacobs to the State.

By its terms, a *Pierringer* settlement releases the settling defendant from liability, settles a part of the cause of action equal to that part of the overall fault for which the settling defendant is liable, and reserves the balance of the plaintiff's whole cause of action against the non-settling defendants. *See Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978). Its basic elements are:

- (1) The release of the settling defendant from the action and the discharge of a part of the cause of action equal to that part attributable to the settling defendant's causal negligence;
- (2) The reservation of the remainder of the plaintiff's causes of action against the non-settling defendants; and
- (3) The plaintiff's agreement to indemnify the settling defendant from any claims of contribution made by the nonsettling parties and to satisfy any judgment obtained from the nonsettling defendants to the extent the settling defendants have been released, [*i.e.*, plaintiff's claims are fully satisfied to the extent of the settling defendant's fault].

Bunce v. A.P.I., Inc., 696 N.W.2d 852, 855 (Minn. Ct. App. 2005).

The State's releases ("Releases") hereby include the following language:¹⁸

¹⁸ The website for the special masters' panel which negotiated the Releases contains a "sample" form of release. *See* <http://bridgecollapseclaims.com/>. A copy of one of the executed Releases is attached. *A.182*.

- (1) “. . . Claimant . . . completely releases and forever discharges the State of Minnesota . . . from each and every legal claim or demand of any kind that Claimant ever had or might now have, which in any way arises out of or relates to the Collapse . . .” and “Claimant fully releases and discharges the State Releasees for any claims of contribution or indemnity with respect to any claim for damages of Claimant, and the claims of Claimant are satisfied to the extent of that fraction, portion or percentage of the total claims for damage Claimant may have against all persons or entities . . .”;
- (2) “Claimant specifically reserves any and all causes of action against any person or entity other than the State Releasees;” and
- (3) “Claimant hereby agrees to indemnify, defend and save the State Releasees harmless from liability for any claims, demands, causes of action or judgments for contribution or indemnity on or under any theory of liability . . . if the claim, demand, cause of action or judgment relates in any way to a claim of the Claimant arising out of or relating to the Collapse.”

A.182, 184. This language contains all the elements of a Pierringer release,¹⁹ so the consequences for the State’s claims must be evaluated accordingly.

Through a Pierringer release, a plaintiff can release the settling defendant without also releasing all non-settling defendants or other parties for their share of fault, and the settling defendant can both buy its peace with plaintiff and avoid contribution or indemnity liability to the non-settling defendants. *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn. 1989); *Bunce*, 696 N.W.2d at 855-56. It is also settled law that, in entering into a Pierringer release, the settling defendant gives up any right to collect any portion of its settlement payments from non-settling parties. *See, e.g., Bunce*, 696 N.W.2d at 855-56. Indeed, the State pleaded the Releases as a defense to PCI’s subsequently released Third-Party Complaints against the State. *A.116, A.136.* Thus, a Pierringer release brings to an end the litigation as to the

¹⁹ The 2008 legislature authorizing the payments also made this language a mandatory part of Releases. *See* MINN. STAT. § 3.7393, subd. 13.

settling party; the State seeks here to create a new settlement agreement that perpetuates litigation rather than brings peace.

The State's Releases include two provisions that purport to reserve its claims for subrogation, contribution or indemnity against non-settling defendants and third parties:

The State is entitled to reimbursement by a third party regardless of whether Claimant is fully compensated. Claimant agrees to cooperate with the State in the State's pursuit of any claims the State may have against any third party for reimbursement or otherwise, including subrogation . . .

Claimant understands and agrees that . . . the State is subrogated to all potential claims that Claimant has or may have against any other person or entity that in any way arise out of or relate to the Collapse. Claimant and the State agree that the State's right to subrogation herein is limited to the total amount of the [settlement payment] made to Claimant . . . Claimant shall not take any action, including settlement with any other person or entity, that adversely affects the State's subrogation or reimbursement rights . . .

A.186-87.

Despite the fact that the Releases contain this language, they must be treated as *Pierringer* releases and the nonconforming clauses nullified. In *Bunce*, the Minnesota Court of Appeals considered and rejected the defendant's attempt to end-run *Pierringer* law by including a provision in the release specifically reserving the defendant's claims for contribution, indemnity, or subrogation against other persons or entities. *See Bunce*, 696 N.W. at 857-58. The court concluded that the defendant could not, for his own self-interest, rewrite *Pierringer* and make the non-settling defendants, nonsignatories to the release, bound by it. *Id.* at 857. The court stated, "[Defendant] crafted its own legal theory to attempt to build in a chance to recoup more money, while remaining absolutely immune from having to pay anybody one dollar more than it paid Bunce, the original plaintiff. Under *Pierringer/Frey*, it just can't be done." *Id.* at 858.

The trial court's conclusion that the statute "may be construed to provide that the State compensated the survivors for damages . . . resulting from the fault of others" or that the payments "reflect more than the State's share of potential damages," ignores the language of the Compensation Fund Statute as well as the State's own admissions. *Add.19*. The State admitted in its trial brief that the statutory reimbursement claim permits it to recoup settlement payments only "to the extent it could show that it paid for more than its comparative fault-based share." *A.190*. Indeed, the language of the statute is explicit about that. *See* MINN. STAT. § 3.7394, subd. 5(a). It is also clear that any recovery allowed under the indemnity provision of the 1962 Contract must be limited to comparative fault principles, *i.e.*, it is not a basis on which the State can recover from Jacobs for the State's own causal fault for the Plaintiffs' injuries. Minnesota law strongly disfavors indemnity agreements that seek to indemnify a party for losses resulting from its own negligence. *Johnson v. McGough Constr. Co.*, 294 N.W.2d 286, 287 (Minn. 1980); *superseded by statute as stated in Katzner v. Kelleher Constr.*, 545 N.W.2d 378 (Minn. 1996). Indemnification contracts are strictly construed, and any intent to indemnify must be "expressed in clear and unequivocal terms." *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646 (Minn. Ct. App. 1985). If intent to indemnify is not expressly contained in the contract, courts will not impose it by implication. *Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838, 842 (Minn. 1979), *superseded by statute as stated in Katzner*, 545 N.W.2d 378.²⁰ Here, the

²⁰ Policy so disfavors allowing indemnification for a party's own negligence that agreements seeking to hold a party liable for another's negligence are now absolutely void and unenforceable under MINN. STAT. § 337.02. *Braegelmann*, 371 N.W.2d at 646. The offending agreements are instead replaced with the law of contribution. *Id.*

1962 Contract does not “clearly and unequivocally” express intent for S&P to indemnify the State for its own negligence. Rather, it says nothing about indemnifying the State for its own negligence. The provision creates no other independent obligations, and so like its statutory claim, the State’s contractual claim is based on comparative fault principles.

By the terms of the State’s Releases with Plaintiffs, the State has paid only for its own share of fault. According to the undisputed language of the Releases, in consideration for the payments made by the State, Plaintiffs fully and finally released and discharged the State for “each and every legal claim or demand of any kind Claimant ever had or might now have, which in any way arises out of or relates to the Collapse,” including:

any claims of contribution or indemnity with respect to any claim for damages of Claimant . . . ***to the extent of that fraction, portion or percentage of the total claims for damage*** Claimant may have against all persons or entities . . . that in any way arise out of or relate to the Collapse, which shall hereafter, by trial or other disposition of any action or proceeding, be determined to be ***the percentage of causal fault or responsibility attributable to the State Releasees.***

A.184. This consideration—release from a defendant’s own share of causal fault in exchange for payment of money—is one of the key identifying characteristics of a Pierringer release. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978); *Bunce*, 696 N.W.2d at 855. It is also dispositive in requiring dismissal of the State’s claims, all based—as demonstrated above—on comparative fault principles. The cases make clear that the controlling characteristic of a Pierringer release is that the settling party has paid only for its own share of fault. *See Bunce*, 696 N.W.2d at 855-56. It is not the label, but instead the formula on which Pierringer releases are based that eliminates both the settling defendant’s liability to others and any claim of its own based on comparative fault principles.

The trial court's conclusion that these principles apply only to common law contribution-indemnity claims, and not to the State's subrogation and statutory reimbursement claims against Jacobs, because those claims do not "fall under the restrictions of the Pierringer common law cases" (*Add.19-20*), is wrong because both the contractual liability and statutory reimbursement claims are based on comparative fault principles—the same principles on which the common-law contribution-indemnity claims are based. The inevitable result is that all of the State's comparative fault-based claims are barred for the same reason: by the terms of its releases with Plaintiffs, its payments represent exactly the share of the State's fault for Plaintiffs' damages. The State has, therefore—regardless of what label it places on a cause of action—no entitlement to contribution based on the alleged fault of others.

The trial court also wrongly relied on MINN. STAT. § 3.7394, subds. 5(a) and 5(b), containing the language "notwithstanding any statutory or common law to the contrary" to intimate that this statute abrogates any law that bars the State's recovery. *Add.19*. It is absurd, however, to presume that the Legislature through this simple formulation sought to repeal rules of logic and common sense, upon which much of the common law is predicated. The State's claims are based upon a thoroughly untenable position—specifically, that the State can be party to a settlement that equates its payment to its own share of fault, while seeking to recover all or a portion of the payment to the extent of the alleged fault of another.

Like the settling defendants in *Bunce*, the State has unambiguously invoked the principles of *Pierringer*. The consequences are straightforward: (1) the State can have no liability for contribution/indemnity arising out of the Plaintiffs' injuries, and so has no claim of its own to avoid or mitigate that liability; and (2) the State is barred from recovering from others the money it paid in settlement of Plaintiffs' claims and cannot overcome this result through self-serving insertion of language into the Releases to the contrary.

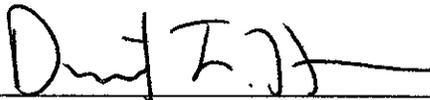
Conclusion

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

Dated: February 12, 2010

Respectfully submitted,

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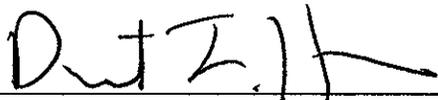
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CERTIFICATE OF BRIEF LENGTH

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 12,728 words. This brief was prepared using Microsoft Word 2003.

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