

Nos. A10-87, A10-89, A10-90 and A10-91

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State of Minnesota  
**In Supreme Court**

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In re Individual 35W Bridge Litigation

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

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## Argument

- I. **The State's Claims Are Barred by the Repose Provision of Minn. Stat. § 541.051.**
  - A. **The Statute of Repose Bars Contractual Indemnity Claims on the Same Basis as Other Claims; Jacobs Is Not Seeking a "Retroactive" Application.**

The State contends that Minn. Stat. § 541.051 does not bar its contractual indemnity claim because the 1962 contract between Sverdrup & Parcel and Associates, Inc. ("S&P") "predated the enactment of the 1965 [and 1980] statute of repose." *See* State Br. at 16-17. The State's argument fails to take into account that "a claim for indemnity does not arise generally at the time of the injury, but upon a showing that liability has been incurred." *Calder v. City of Crystal*, 318 N.W.2d 838, 841 (Minn. 1982) (citation omitted). Here, no claim for contractual indemnity could arise, if at all, until after the I-35W Bridge ("Bridge") collapse, many years after the repose statute had already extinguished any such claim. On several occasions, the statute of repose has been held to bar claims for work completed long before it was enacted. In *Calder*, the 1980 version of the statute of repose was applied to bar contribution and indemnity claims arising out of a project that had been substantially completed in 1958. *Id.* at 839, 841 (rejecting contention that application was retroactive). The Court in *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988), enforced the statute to bar claims for an improvement substantially completed in 1964. *See id.* at 454. *See also Lourdes High Sch. of Rochester, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 445 (8th Cir. 1989) (applying § 541.051 to bar claims deriving from a construction project completed in 1959). The State purports to distinguish these cases on the ground that "they do not involve

contractual indemnity claims.” See State Br. at 17-18 n.7. Even if they did not,<sup>1</sup> the State fails to explain why *contractual* indemnity claims should be treated any differently under § 541.051 than other contribution and indemnity claims.<sup>2</sup>

The State has repeatedly relied on an inapposite Ohio intermediate appellate case. See State Br. at 17. In *Richards v. Gold Circle Stores*, 501 N.E.2d 670 (Ohio Ct. App. 1986), the court addressed whether the Ohio statute of repose applied solely to actions sounding in tort, or to both tort and contract actions. The court held that the terms of the statute did not apply to written contracts. *Id.* at 674. What the State fails to consider, however, is that the Minnesota statute *does* expressly apply to indemnity claims. See Minn. Stat. § 541.051 (1980 version) (“no action in contract, tort, or otherwise . . . nor any action for contribution and indemnity”). See also *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 796-97 (Minn. 1987) (§ 541.051 applied to bar contractual indemnity claim).

**B. The 2007 Amendments to Minn. Stat. § 541.051 Do Not Apply to Eliminate Jacobs’ Immunity from Suit or Liability Acquired Before the Effective Date of the Amendments.**

The State equates the issue of whether the 2007 amendments to § 541.051 were intended to operate retroactively with the intended scope of the retroactive effect. It finds

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<sup>1</sup> The State’s assertion is dubious at best. In *Lourdes*, recovery was sought on both contract and tort theories. 870 F.2d at 444. *Sartori* involved both warranty and tort claims. 432 N.W.2d at 450-51. *Calder* involved both indemnity and contribution claims which almost certainly arose out of a construction contract inasmuch as the case involved the installation of a municipal water system. 318 N.W.2d at 839.

<sup>2</sup> The State also mischaracterizes this Court’s holding in *Cooper v. Watson*, 290 Minn. 362, 187 N.W.2d 689 (Minn. 1971), which has no application to the facts of this case. In *Cooper*, the Court held that an amendment to the workers’ compensation statutes regarding indemnity agreements could not be retroactively applied to an injury occurring *prior* to the effective date of the statute. *Id.* at 368, 187 N.W.2d at 693.

the legislature's use of the word "retroactive" sufficient to dispose of both issues. *See* State Br. at 19 n.8. The issues, however, are not identical. The legislature certainly intended the amendments to be retroactive. But whether they were meant to apply to claims extinguished both before and after June 30, 2006, is not answered simply by reference to the word "retroactive." In arguing that the amendments revived claims extinguished *prior* to June 30, 2006, the State primarily relies on this Court's opinion in *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002). *Gomon* held that the legislature can "by expression of clear legislative intent, retroactively amend a statute of limitations." *Id.* at 416. There are important constitutional reasons why the same rule does not apply to revival of claims extinguished by a statute of repose, as discussed below. On the question of legislative intent—the *scope* of retroactivity with respect to the 2007 amendments to Minn. Stat. § 541.051—*Gomon* does not furnish an answer because the language used by the legislature to express retroactive intent in that case was very different from the language employed for the 2007 amendments. There was no doubt about the intended scope of retroactivity in *Gomon* because the statutory amendment was made "effective on August 1, 1999, for actions commenced on or after that date." *Gomon*, 645 N.W.2d at 415. It is perverse logic, however, to contend, as the State does, that the legislature's *failure* to use with the 2007 amendments the kind of language that was clear evidence of intent in *Gomon* also demonstrates the *same* clear intent. Instead, it is more likely that the legislature intended a difference.

The State alternatively asserts that the legislature's choice of the June 30, 2006, effective date was only an expression that the amendments were not intended to apply to the parties in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006). *See* State Br. at

21 n.10. This is also an unreasonable interpretation. *Weston* was decided nearly a year before passage of the 2007 amendments, with a direction from this Court for entry of summary judgment in the defendant's favor. *Id.* at 637, 645. One point of agreement in this case is that a final judgment gives a party a vested right protected by constitutional due process. *Add.14.* (“[T]here “is no vested right in an existing law nor in an action until *final* judgment has been entered therein.”) (quoting *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 101 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008) (citations omitted)). Because there was no need to exempt the parties in *Weston* from the effect of the 2007 amendments, there is no valid reason to presume that the choice of retroactive date had that superfluous purpose.

The State implicitly concedes that the effective date provision of the 2007 amendments is open to more than one interpretation. *See* State Br. at 21 n.10. (“Whether the June 30, 2006, date applies to claims that had not been previously subject to such a final judgment, or to the date the claim is filed, or even the date accrued . . .”). The State’s catalogue of possibilities is, however, selective and incomplete. It excludes without explanation the interpretation that the amendments were intended to be retroactive, but not to such an unlimited extent that they reach “indefinitely into the past” (*Add.12*) to revive *all* prior extinguished claims.

Because the retroactive provision of the 2007 amendments is “not explicit” about the scope of the intended retroactive effect, it is appropriate for this Court to apply certain canons of interpretation. *See* Minn. Stat. § 645.16. Particularly relevant in this case are the occasion and necessity of the law; the circumstances under which it was enacted; the

mischief to be remedied; the object to be obtained; and the consequences of a particular interpretation. *Id.* (1)-(4), (6). These are discussed at length in Jacobs’ opening brief. *See* Jacobs’ Br. at 18. The parties agree that the amendments were enacted in response to this Court’s decision in *Weston*. *See* State Br. at 18. The State, however, mischaracterizes Jacobs’ position as one “that the Legislature intended to address *only* the precise type of fact situation involved in *Weston*.” *Id.* at 19 n.9 (emphasis added). The legislature can—and did with passage of the 2007 amendments—respond to more than just the precise factual scenario presented by a particular case. The 2007 amendments eliminated the repose provision altogether for contribution and indemnity claims, and not just in those situations in which the plaintiffs’ direct claim is brought late in the repose period, as in *Weston*, or afterwards. But given it is undisputed that the amendments were a response to *Weston*, it is relevant to consider the scope of intended retroactivity in light of the issue that the statute was intended to address.

Finally, the State’s reliance on *Baertsch v. Minn. Dep’t of Revenue*, 518 N.W.2d 21 (Minn. 1994), is misplaced. The case involved an amendment to the Minnesota Health Right Act (codified at Minn. Stat. §§ 295.50-59) that incorporated provisions of Minnesota’s anti-injunction act, Minn. Stat. § 289A.43, prohibiting certain taxpayer lawsuits. The amendment was passed in May 1993 and given an effective date of January 1, 1993, which this Court held was “clear evidence” of the legislature’s intent for the amendment to operate retroactively. *Baertsch*, 518 N.W.2d at 24. The plaintiff’s suit was commenced after that effective date, so this Court held that the amendment applied. *Id.* The case did not involve any claim of a

right or defense acquired before the effective date which was then lost as a result of the amendment, and so the kind of question presented here simply was not at issue.

**C. The Reimbursement Provision of the Compensation Statutes Does Not Apply to Eliminate Jacobs' Immunity from Suit or Liability.**

For the reasons explained in Jacobs' opening brief, the State's statutory reimbursement claim against Jacobs is precluded on the same basis as any other claim of the State or another party. *See* Jacobs' Br. at 23-24. Once the repose period expired, the statute extinguished *all* existing causes of action against Jacobs and, significantly for this case, eliminated the *potential* for any causes of action to arise thereafter. *See Weston*, 716 N.W.2d at 641-44 (recognizing that statute of repose may validly eliminate a cause of action before it accrues). The reimbursement provision of the compensation statutes did indeed create a cause of action where none had existed before. But that claim is on the same footing as any other against Jacobs; it was eliminated before it could or did accrue. The prefatory clause of the reimbursement provision ("Notwithstanding any statutory or common law to the contrary"), moreover, is not sufficient to impose a liability on Jacobs that had already been eliminated. The language is too general to accomplish that purpose. At most, the language can fairly be interpreted to allow a remedy ("the state is entitled to recover . . .") where none had existed before, or where the *remedy* was otherwise barred. Because the statute of repose does more than just eliminate a procedural remedy, an intent to revive extinguished liabilities should be express. *See* Minn. Stat. § 541.22, subd. 2. (similar "notwithstanding any law to the contrary" clause used in conjunction with expressly "revived" asbestos property damage claims). Finally, given the constitutional violations that would arise from applying the reimbursement provision to revive potential liabilities against Jacobs (*see* discussion below at

11-20), the statute should be given an interpretation that would not render it unconstitutional. *See Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 (Minn. 2004) (noting that where statute susceptible of two different constructions, the one making it constitutional should be adopted).

## **II. Statutory Revival of Claims for which Jacobs Has Acquired a Vested Right of Immunity Would Violate Constitutional Due Process.**

### **A. Jacobs Has a Vested Right of Repose Entitled to Constitutional Due Process Protection.**

In arguing that a vested right does not arise upon expiration of the repose period prescribed in Minn. Stat. § 541.051, the State chooses to treat statutes of repose as if they are no different than a statute of limitations or other procedural defense to a cause of action. In so doing, the State turns a blind eye to the importance and consequences of this substance-procedure distinction, which this Court has repeatedly recognized. The difference is not just one of semantics. A repose statute is substantive because it eliminates a cause of action altogether, whereas a statute of limitations does not. *See Weston*, 716 N.W.2d at 641. Because it is only a procedural defense, which does not eliminate the cause of action, the legislature may change the limitations period, even retroactively, so that once time-barred claims may again be sued upon. Such revival has been held valid precisely because statutes of limitations are only a procedural limitation. *See Peterson v. City of Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969) (“It is generally held that legislation dealing *only with remedies and procedures* are not beyond the reach of retrospective legislation”) (emphasis added). The holding in *Gomon*, therefore, which concerned a statute of limitations, was consistent with this distinction.

The State concedes that a statute of repose is a substantive limitation on liability, but disputes that a protected vested right is created. *See* State Br. at 26. It is, first of all, a right from the standpoint of the party entitled to repose for the same reason that it is a substantive limitation on the plaintiffs' ability to acquire a cause of action: it confers immunity from both suit and liability by eliminating any cause of action. Moreover, the right vests when the repose period expires because it fully arises at that point and does not depend on any other contingency occurring.

The State relies on the holding of the court of appeals that a right becomes vested only after a final judgment. *See* State Br. at 23. But as explained in Jacobs' opening brief, that is only one way that rights vest, and the case that the court of appeals relied upon involved public, not private rights. *See* Jacobs' Br. at 24-25. The State also cites United States Supreme Court cases holding that the legislature may create a new liability where there was none before. *See* State Br. at 24. Those cases, however, addressed laws of general application and not instances where a particular party had acquired by operation of law an immunity from suit or liability which the government later seeks to eliminate retrospectively.

That Jacobs has a "vested" right to be immune from suit or liability is also apparent from this Court's framework for analyzing the question as explained in *Peterson v. City of Minneapolis*. For the reimbursement provision, the State identifies the first of the three factors under *Peterson*—the nature and strength of the public interest served by the statute—to be the resolution of the survivors' claims against the State. *Peterson*, 285 Minn. at 288, 173 N.W.2d at 357. But that is not the asserted public interest that Jacobs challenges, and in any event, resolving the survivors' claims against the *State* does not logically require the State to

pay for the asserted liabilities of *others*. For the statutory reimbursement claim, the appropriate inquiry should be into the nature and strength of a purpose in a one-case only, retroactive repeal of a party's right of repose. The legislature has never before asserted a public interest in exempting the State from the potential of having its claims extinguished by the repose provisions of § 541.051; the statute has always operated to extinguish claims against the State on the same basis as other parties. There is no principled reason for recognizing as important or strong the State's asserted interest in granting itself the one-time exception from the operation of the repose statute that it seeks here.

With respect to the 2007 amendments, the State identifies the public interest as providing for a fair apportionment of damages among at-fault parties. The legislature is certainly entitled to reverse a longstanding policy—such as the one that favored the elimination of contribution and indemnity claims after expiration of a repose period—but where the public policy was for so many years to promote those settled expectations of immunity, it is unreasonable to suggest that there is a strong public interest in applying the new policy *retroactively*.

The second factor under *Peterson* is the extent to which the statute modifies or abrogates pre-enactment rights. *Id.* at 288, 173 N.W.2d at 357. The State describes the effect here as “limited.” *See* State Br. at 32. This is hardly so. In the case of the 2007 amendments to § 541.051, if interpreted in the manner that the court of appeals did, the abrogation is *total*, and not just for Jacobs, but for any party against whom claims for contribution and indemnity had been extinguished in the many years and decades prior to

June 30, 2006. If the reimbursement provision is given effect, Jacobs' pre-enactment right to immunity from suit or liability in this case is also completely and retroactively eliminated. For the State to minimize the consequences to Jacobs—"liable only for a singular event . . . and only to the extent . . . [it] caused or contributed to the . . . collapse"—is disingenuous when it is seeking to deprive Jacobs of immunity from suit and liability to the extent of many millions of dollars. *See* State Br. at 32.

Finally, for all the reasons that a policy of repose has for so many years been given expression in the provisions of § 541.051, the third factor to consider under *Peterson*—the nature of the right altered here—is a strong and venerable one. *Peterson*, 285 Minn. at 288, 173 N.W.2d at 357. The State disputes this in Jacobs' case because there was no statute of repose when S&P contracted with the State. This entirely misses the point of a public policy favoring certain knowledge of immunity from suit and liability after a prescribed number of years after substantial completion of construction. The statute has never required reliance to enforce repose rights. Moreover, the expectations of immunity inure not only to the original party furnishing design or construction services for an improvement, but also to all those who succeed to or acquire ownership of the original entity. Jacobs acquired S&P in 1999. By that time, any direct, contribution or indemnity liability arising from S&P's work on the Bridge had long before been eliminated by § 541.051. Jacobs enjoys the same right of immunity as did S&P.

**B. If Interpreted to Revive Claims Against Jacobs, the 2007 Amendments to § 541.051 and the Reimbursement Provision of the Compensation Statutes Violate Jacobs' Due Process Rights.**

Because Jacobs acquired a vested right of repose long before the passage of either the 2007 amendments to § 541.051 or the compensation legislation, those statutes may not constitutionally deprive Jacobs of that right. Interpreted as the State does, they are “retroactive laws” that “interfere with Vested legal rights,” and “vested interests’ . . . describe the kind of interest that cannot be impaired by retroactive legislation.” *Peterson*, 285 Minn. at 288, 173 N.W.2d at 357 (citation omitted).

The State attempts to justify the reimbursement provision as just another instance where the legislature can “adjust the burdens of economic life.” *See* State Br. at 27 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984)). The cases relied upon by the State, however, are very different from this one. They involved economic or regulatory legislation of general application. *See, e.g., Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (state-wide workers’ compensation legislation); *Pension Benefit Guar. Corp.*, 467 U.S. at 729 (pension legislation of nationwide scope); *Usery v. Turner Elkborn Mining Co.*, 428 U.S. 1, 18 (1976) (industry-wide legislation regarding liability of mine operators for miners’ illnesses); *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 688 (8th Cir. 2008) (national legislation imposing new liabilities on railroad companies); *Sisson v. Triplett*, 428 N.W.2d 565, 567-68 (Minn. 1988) (state-wide tax on marijuana and other controlled substances); *Contos v. Herbst*, 278 N.W.2d 732, 734-35 (Minn. 1979) (state-wide legislation regarding registration

and taxation of mineral interests). These cases do not involve legislation depriving a particular defendant of a vested right it had acquired, specific to it, by operation of law.<sup>3</sup>

Even if this were an instance where the reimbursement provision could be characterized as legislation of a general economic or regulatory nature, the means selected must be rationally related to a legitimate purpose. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). Moreover, due process requires that the legislation not be “unreasonable, arbitrary, or capricious.” *Contos*, 278 N.W.2d at 741. The particular circumstances of this case are such that the reimbursement provision as applied to the State’s claims against Jacobs fails these tests.

Much of the State’s defense to the constitutional challenge focuses on the legitimacy and reasonableness of the legislature’s decision to voluntarily waive its \$1 million aggregate liability cap and pay out approximately \$37 million to the survivors. Jacobs has made clear that it does not challenge the constitutionality of those payments, or any aspect of the legislation other than the reimbursement provision. This point is significant because the arguments the State uses to justify the payments to the survivors have no rational connection to explaining the reasonableness or legitimacy of the State’s claimed right to obtain reimbursement of those payments from Jacobs.

The State has identified the purpose of the compensation legislation as enabling “the victims of this extraordinary and horrific event to *settle with the State* and receive payment

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<sup>3</sup> In opposing further review by this Court, the State conceded the narrow and highly specific scope of the legislation: “[T]he compensation fund legislation is unique. The law was passed to address a singular and historic event—the collapse of the 35W Bridge.” State Response to Petition for Review at 5. This fact, however, does not make the deprivation of due process any less important.

promptly without protracted legislation *against the State.*” See State Br. at 29 (emphasis added); *id.* (“compensation fund process ‘furthers the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protected litigation to resolve the issue of the *liability of the state, a municipality, or their employees* for damages incurred by survivors” (quoting Minn. Stat. § 3.7391, subd. 2) (emphasis added)). While Jacobs does not challenge the legitimacy of this purpose, there is no logical or rational relationship between the stated purpose and the reimbursement provision as a means to achieve it. As the State notes at various points in its brief, its claim for reimbursement is limited by the statute to its payments to the survivors that represent the percentage of causal fault of *third parties*. See State Br. at 29. So it is a *non sequitur* for the State to argue that a potential recovery from a *third party*, such as Jacobs, is a rational means for the State to accomplish the purpose of compensating the survivors for the *State’s* liability.

The State argues that, if it had not passed the legislation authorizing the \$37 million in compensation payments, it risked the survivors challenging the constitutionality of the State’s \$1 million aggregate limit for tort claims. See State Br. at 46. Even if that was a reasonable concern,<sup>4</sup> the State fails to relate it in any logical way to the reimbursement provision of the legislation. The State has identified no ground on which it could have risked any serious contention that the survivors had a viable constitutional challenge to the tort cap for damages attributable to the causal fault of *others*. So for all these reasons, the reimbursement provision was not in the least a “necessary corollary” (*see* State Br. at 29) to

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<sup>4</sup> This Court has, on more than one occasion, upheld the constitutionality of the tort cap. See *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989); *Lienhard v. State*, 431 N.W.2d 861, 868 (Minn. 1988).

the compensation provisions of the statutes and cannot be justified as rationally related to a purpose of compensating the survivors for the liability of the State.

The reimbursement provision is also a model of legislative arbitrariness. If given effect, the statute singles out one party in connection with a singular past occurrence and strips that party of a statutory right of immunity from suit or liability to which it was otherwise entitled, all in the economic self-interest of the State. The State has not even attempted to identify any standards or principles by which the legislation can be justified as anything other than a raw exercise of government power to retrospectively change the law in one case for its own benefit. The closest it comes to articulating a general principle on which the reimbursement provision can be defended is that the legislation responded to a “catastrophe of historic proportions.” *See* State Br. at 28 (quoting § 3.7391). The implication is that, if the case is big enough, historic enough, and if an accident injures or kills many persons, rather than one or a few, then the State has a reasonable and legitimate basis to change the law retroactively on a one-off basis to achieve a desired result at the expense of the legal rights of another.

Nowhere does the State explain or justify where this line should or can be drawn in separating particular cases that warrant retroactive changes in the law depriving a party of its legal rights from those that do not. It is apparent that there are no intelligible standards. If the State may do what it seeks to do in this case, then whether it does something similar in the future is just a matter of whether it chooses to exercise its arbitrary, standardless discretion. If upheld as just another garden variety “economic regulation,” (*see* State Br. at 28), the reimbursement provision will be an archetype for legislation that permits the State

on a case-by-case basis to retrospectively alter or eliminate a particular party's rights whenever doing so can be shown to produce some economic benefit to the State, which is to say any case in which the State can recover money from another party.

It is difficult to conceive of what the due process protection against arbitrary government action extends to if the reimbursement provision at issue passes muster. In other constitutional contexts, this Court has struck down similarly arbitrary and illogical legislation. See *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 406 (Minn. 1982) (invalidating Minn. Stat. § 573.01 on equal protection grounds because the distinction between intentional torts and other causes of action with respect to the Minnesota survival statute was “arbitrary” and “illogical”); *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981) (invalidating on equal protection grounds “manifestly arbitrary” distinction in Dram Shop Act between 3.2 beer and intoxicating liquors). Because due process also forbids arbitrary government action, or means chosen having no logical relation to the stated purpose, the reimbursement statute as applied to Jacobs violates its due process rights.

With respect to the 2007 amendments to § 541.051, it would be similarly arbitrary and irrational for the legislature to have a longstanding policy that parties should be able to have settled expectations about immunity from suit after a prescribed period of years, and then to suddenly change that policy retroactively, rather than prospectively, thereby undercutting precisely the reliance and stability that the original policy was intended to foster.

### **III. The Reimbursement Provision of the Compensation Statutes as Applied to Jacobs Would Unconstitutionally Impair Its Contract Rights.**

#### **A. The Reimbursement Provision Is a Substantial Impairment of Jacobs' Contract Rights.**

The State wrongly insists that the indemnity provision in the contract conferred rights in only one direction—in favor of the State. *See* State Br. at 36-37. The law is clearly contrary to the State's assertion. A party who has agreed to indemnify another also has a set of legally enforceable rights which arise directly from the agreement to indemnify. It is settled law that the party indemnified "owes a duty of good faith to its indemnitor, and any act of the indemnitee which prejudices the rights of the indemnitor will release his obligation to the extent of the prejudice." *New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 549 (Minn. 1972). An indemnitee has a "duty of acting reasonably under all circumstances so as to protect the indemnitor against liability and of refraining from compromising any of its rights, particularly in settlement negotiations." *Cravens v. Smith*, 610 F.3d 1019, 1030 (8th Cir. 2010) (citation omitted). An obligation to indemnify arises only where one is legally required to pay an obligation for which another is primarily liable. *See Samuelson v. Chi. Rock Island. & Pacific Ry. Co.*, 178 N.W.2d 620, 624 (Minn. 1970). An indemnitees' unilateral act of payment cannot bind the indemnitor, which has a right to notice, tender of defense (a condition precedent to creation of an obligation to indemnify), and an opportunity to defend. *See Seifert v. Regents of the Univ. of Minn.*, 505 N.W.2d 83, 87 (Minn. Ct. App. 1993).

The State seeks, through enforcement of the reimbursement provision contained in Minn. Stat. § 3.7394, to sweep aside all these rights that Jacobs acquired from the indemnity provision of the 1962 contract. It does so first by trying to impose upon Jacobs a liability

that the objective terms of the contract did not contemplate and instead, in fact, excluded because the State was undisputedly immune from any liability in tort at the time it entered into the contract. While the State repeatedly mischaracterizes the point, it is the State that enjoyed “zero liability in tort” when it entered into the 1962 contract, and it is for that reason that there could be no objective expectation to indemnify the State for tort liability. Even if Jacobs could be required to indemnify the State for ordinary tort liability because of the later partial abrogation of sovereign immunity, the reimbursement provision is a far more severe impairment. The State, through the legislature’s own unilateral, after-the-accident act, seeks to impose a new, unique and extraordinary indemnity liability. A question of substantial impairment cannot seriously be in doubt where the contract anticipated no exposure to indemnify the State for its tort liability, and certainly not when the State has increased by millions of dollars the potential indemnity liability that otherwise, and in any other case, would apply because of the statutory tort cap.

**B. The State Lacks a Legitimate Purpose to Impair Contract Rights, and the Reimbursement Provision Is Not a Reasonably and Appropriately Tailored Means to Accomplish It.**

Where the impairment is (1) severe or (2) the State seeks to impair rights to a contract to which it is a party, heightened scrutiny applies. *See Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983). Both considerations apply here. The first is present because the reimbursement provision created a potential exposure to indemnity liability many millions of dollars greater than would have existed if the State had not lifted—for this case only—the tort cap limit. The reimbursement statute thus created “a completely unexpected liability in potentially disabling amounts.” *Allied Structural Steel Co. v. Spannaus*,

438 U.S. 234, 247 (1978) (finding substantial impairment). The State never responds to that point, but argues that heightened scrutiny does not apply because the State is not seeking to void its obligations to Jacobs. *See* State Br. at 40-41. But as explained above, an indemnitee has obligations to the indemnitor, imposed by law, among them a duty to act both in good faith and in a way that protects the indemnitor from liability. Moreover, the cases are clear that the second consideration arises when the State is a party to the contract being impaired—and there is no question about that in this case. *See Christensen*, 331 N.W.2d at 751 (quoting *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 26 (1977) (“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 . . .”)).

Heightened scrutiny should, therefore, be applied in determining whether the State had a legitimate purpose to disrupt contract expectations and whether the means chosen were reasonably and appropriately tailored. The purpose of the compensation legislation was narrow and limited: It “resolv[ed] the survivors’ claims against the State . . . . It provid[ed] expedited financial recovery to the survivors . . . without requiring them to endure protracted litigation with the State.” *See* State Br. at 39. While, as noted, Jacobs does not challenge the authority of the State to have made those payments, this is not the kind of purpose that advances “a broad societal interest” by providing for a “generally applicable rule of conduct.” *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983) (quoting *Allied Structural Steel Co.*, 438 U.S. at 249). To the contrary, this legislation benefits a “narrow class.” *Allied Structural Steel*, 438 U.S. at 249. It certainly cannot be said that the compensation legislation “remed[jed] . . . a broad and general social or economic problem,”

or that it did so with only the incidental effect of impairing contract rights. *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 874 (Minn. 1986) (citing *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-13 (1983)).

While the purpose of the compensation legislation was to compensate the survivors for their claims against the State, as discussed above with respect to due process, the reimbursement provision contained in § 3.7394 is not a reasonably and appropriately tailored means of accomplishing that purpose. Far from it, since the means and end here are completely disconnected: The State resolves claims against it by paying the survivors for its own potential liability, not by paying for the liability of third parties. Yet the reimbursement provision gives the State a right only to recover for the causal fault of others. The State never attempts to explain how the two are logically related or how the means serve the end. Instead, the State defines “narrow tailoring” in a context completely unrelated to the purpose of compensating the survivors for the State’s liability to them: “The statutory reimbursement provision is narrowly tailored to apply only to those who can be shown at trial to have caused or contributed to the Bridge collapse, and to recoup taxpayer funds to that extent.” *See* State Br. at 40. The statement is effectively an admission that the reimbursement provision is not in any respect tailored to accomplishing the objective of resolving the claims of the State’s liability to the survivors, much less narrowly tailored to that end.

#### **IV. The State’s Releases from the Survivors Preclude Any Liability of Jacobs to the State.**

The State cites no authority for its proposition that a *Pierringer* settlement “has no application” when the plaintiff is without a cause of action against the non-settling

defendant. *See* State Br. at 42. The operative aspect of a *Pierringer*, which eliminates the settling defendant's claim to recover contribution or indemnity from a non-settling defendant, is the language in the release whereby the plaintiff's cause of action is discharged to the extent of the causal fault of the settling defendant. The settling defendant has no claim against a non-settling defendant since it has paid to settle for its share of fault only, and not for more than its fair share. This feature of a *Pierringer* and the consequences that follow from it have nothing to do with whether the plaintiff also has made a claim against another party. If the State's interpretation of *Pierringer* law were accurate, then such releases would never be used or useful in cases involving third-party defendants. That is certainly not the case, however. *See, e.g., Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 857-58 (Minn. Ct. App. 2005).

The State's releases with the survivors contain the essential elements of a *Pierringer*, including the discharge of the survivors' cause of action to the extent of the State's percentage of causal fault. *A.182-184*. Accordingly, the State cannot escape the consequence that having discharged the survivors' causes of action *only* to the extent of the State's percentage of causal fault, the State does not have a claim based on causal fault attributable to Jacobs. *See Bunce*, 696 N.W.2d at 855-56.

The State also contends that a *Pierringer* has no application when there is a contract to indemnify. That is only true, however, when the contract gives a party independent rights beyond securing indemnity to the extent of the indemnitors' percentage of causal fault. This is illustrated by one of the cases cited by the State, *Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364 (Minn. 1988). *See* State Br. at 44. In *Seward*, a defendant which paid

\$400,000 to the plaintiff in exchange for a *Pierringer* release had a contractual indemnity agreement with another party requiring that party to procure a \$250,000 policy insuring the defendant against its own fault.<sup>5</sup> *Seward*, 573 N.W.2d at 365. After the settlement, the defendant/indemnitee commenced an action for indemnity for the amount of the policy, which had never been procured. *Id.* Significantly, the action was not to recover the full \$400,000, *id.*, and for all the reasons explained above, the terms of its *Pierringer* release foreclosed such a claim. The contractual agreement to procure insurance, however, was an independent undertaking not based on comparative fault principles. Hence, the defendant/indemnitee had a claim to the extent of that independent agreement. The case offers no support to the State's position, because here it is not seeking indemnity for the failure to procure insurance or for any other undertaking independent of comparative fault principles.<sup>6</sup>

The other Minnesota cases cited by the State are also factually inapposite. *Osgood v. Medical, Inc.*, 415 N.W.2d 896 (Minn. Ct. App. 1987), does not support the State's claim, because in that case, both the manufacturer and the purchaser entered into a *Pierringer* settlement with the plaintiff in which *both* parties "left open the cross-claims between [them]

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<sup>5</sup> Under Minnesota law, while agreements to indemnify another for the other's own negligence are unenforceable, it is permissible to contractually require a party to procure a policy of insurance covering that fault. *See* Minn. Stat. § 337.05, subd. 1.

<sup>6</sup> The State also cites two Wisconsin unpublished decisions. One of those cases demonstrates, however, that Wisconsin law permits a party to obtain indemnification from another for its own fault. *See Rudolph Moravian Church v. Michels Pipe Line Constr., Inc.*, 1982 WL 171750, at \*2 (Wis. Ct. App. Oct. 4, 1982) (unpublished decision). In such circumstances, unlike under Minnesota law, the formula of a *Pierringer* release would not extinguish an indemnity claim because the settling party would be seeking to recover for its own fault, and not that of others.

for later resolution.” *Id.* at 899. It was in consideration of those cross-claims that the court enforced the indemnification agreement. *Id.* at 899-900.

**V. The State’s Claims Are Precluded to the Extent They Were Made Voluntarily and in the Absence of a Legal Duty.**

In arguing that its payments to the survivors of millions of dollars in excess of the statutory tort cap were not voluntary, the State asserts that there was “substantial uncertainty as to whether a court would uphold a \$1 million aggregate tort cap” in the face of the number of potential claims. *See* State Br. at 46. This rationale does not explain, however, why the State paid the survivors for damages attributable to third parties. If the “uncertainty” about a constitutional challenge to the tort cap was that the State’s percentage of causal fault would far exceed the \$1 million tort cap, that was no reason for the State to volunteer payments for damages caused by *others*. The State does not identify any other basis for a challenge to the tort cap, and it is simply not plausible that the State was under any constitutional obligation to pay the survivors for damages attributable to others.

The State’s voluntary payments to the survivors, including for damages attributable to others for which the State was not legally obligated, defeat its contractual indemnity claim. *Samuelson*, 178 N.W.2d at 624. Moreover, as an indemnitee, the State was simply not free to pay the claims of the survivors without tendering the defense and providing Jacobs an opportunity to defend. *Seifert*, 505 N.W.2d at 87. Among other things, Jacobs would have been entitled to raise any defenses available to the State, including the statutory tort cap. By ignoring all these obligations that it owed to Jacobs and instead volunteering payments in excess of the tort cap and for the damages attributable to third parties, the State has relieved Jacobs of liability for contractual indemnity.

## Conclusion

For all the foregoing reasons, Jacobs respectfully requests this Court to reverse the court of appeals and order judgment to be entered in Jacobs' favor.

Dated: January 31, 2011.

Respectfully submitted,

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**CERTIFICATE OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6,854 words. This brief was prepared using Microsoft Word 2003.

Dated: January 31, 2011.

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