

Nos. A09-1776 & A09-1778

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re: Individual 35W Bridge Litigation

**BRIEF AND APPENDIX OF
RESPONDENT URS CORPORATION**

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

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STATEMENT OF LEGAL ISSUES

1. Where the Minnesota legislature has provided that claims for contribution or indemnity may be brought “notwithstanding paragraph (a)” of Minn. Stat. § 541.051, subd. 1, and “regardless” of “the ten-year [repose] period referenced in paragraph (a)” for direct claims, may a third-party defendant such as Jacobs nonetheless rely on the passage of the ten-year period and the terms of paragraph (a) that bar accrual of direct claims to assert that no claims for contribution or indemnity may be brought because of the “common liability” rule?

In its Order dated August 29, 2008, the district court held that URS’s claims for contribution and indemnification were permitted under the plain language of Minn. Stat. § 541.051, as amended, and URS’s claims were not barred by the common liability rule.

Apposite Authority: Minn. Stat. § 541.051; *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002); *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008).

2. Do the 2007 amendments to Minn. Stat. § 541.051 violate due process by allowing contribution and indemnification claims that would not have accrued under the prior version of the statute, even though this Court previously held in *U.S. Home* that the amendments are constitutional?

In its Order dated August 29, 2008, the district court held that Jacobs failed to demonstrate the 2007 amendments to Minn. Stat. § 541.051 violated due process.

Apposite Authority: *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976); *Wesley Theological Seminary v. U.S.*, 876 F.2d 119 (D.C. Cir. 1989) *cert. denied*, 494 U.S. 1003

(1990); *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008); *Larson v. Babcock & Wilcox*, 525 N.W.2d 589 (Minn. Ct. App. 1994).

STATEMENT OF THE CASE

The August 1, 2007 collapse of the 35W Bridge (the “Bridge”) resulted in 121 civil lawsuits, including the personal injury and wrongful death actions that are the subject of these consolidated appeals. All 121 cases are assigned to Judge Deborah Hedlund in Hennepin County District Court and are partially consolidated into nine categories. In addition to the individual plaintiffs, the parties to the collapse litigation include the State of Minnesota; Jacobs Engineering Group, Inc. (“Jacobs”), the corporate successor in interest to the original designer of the Bridge; Progressive Contractors, Inc. (“PCI”), a contractor that was performing work on the Bridge’s concrete deck at the time the Bridge collapsed;¹ and URS Corporation (“URS”), an engineering company hired by the State of Minnesota in 2003 to perform a fatigue evaluation and a redundancy analysis of the Bridge.

The plaintiffs in the cases that are the subject of these appeals brought personal injury and wrongful death claims against URS beginning in November 2008. URS then, in turn, brought claims against Jacobs for contribution and indemnification. Jacobs responded by moving to dismiss URS’s Third-Party Complaint pursuant to Minn. R. Civ. P. 12.02(e). Jacobs claimed in its motion papers that URS’s third-party claims against Jacobs were barred by the common liability rule and the prior version of Minn.

¹ PCI settled with the individual plaintiffs and the State of Minnesota, and has indicated that it will not participate further in these appeals.

Stat. § 541.051. The district court denied Jacobs' Rule 12.02(e) motion, and Jacobs sought interlocutory appeal under both a claim of right and through Rule 105 petitions. In its Order dated November 3, 2009, this Court accepted Jacobs' interlocutory appeals under the collateral order doctrine, concluding the "question of whether appellant is immune from liability based on the statute of repose is a legal issue completely separate from the merits of the action." A258.

STATEMENT OF FACTS²

I. Jacobs is Responsible for the Defective Design of the Bridge.

In 1962, Sverdrup & Parcel and Associates, Inc. ("Sverdrup") entered into an agreement with the State of Minnesota to design the Bridge. A67. Under its contract with the State, Sverdrup agreed to design the Bridge in accordance with Division I of the American Association of State Highway Officials' "Standard Specifications for Highway Bridges," 1961 Edition, and the 1961 and 1962 Interim Specifications. A57. Unfortunately, Sverdrup designed a bridge that did not comply with the required specifications. A57-A58. Specifically, Sverdrup designed gusset plates for the Bridge's U10 and L11 nodes that were approximately half the necessary thickness. A57. Sverdrup's negligent design resulted in the Bridge's collapse. A15-16; A58.

In 1999, prior to the collapse, through a series of name changes and corporate mergers, Sverdrup merged with Jacobs. A55-A56. Jacobs is, therefore, the successor in

² Because this appeal is from a motion to dismiss brought under Minn. R. Civ. P. 12.02(e), the facts are taken from the pleadings.

interest to Sverdrup and is responsible for Sverdrup's liabilities, including liability for the Bridge's negligent design. A56.

II. The Collapse of the Bridge.

On August 1, 2007, shortly after 6:00 p.m., the Bridge collapsed. A15. Thirteen people were killed in the collapse and many more were injured. *Id.* The cause of the collapse was inadequate load capacity, resulting from Sverdrup's under-design of the gusset plates at critical nodes. A15-A16, A58, A67-A68. Sverdrup & Parcel's negligent design, and extra weight added to the Bridge by the State and Defendant PCI, caused the Bridge to collapse. A58-A59.

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

In May 2007, before the Bridge collapsed, the Minnesota legislature amended Minn. Stat. § 541.051, titled "Limitation of actions for damages based on services or construction to improve real property." The amendment, "effective retroactively from June 30, 2006," or "effective retroactively to June 30, 2006,"³ eliminated the statute of repose for contribution and indemnity claims and provided that, "notwithstanding paragraph (a)" (which prevents the accrual of direct claims after a ten-year repose period), contribution or indemnity claims "may be brought" within two years of their own accrual (defined, as applicable here, as "upon . . . commencement of the action against

³ 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29. The two versions of the retroactive provision of the 2007 amendments differ only in this minor respect. Like Jacobs, URS considers the difference immaterial. The legislature intended the amendments to be retroactive, and wanted that retroactive effect to begin on June 30, 2006.

the party seeking contribution or indemnity”), “regardless” of whether they accrued “before or after” the ten-year repose period applicable to direct claims for damages. 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29; codified at Minn. Stat. § 541.051.

IV. The Present Litigation.

Starting in November 2008, various plaintiffs, including the personal injury and wrongful death plaintiffs in these matters, asserted claims against URS seeking damages for losses they incurred as a result of the collapse. *E.g.* A12-A42. The plaintiffs are individual victims (along with spouses and the parents of minors), insurance carriers with subrogation claims, companies that had property damaged in the collapse, and the State of Minnesota. URS, in turn, brought third-party claims against Jacobs for contribution and indemnification. A43-A63; A64-A108. The State of Minnesota has also asserted a variety of claims against Jacobs and URS, including claims for contribution and indemnity.

V. Jacobs’ Motions to Dismiss URS’s Third-Party Complaints and the District Court’s Ruling.

Jacobs responded to URS’s Third-Party Complaint by bringing motions to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure. A109-A111. On June 12, 2009, the district court heard the parties’ arguments on Jacobs’ motions. On August 28, 2009, the district court denied Jacobs’ motions to dismiss URS’s Third-Party Complaint against Jacobs. Add.1.

While URS’s contribution and indemnity claims did not accrue until November 2008, the repose period applicable to the plaintiffs under Minn. Stat. § 541.051, subd.

1(a), prevents the victims of the Bridge collapse from asserting direct claims against Jacobs. Before the district court, Jacobs attempted to bootstrap URS's third-party contribution and indemnification claims against Jacobs onto the prohibition against direct claims, arguing it had no common liability with URS. A116. In other words, Jacobs argued that, because plaintiffs were barred from suing it directly, no common liability for the plaintiffs' claims existed between Jacobs and URS, which, Jacobs argued, meant URS could not assert third-party contribution and indemnification claims against Jacobs. Further, Jacobs claimed that if the 2007 amendments to Minn. Stat. § 541.051 did allow URS to bring claims against Jacobs, the change in law violated Jacobs' due process rights.

The district court concluded that this Court, in *U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc.*, 749 N.W.2d 98, 103 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008), previously determined the 2007 amendment to Minn. Stat § 541.051 showed a clear legislative intent for retroactive application and "revived" claims for contribution and indemnity that would have been barred under the previous version of the statute.⁴ Add.5. Accordingly, the district court concluded that "while [URS's] contribution and indemnity claims were barred by the previous version of Minn. Stat. § 541.051, the amended 2007 version removes the ten-year repose barrier to assertion of

⁴ The contribution and indemnification claims asserted by URS never needed to be "revived," of course, because they had not yet accrued when the legislature amended Section 541.051 in May 2007. URS's claims against Jacobs did not accrue until November 2008 when several plaintiffs commenced their lawsuits against URS. The amendment's effect merely removed the availability of a possible repose defense.

the claims.” Add.5. The district court determined that “revival” of the contribution and indemnity claims was constitutional for two principal reasons. First, Jacobs had no vested property interest in the prior repose statute because the statute of repose is an affirmative defense that only arises when a lawsuit exists and judgment is entered. Add.6, *citing U.S. Home Corp.*, 749 N.W.2d at 103. Second, the legislature had a rational reason for the change. *Id.*, *citing, e.g., Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006).

The district court determined the plaintiffs’ lack of direct claims against Jacobs did not extinguish common liability. Add.7. Only a defense that reaches the merits of a case can extinguish common liability. *Id.* A statute of repose is a technical defense that does not go to the underlying merits of a claim. *Id.* Accordingly, the district court held that common liability existed. *Id.* Further, although common liability is a factor in contribution claims, the district court held, based on precedent, it is not required for indemnity. Add.8, *citing Blomgren v. Marshall Mgmt. Servs. Inc.*, 483 N.W.2d 504, 506 (Minn. Ct. App. 1992).

On September 28, 2009, Jacobs responded to the district court’s order by (1) petitioning this Court for discretionary review under Rule 105 and (2) filing notices of appeal claiming it has the right to an interlocutory appeal of the district court’s order under Rule 103.03(j) and the collateral-order doctrine. In its Order dated November 3, 2009, this Court accepted Jacobs’ interlocutory appeals under the collateral order doctrine.

SUMMARY OF ARGUMENT

Jacobs seeks to escape all liability and force URS to pay for Jacobs' mistakes. Without recognizing the irony, Jacobs asserts this inequitable result is required by the rules of the equitable doctrines of contribution and indemnity, or by the constraints of due process. This attempt to achieve inequity must be denied, for at least three reasons.

First, the applicable statute, Minn. Stat. § 541.051, is clear and unambiguous. The Minnesota legislature has the authority to change the law in Minnesota, and it did so for reasons unrelated to the Bridge. This Court is bound to follow the legislature's clearly expressed intent. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). The 2007 amendments, in effect since before the collapse, entitle URS to pursue third-party contribution and indemnity claims against Jacobs, even though the plaintiffs' claims against Jacobs cannot accrue. Section 541.051 does not require the plaintiffs to have direct claims against Jacobs allowed under § 541.051, subd.1(a) before URS can prosecute its third-party claims against Jacobs under subd.1(b). Indeed, the opposite is true: the legislature clearly stated that contribution or indemnity claims may be brought whether or not direct claims are barred under paragraph (a) of the subdivision: "Notwithstanding paragraph (a), an action for contribution or indemnity . . . may be brought . . ." Minn. Stat. § 541.051, subd. 1(b).

Second, even if the legislature had not made it clear that common liability is not required here, where only § 541.051, subd.1(a) prevents the direct claims, Jacobs' common liability argument would nonetheless fail. Minnesota's broad application of the equitable doctrine of contribution is contrary to Jacobs' narrow interpretation of common

liability. Jacobs' definition of common liability is that a plaintiff must have a viable cause of action against all defendants before common liability can exist, enabling the defendants to seek contribution from each other. That definition is not correct, and has not been for decades. *See, e.g., Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977). Moreover, Jacobs' reliance on Iowa law to bolster its common liability argument is misplaced. Minnesota law differs significantly from Iowa law on this point, and reliance on Iowa law is therefore inappropriate.

Finally, this Court has already determined the 2007 amendments to Section 541.051 are constitutional. *U.S. Home Corp. v. Zimmeran Stucco & Plaster, Inc.* 749 N.W.2d 98, 103 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008). Jacobs has no vested right in any expectation that Minnesota law will never change. Equally as important, Jacobs has no vested right in a statute of repose defense that it might someday use. Even if Jacobs had a vested right (which it does not), the Minnesota legislature had a rational basis for amending Section 541.051. Indeed, the Minnesota legislature has previously revived all sorts of claims. *E.g. Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002) (medical malpractice claims); *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 292-298 (D. Minn. 1990) (asbestos claims). It certainly has the power to revive contribution and indemnity claims regarding improvements to real property as well.

URS has viable claims against Jacobs for contribution and indemnity upon which relief may be granted. The district court properly held that Jacobs cannot simply escape

its responsibility for negligently under-designing the Bridge at the pleading stage, and this Court should affirm that ruling.

ARGUMENT

I. Standard of Review.

Jacobs cannot meet the stringent standard for dismissal under Rule 12.02(e) of the Minnesota Rules of Civil Procedure. When considering a motion to dismiss, whether before the district court or on appeal, the facts in the complaint must be taken as true and considered in the light most favorable to the non-moving party. *North Star Legal Foundation v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. Ct. App. 1984). All fact inferences and assumptions are made in favor of the claimant in determining whether a claim will withstand a motion to dismiss. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29-30 (Minn. 1963). A claim prevails against a motion to dismiss if it is possible for the court to grant relief on any evidence that is consistent with the claimant's theory. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-740 (Minn. 2000).

II. The 2007 Amendments to Minn. Stat. § 541.051 Entitle URS to Pursue Contribution and Indemnity Claims Against Jacobs.

Jacobs' defenses against URS's contribution and indemnity claims are based in large part on Section 541.051 of the Minnesota Statutes and the 2007 amendments made to that law. Those amendments were made "effective retroactively from June 30, 2006," or "effective retroactively to June 30, 2006." 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8 § 29.

A. The Previous Version of Minn. Stat. § 541.051 Included A Statute of Repose for All Claims.

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

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

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

B. The 2007 Amendments to Minn. Stat. § 541.051 Removed the Statute of Repose for Contribution and Indemnity Claims.

In May 2007, before the Bridge collapsed, Section 541.051, subd. 1(a), was amended and it now provides:

Except where fraud is involved, no action by any person in contract, tort, or

otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

The 2007 amendments affirmatively removed any references to claims for contribution and indemnity from paragraph (a) of subdivision 1. Accordingly, the statutes of limitation and repose in paragraph (a) no longer apply to contribution or indemnity claims. Instead, paragraph 1(a) now governs only direct actions.

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

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

Minn. Stat. § 541.051, subd. 1(b) (emphasis added).⁵ Claims for contribution and indemnification still have a two-year statute of limitations (beginning from their accrual),

⁵ The statute in both its current and prior form refers to actions for “contribution or indemnity,” reflecting the legislature’s recognition that the two are separate causes of action and not, as Jacobs claims, a single cause of action known as “contribution-indemnity.”

but they do not have a statute of repose; indeed, the legislature underscored that fact by not only removing contribution and indemnity claims from paragraph (a) but by also affirmatively stating that such a claim “may be brought . . . regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).” There is, therefore, no longer any statute of repose for actions for contribution or indemnity that arise out of the unsafe and defective condition of improvements to real property. Minn. Stat. § 541.051.

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

The amended statute also defines when a cause of action for contribution or indemnity accrues. Previously, Minn. Stat. § 541.051 provided that: “a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.” Minn. Stat. § 541.051, subd. 1(b) (2006) (amended 2007). In its current form, the statute provides a different definition of accrual for contribution and indemnity claims:

. . . in the case of an action for contribution or indemnity under paragraph (b), a cause of action accrues upon the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

Minn. Stat. § 541.051, subd. 1(c).

Contribution and indemnity thus accrue either when the underlying action is started or when a final judgment, award, or settlement is paid, whichever is earlier. *Id.*

The cause of action may then be brought within two years of that accrual, regardless of whether accrual happens before or after the ten-year repose period has run for the direct actions. URS's claims for contribution and indemnity are allowed under the current version of Section 541.051.

In this case, the plaintiffs began their first lawsuits against URS in November 2008, seeking damages for injuries that arose out of the unsafe and defective condition of an improvement to real property, the Bridge. *E.g.*, RA018-RA035. Less than two years after the commencement of those suits, the statutory accrual date for contribution or indemnification claims, URS brought its contribution and indemnity claims against Jacobs. *E.g.*, RA036-RA044. The ten-year statute of repose established in paragraph (a) of Section 541.051 barred any direct claim by the plaintiffs against Jacobs from accruing, but URS is explicitly allowed to bring its claims against Jacobs within two years of their accrual "regardless" of the fact that the repose period for direct actions had already run. Minn. Stat. § 541.051, subd. 1(a)-(b).

In its attempt to escape the clear implications of the current version of Minn. Stat. § 541.051, Jacobs claims the amended statute should be narrowly interpreted so that it only remedies the particular situation presented in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006). (Jacobs' Br. at 20-21, 26). If, however, the Minnesota legislature had only wanted to fix the specific problems created by the definition of when a claim accrues, it could have passed a limited amendment that merely changed that definition. Instead, in addition to altering the accrual definition (in paragraph (c)), the legislature revised paragraph (a) and created a new paragraph (b), which freed

contribution and indemnification claims from the statute of repose applicable to direct claims, and indeed from any provision of paragraph (a). Further, if the legislature had only wanted to narrowly fix the *Weston* problem of a defendant who is sued late in the repose period and is unable to bring in third-party defendants, it could have followed the Minnesota Supreme Court's implicit suggestion and amended Section 541.051 so that it was similar to a Wisconsin law that frees contribution and indemnity claims from the statute of repose only "if the underlying injury action is brought late in the repose period." 716 N.W.2d at 639-640.

D. Jacobs May Not Rely On The Terms Of Paragraph (a) For Its Common Liability Argument.

When it amended Minn. Stat. § 541.051, the Minnesota legislature did more than just remove the statute of repose for contribution or indemnity claims. In redefining when a contribution or indemnity claim may be brought, the legislature made clear that such a claim may be brought "notwithstanding paragraph (a)." But it is only because of paragraph (a) and its disallowance of accrual of direct claims after 10 years that Jacobs is able to make its "lack of common liability" argument. Accordingly, Jacobs is wrong when it asserts the amendments had no effect on the common liability rule. Whatever that rule otherwise requires (and, as discussed below, Jacobs is also wrong in its assertions regarding the general rule), the legislature decided paragraph (a) does not prevent contribution claims; they may be brought "notwithstanding paragraph (a)."⁶ That

⁶ Any other reading would impermissibly render the phrase mere surplusage, since paragraph (a), as amended, makes no reference to contribution or indemnity claims, and

fact alone is sufficient to defeat Jacobs' common liability arguments, since they depend on what paragraph (a) does to direct claims.

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

Jacobs relies on the Iowa Supreme Court's decision in *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724 (Iowa 2008) in arguing the clear meaning of Minn. Stat. § 541.051, subd. 1(b) can be ignored. (Jacobs' Br. at 17-18). Obviously, however, *Ryan* is not binding authority. Nor is it particularly persuasive. The Iowa Supreme Court's rigid and formulaic analysis of whether to allow a contribution claim to proceed should not guide this Court because it is not consistent with the flexible and equitable nature of contribution in Minnesota (as the next section shows). Moreover, the Iowa Supreme Court was faced with a different question than is faced by this Court.

In Iowa, common liability is a statutory requirement, not an equitable action as it is in Minnesota. *See Ryan*, 745 N.W.2d at 731 (discussing Iowa's common liability statute); *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994) (contribution is equitable action and part of the state's common law). In *Ryan*, the Iowa Supreme Court was faced with a potential conflict between two Iowa statutes, one requiring common liability and another excepting claims for contribution from the statute

there is thus no need to distinguish any of its provisions from paragraph (b) in that regard. *See* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions.") Nor is it needed to negate any assumption that the 10-year period of repose might somehow still apply, since the "regardless" clause explicitly does that by stating a contribution or indemnity claim may be brought "regardless of whether it accrued before or after the ten-year period referenced in paragraph (a)."

of repose. 745 N.W.2d at 731. The Iowa Supreme Court may or may not have resolved that issue correctly based on Iowa statutory law, but the Iowa Supreme Court's holding has no bearing on the 2007 amendment to Minn. Stat. § 541.051 or Minnesota's equitable rule of common liability.

F. The 2007 Amendments to Minn. Stat. § 541.051 Retroactively Removed the Bar on Contribution and Indemnification Claims Created by a Prior Version of the Statute.

Jacobs argues the 2007 amendments to Minn. Stat. § 541.051 were not intended to allow claims that would have been barred under the previous statute of repose. (Jacobs Br. at 27). In *U.S. Home*, however, this Court already resolved that issue. 749 N.W.2d at 101-103.

There are various insignificant differences between the present case and *U.S. Home*, which are described by Jacobs. (Jacobs Br. at 25-26). In *U.S. Home*, the ten-year statute of repose had not run at the time the homeowner filed suit against the general contractor, but had run when the case was settled and when the general contractor subsequently brought suit against the subcontractor. 747 N.W.2d at 100. Then, while the case was on appeal, the 2007 amendments were enacted. *Id.* Those distinctions, however, do not relate to whether the legislature intended to revive claims that would have been barred under the previous statute.

In *U.S. Home*, this Court, “analyze[d] whether retroactive application of the statute revives appellant's claims.” 749 N.W.2d at 101. After analyzing the statute and its constitutionality, this Court concluded that although the claims for contribution and indemnity had been barred under the earlier version, they were “timely” under the revised

statute. *Id.* at 103. Jacobs complains the word “revival” is not used in the 2007 amendments as it was in an earlier asbestos revival statute, (Jacobs Br. at 27, n.10), but the Minnesota Supreme Court does not require the legislature specifically state that it intends to revive barred claims.

In *Gomon*, 645 N.W.2d at 415, for example, the Minnesota Supreme Court considered a change to the statute of limitations for medical malpractice actions passed in 1999 that was to be “effective on August 1, 1999, for actions commenced on or after that date.” The plaintiffs’ cause of action had been barred by the prior two-year statute of limitations, but had accrued within the new four-year period of limitation when they commenced their action in December 1999. *Id.* at 415. Like Jacobs, the defendants in *Gomon* argued that even if a statute is intended to apply retroactively, “it should not be applied retroactively to *revive* a previously time-barred claim unless intent to revive is specifically expressed.” *Id.* at 417 (emphasis in the original). The Minnesota Supreme Court rejected that argument and held that because the legislature had “clearly and manifestly expressed its intent” that the new four-year statute of limitations “be applied retroactively” the plaintiffs would be allowed to proceed because they had brought their claim within the new four-year limitation period. *Id.* at 420. The same reasoning supports URS’s claims for contribution and indemnity in these cases. The Minnesota legislature indicated it wanted the 2007 amendments to apply retroactively, and URS brought its claims against Jacobs within the two-year statute of limitations required under the amended statute.

III. Even Without the 2007 Amendments to Minn. Stat. § 541.051, Minnesota's Broad Application of the Equitable Doctrine of Contribution is Contrary to Jacobs' Narrow Definition of Common Liability.

Jacobs advances an inaccurate and overly restrictive definition of common liability in Minnesota. (Jacobs Br. at 9) (“Common liability arises when both parties are liable to the injured party for part or all of the same damages.”) “[C]ontribution is an equitable action, and the rules governing its use should promote the fair and just treatment of the parties.” *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 169 (Minn. 1979). In *Lambertson v. Cincinnati Corp.*, 257 N.W.2d. 679, 688 (Minn. 1977), the Minnesota Supreme Court stated that “contribution is a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties.” *Lambertson* traced the rationale underlying contribution to equitable principles, stating that:

The principles governing contribution and indemnity . . . comprise the subject that is treated under the general title of restitution . . . The basis of the right to restitution is the belief that men should restore what comes to them by mistake or at another's expense, and that it is unfair to retain a benefit or advantage which should belong to another.

Id. at 685-686 (internal quotation omitted).

A. Equitable Principles Support URS's Claims.

URS was not responsible for the Bridge collapse, nor did it breach any legal duty. Nonetheless, litigation is uncertain and a jury could assign some liability to URS for failing to discover Jacobs' mistakes. If that happens and Jacobs has been dismissed from the lawsuits, URS could be forced to pay damages resulting from Jacobs' negligence.

If someone is to pay for the damages and injuries caused by Jacobs, it should be Jacobs. Contribution “is a flexible, equitable remedy designed to accomplish a fair

allocation of loss among parties.” *Jones v. Fisher*, 309 N.W.2d. 726, 730 n.4 (Minn. 1981) (quoting *Lambertson*, 257 N.W.2d at 688). The fair allocation would be to have Jacobs, not URS, pay for the damages caused by Jacobs’ negligent work. URS paying for Jacobs’ mistakes is more unjust than Jacobs having to pay for its own mistakes after the statutory period has run.

In *City of Willmar*, the Minnesota Supreme Court held that the plaintiff’s inability to directly sue a third-party defendant because of the statute of limitations did not bar claims for contribution and indemnity. 512 N.W.2d at 874-875. The Minnesota Supreme Court stated:

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

512 N.W.2d at 875. The same considerations are at play in this case. True, Jacobs will be forced to remain in the lawsuits and may have to pay for its negligence. However, dismissing Jacobs would be at the “literal expense” of URS. To avoid such an inequitable result, this Court should allow URS the equitable remedy of contribution.

A. Common Liability is Defined Broadly to Accomplish its Equitable Purpose.

Common liability is, as Jacobs claims, generally “a prerequisite to obtaining contribution.” *Jones*, 309 N.W.2d. at 730; *but see, Blomgren*, 483 N.W.2d at 506 n.2 (noting that the Minnesota Supreme Court “has, on equitable principles, allowed contribution in certain cases despite the absence of common liability.”) However, when

determining whether there is common liability, Minnesota courts apply an equitable analysis focusing on the merits. In *Anderson v. Stream*, 295 N.W.2d 595, 600 (Minn. 1980), the Minnesota Supreme Court stated that “the equitable doctrine of contribution... requires that those who contribute to an injury bear liability in direct proportion to their relative culpability.” The Minnesota Supreme Court related this reasoning to the “fundamental concept of our legal system and a right guaranteed by our state constitution... that a remedy be afforded to those who have been injured due to the conduct of another.” *Id.*

In *Jones*, the Minnesota Supreme Court held contribution was required to “secure restitution and a fair apportionment of loss among all those whose activities combine to produce the injury.” 309 N.W.2d at 729 n.3. *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984) likewise held that common liability was a flexible, equitable concept that could not and should not be rigidly defined: “[W]hat constitutes ‘common liability’ is not susceptible to a single precise definition. The concept, an element of the equitable remedy of contribution, is accorded some elasticity.”

B. Defenses That Do Not Go to the Merits of the Claim Are Disregarded When Determining Common Liability.

Importantly, common liability “does not depend on whether or not a plaintiff can enforce recovery against two or more defendants.” *Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp. of Am.*, 366 N.W.2d 111, 116 (Minn. 1985) (quoting *Horton v. Orbeth*, 342 N.W.2d at 114). In *Jones*, the Minnesota Supreme Court held that “defenses which do not go to the merits of the case . . . do not extinguish

common liability.” 309 N.W.2d at 729. In *Horton*, the Minnesota Supreme Court criticized such defenses⁷ advanced by parties attempting to escape common liability, and considered only the *actions* of the defendant when determining the underlying liability:

[D]efenses that do not go to the merits of the case... do not extinguish common liability even though they eliminate one defendant’s direct obligation to compensate the plaintiff... In such instances, it is a factor *extrinsic* to the tort itself...by which liability is avoided. The acts or omissions of the excused defendant were otherwise sufficient to subject the defendant to liability.

342 N.W.2d at 114 (emphasis in original). The *Horton* court denied contribution because the non-liability of the potential contributors had actually been adjudicated. *Id.* Jacobs’ negligence, in contrast, has not been considered by a jury and its statute of repose defense to the victims’ claims does not relate, at all, to its negligence. The statute of repose eliminates any direct liability to the plaintiffs, but it does not arise out of the merits of Jacobs’ own acts or omissions.

Jacobs argues the statute of repose is “substantive” law, not “procedural” law, and that it is, therefore, different from the various technical defenses that have been held not to defeat common liability. Certainly, in discussing the sorts of defenses that do not foreclose a claim for contribution, Minnesota courts have referred to them as procedural defenses. *E.g., Spitzack v. Schumacher*, 241 N.W.2d 641, 643 (Minn. 1976).⁸ In other

⁷ *Horton* recited a list of such representative defenses, including covenants not to sue, expired limitations periods, failures to provide notice, and personal immunities. *Id.* at 114.

⁸ *Horton* listed a covenant not to sue as one example of a defense that did not bar an action for contribution. 342 N.W.2d at 114. Such a covenant has nothing to do with the procedures used to resolve disputes in Minnesota’s courts. It is a promise contained in a substantive agreement.

cases, however, they are characterized as technical defenses. *E.g., Neussmeier Electric, Inc. v. Weiss Manufacturing Co.*, 632 N.W. 2d 248, 252 (Minn. Ct. App. 2001) (“The supreme court has held that technical defenses that do not go to the merits of a case do not eliminate common liability even though they eliminate one defendant’s direct obligation to compensate the plaintiff.”)

The key issue is whether the defense in question goes to the merits. *Horton*, 342 N.W.2d at 114. Contribution is an equitable remedy. If a third party defendant has a complete defense on the merits, a claim for contribution would be inequitable. Jacobs, however, is the beneficiary of a defense unrelated to its acts, omissions, or culpability, and it should not be able to use that defense to force URS to pay for its mistakes.

C. Jacobs’ Immunity to Direct Claims Does Not Eliminate Common Liability.

In arguing it had the right to an interlocutory appeal, Jacobs repeatedly claimed the statute of repose gave it an “immunity” that was separate from the underlying merits. For example, in its Statements of the Case, Jacobs claimed the statute of repose created an “immunity from suit” and that a “question of immunity” was at stake. A243-A244. Further, Jacobs contended the repose issues addressed by the district court are “wholly separable and collateral to” the underlying merits of the case. A243. Likewise, in its informal memorandum regarding appellate jurisdiction, Jacobs claimed that the repose “issue” was “a question of immunity,” that its motion presented a “claim of immunity,” and that § 541.051 provides “immunity, rather than simply a defense.” RA008, RA010-RA012.

In its Order dated November 3, 2009, this Court accepted Jacobs' arguments and held that denial of Jacobs' motion was immediately appealable stating that "[t]he question of whether appellant is immune from liability based on the statute of repose is a legal issue completely separate from the merits of the action." A258. Jacobs and this Court concluded the protection afforded by the statute of repose is an immunity unrelated to the merits of the case. The statute of repose (or prior versions thereof) does not, therefore, eliminate common liability. *Jones*, 309 N.W.2d at 729 ("[D]efenses which do not go to the merits of the case . . . do not extinguish common liability"); *see also Horton*, 342 N.W.2d at 114 (listing personal immunity as one example of a defense that does not eliminate common liability).

D. Indemnity is a Distinct Equitable Doctrine That Does Not Require Common Liability.

While contribution and indemnification are often pled and analyzed together, they are separate causes of action. *See Blomgren*, 483 N.W.2d at 506 (describing the differences between contribution and indemnity). Even in *City of Willmar*, the case Jacobs cites because of the references to "contribution-indemnity," the Minnesota Supreme Court explained that "contribution and indemnity are independent causes of action; they are venerable equity actions and part of our state's common law." 512 N.W.2d at 874. One notable difference between contribution and indemnity is that "[i]ndemnity does not require common liability." *Blomgren*, 483 N.W.2d at 506; *see United States v. J&D Enterprises*, 955 F. Supp. 1153, 1157 (D. Minn. 1997) (quoting *Hermeling v. Minnesota Fire & Cas. Co.*, 548 N.W.2d 270, 273 n.1 (Minn. 1996)).

Jacobs's arguments with regard to the common liability rule are, therefore, inapplicable to URS's indemnity claim.

Like contribution, indemnity is an equitable remedy that "does not lend itself to hard-and-fast rules, and its application depends upon the particular facts of each case."⁹ *Farr v. Armstrong Rubber Co.*, 179 N.W.2d 64, 72 (Minn. 1970). Although indemnity usually requires that one party reimburse another *entirely* for its liability, this is not a hard-and-fast rule. *Zontelli & Sons, Inc. v. City of Nashwauk*, 373 N.W.2d 744, 755 (Minn. 1985) (holding that city's indemnity claim against contractor was appropriate under the facts of the case, and finding that city should be indemnified only for the costs attributable to the contractor's breach, even though that amount was less than city's total liability to the plaintiff); *see also City of Willmar*, 512 N.W.2d at 874 ("Indemnity applies when, among other situations, a party fails to discover or prevent another's fault and, consequently, pays damages for which the other party is primarily liable"). Moreover, despite Jacobs' contention that there is "no conceivable circumstance under which URS could be found at trial to have 0% fault but nonetheless have liability to the Plaintiffs for any fault assigned to Jacobs," the 2003 amendments to the comparative fault scheme have not been tested on that point. *See* Minn. Stat. §§ 604.01-604.02; *see also Engvall v. Soo Line Railroad Co.*, 632 N.W.2d 560, 572 (Minn. 2001) (reversing summary

⁹ The application of indemnity in the case brought by the State of Minnesota against URS, which is not before this Court, may, for example, present different legal issues due to the State's breach of contract claims against URS.

judgment on indemnity claim because the jury could assign 100% of the fault to third-party defendant).

Indemnity may be available only if a jury ultimately assigns little or no fault to URS, but without a determination of fault, dismissal of URS's indemnity claim would be inequitable. URS's contribution and indemnity claims may both be necessary to effectuate the fair apportionment contemplated by Minnesota's comparative fault laws. *See* Minn. Stat. §§ 604.01-604.02.

IV. The 2007 Amendments to Minn. Stat. § 541.051 are Constitutional.

A. Jacobs Cannot Overcome the Presumption of Constitutionality.

Jacobs seeks to have this Court declare the 2007 amendments to Minn. Stat. § 541.051 unconstitutional. (Jacobs' Br. at 28-35). As the party challenging the statute, Jacobs has the "very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999) (*quoting State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990)). The power to declare a statute unconstitutional should be exercised "only with extreme caution and only when absolutely necessary." *Doll v. Barnell*, 693 N.W.2d 455, 460-461 (Minn. Ct. App. 2005) (*quoting In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989)). Minnesota statutes are presumed to be constitutional. *Id.* Debatable questions as to the statute's reasonableness, wisdom, and propriety are for the legislative body, and not for the determination of the courts. *Id.* at 461 (*quoting S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 191 (1938)).

B. Minnesota and Federal Courts Have Repeatedly Recognized that Retroactive Changes to Statutes of Repose Do Not Violate Due Process.

a. The Minnesota Cases.

Jacobs has not met--and cannot meet--its heavy burden. Indeed, every Minnesota court that has considered the question has concluded that it does not violate due process to retroactively change a statute of repose so as to allow claims that would have been barred under the prior law. *U.S. Home Corp.*, 749 N.W.2d at 102 (analyzing the constitutionality of the 2007 amendments to Minn. Stat. § 541.051 and holding “the legislature can revive a claim that was otherwise barred by a repose period”); *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591 (Minn. Ct. App. 1994) (stating in a discussion of a statute of repose that the “legislature can constitutionally modify time limitations and thereby divest a party of previously obtained rights”); *see also Independent Sch. Dist. No. 197*, 752 F. Supp. at 298 (considering a constitutional challenge to a law reviving asbestos claims that had been barred under the statute of repose and stating that “the Court will follow the leading cases which have sustained retroactive modification of time limitations, and affirm the revival statute against defendant's due process challenge”).

Jacobs mentions the direct claims against the general contractor in *U.S. Home* arose before expiration of the repose period, (Jacobs Br. at 25-26), but the difference is unimportant. In this case and in *U.S. Home*, the statute of repose period had run before the statute was retroactively amended in 2007 and before claims for contribution and indemnification were brought by third-party plaintiffs against third-party defendants. The constitutional question in both cases is the same: could the legislature retroactively amend the statute of repose in Section 541.051 so as to allow claims that would have

been barred under the prior law? In *U.S. Home*, this Court concluded the amendments were constitutional, and that holding disposes of Jacobs' challenge to Minn. Stat. § 541.051.

b. The Federal Cases.

In addition to the Minnesota cases discussed above, the Federal courts that have considered the issue held it does not violate due process to revive claims that had been barred under a previous statute of repose. *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1076 (4th Cir. 1995) *cert. denied*, 516 U.S. 1184 (1996); *Wesley Theological Seminary v. U.S.*, 876 F.2d 119 (D.C. Cir. 1989) *cert. denied*, 494 U.S. 1003 (1990). These cases are particularly persuasive authority because, as Jacobs recognizes, "Minnesota's Due Process Clause is identical in scope to the federal clause." (Jacobs Br. at 29).

In *Wesley*, the plaintiff's building was built with tiles containing asbestos that had been purchased from the defendant. 876 F.2d at 120. While the case was pending, a new law was enacted in the District of Columbia that removed the defendant from the scope of the District's statute of repose. *Id.* The D.C. Circuit applied the rational basis test to determine the constitutionality of the retroactive application of the new statute, and concluded that it was not irrational, "to decide that the losses due to defects in building materials discovered long after installation should fall on the supplier rather than the building's owner." *Id.* at 122. The defendant argued that the statute of repose was "substantive" (as it is under Minnesota law), and while the D.C. Circuit was not convinced that a statute of repose is substantive, it stated, "we need not tarry with these

theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim.” *Id.* at 123. Further, the D.C. Circuit noted the defendant had sold the tiles without relying on the statute of repose. *Id.* at 122.¹⁰

In *Shadburne-Vinton*, Fourth Circuit considered a retroactive change to Oregon’s statute of repose. 60 F.3d at 1072-1073. The defendant argued it would violate due process to give force to the retroactive amendment enacted by the Oregon legislature. *Id.* at 1074-1075. The Fourth Circuit, relying on the U.S. Supreme Court’s cases on retroactive lawmaking, applied the rational basis test. *Id.* at 1075-1077. The Oregon legislature had amended the statute to give women injured by IUDs a fair opportunity to litigate their claims, and the *Shadburne-Vinton* court held the statute was rationally related to that legitimate purpose. *Id.* at 1077.

Unable to find support in modern due process jurisprudence, Jacobs directs this Court to the *Lochner*-era case of *William Danzer & Co., Inc. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), claiming the case stands for the proposition that a statute of repose cannot be retroactively changed so as to revive claims that had been previously barred. (Jacobs Br. at 30). *Danzer*, however, held that if a law both creates a statutory liability

¹⁰ URS notes that any claim Jacobs makes regarding reliance will likely be a fact issue that cannot be resolved at this state of the litigation. Moreover, it appears from the pleadings there would not be a factual basis for such an argument. Minn. Stat. § 541.051 was originally enacted in May 1965. 1965 Minn. Laws, ch. 564. Jacobs certified its final design plans for the Bridge in March 1965. A57. When it initially agreed to design the Bridge, Jacobs was likely not relying on a statute of repose that was only enacted after Jacobs had finished its work.

and puts a limitation period on that liability, the limitation period cannot be changed. 268 U.S. at 636-637. The *Danzer* rule is inapplicable to this case because URS has common law claims for contribution and indemnity. Further, in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), the Supreme Court upheld the revival of a claim that had been barred under a prior limitation period in Title VII. The holding in *Robbins & Myers* indicates that *Danzer* is no longer good law. See *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 887-888 (Minn. Ct. App. 1987), overruled on other grounds, *Powell v. Anderson*, 660 N.W.2d 107, 114 (Minn. 2003) (concluding that *Danzer* has been tacitly overruled and holding a retroactive change to the statute of limitations for Minnesota's statutory cause of action for wrongful death was constitutional); see also *Shadburne-Vinton*, 60 F.3d at 1076 (finding that analysis used by the Supreme Court in the *Danzer* and *Chase* cases is no longer valid in light of more recent Supreme Court cases).

C. Jacobs Does Not Have a Vested Property Interest In the Prior Statute of Repose.

The due process clauses in the United States and Minnesota constitutions protect against deprivations of "life, liberty, or property" made without due process of law. U.S. Const. amend. XIV, § 1; Minnesota Const., Art. I, § 7. Jacobs assumes that because the Minnesota Supreme Court said in *Weston* that statutes of repose have a "substantive, rather than procedural, nature," 716 N.W.2d at 641, they must give their beneficiaries a property interest that is constitutionally protected from any change. (Jacobs Br. at 28-29). Jacobs is incorrect. "[A]lthough a civil defendant's repose is important, it does not

receive constitutional protection.” *Wschola v. Snyder*, 478 N.W.2d 225, 227 (Minn. Ct. App. 1992).

Defendants do not have a property interest in any affirmative defense. A statute of repose is an affirmative defense. See *Integrity Floorcovering, Inc., v. Broan-Nu Tone, LLC*, 503 F.Supp.2d 1136 (D. Minn. 2007) (citing *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 885 (Minn. 2006) for the proposition that a statute of repose is an affirmative defense under Minnesota law). Further, statutes of repose are considered to be substantial in nature because, unlike statutes of limitation that only limit the time period in which a party can pursue its remedy, a statute of repose limits the time in which a party can acquire a cause of action. *Weston*, 716 N.W.2d at 641. Significantly, the Minnesota legislature has the power to retroactively eliminate causes of action, including claims for contribution and indemnification. See *Reinsurance Ass’n of Minnesota v. Dunbar Kapple, Inc.*, 443 N.W.2d 242, 248 (Minn. Ct. App. 1989) (holding that a claim for contribution and indemnity is a contingent right that only vests after litigation and sufficient proof).

The existence or non-existence of a cause of action, the very thing that makes a statute of repose substantive, is not, therefore, a vested right. Like causes of action, defenses are not vested before litigation. See *Olsen v. Special School Dist. No. 1*, 427 N.W.2d 707, 712 (Minn. Ct. App. 1988) (holding that no person has a vested right in an exemption from a remedy);¹¹ see also *United Realty Trust v. Property Development &*

¹¹ Under Minnesota law, the causes of action for “[c]ontribution and indemnity are

Research Co., 269 N.W.2d 737 (Minn. 1978) (upholding the retroactive removal of the complete defense that had previously been afforded the defendant under Minnesota's usury laws).

Until Jacobs was actually sued, the protection afforded by the statute of repose was inchoate. Once the ten-year period ran, Jacobs had a defense to future litigation that it would be able to plead if (1) there was litigation arising out of its negligent work designing the Bridge and (2) the law was not changed in the interim. While some limitation or repose periods can vest a party with ownership of real or personal property, as is the case with the statutes of limitation applicable to adverse possession and the redemption period for foreclosures, Minn. Stat. § 541.051 merely gave Jacobs a defense that it might someday plead. Jacobs may have hoped, or even assumed, the law would not change. It is, however, well-established Minnesota law that no party has a vested interest in a mere expectation based on an anticipated continuation of existing laws. *E.g.* *U.S. Home*, 749 N.W.2d at 101.¹²

equitable remedies of restitution.” *Blomgren*, 483 N.W.2d at 506.

¹² Jacobs cites to *Yeager v. Delano Granite Works*, 84 N.W.2d 363 (Minn. 1957) for the proposition that substantive rights are vested rights. *Yeager*, however, dealt with changes to the workers' compensation laws and involved, therefore, an unconstitutional impairment of what is considered to be a contract under Minnesota law. “Since a workmen's compensation act is contractual in nature, any statute which purports to alter a substantive term of the contract which was in effect at the time the controlling event occurred (the death of the employee in these cases) impairs the obligation and is therefore unconstitutional.” *Id.* at 366.

D. The 2007 Amendments to Minn. Stat. § 541.051 Satisfy Due Process Because the Legislature Had a Rational Basis for Amending the Statute.

Even if Jacobs could be said to have a constitutionally-recognized property interest in the bar to liability created by the previous version of Minn. Stat. § 541.051, the 2007 amendments are constitutional because the legislature had rational reasons for changing the law. Unless a statute limits a fundamental right or uses a suspect classification, “minimal judicial scrutiny is appropriate.” *Doll*, 693 N.W.2d at 463. “Absent cause for special scrutiny, legislation is constitutional if it is not unreasonable, arbitrary, or capricious and bears a rational relation to the public purpose it seeks to promote.” *Id.* The 2007 amendment to Minn. Stat. § 541.051 does not use any suspect classifications and does not limit any fundamental rights.

The Fourth Circuit and D.C. Circuit have applied the rational basis test when considering retroactive changes in statutes of repose. *Shadburne-Vinton*, 60 F.3d at 1075-1077; *Wesley*, 876 F.2d at 122; *see also Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass’n*, 110 F.3d 547, 554-555 (8th Cir. 1997) (en banc) (applying the rational basis test to a retroactive change in the Minnesota law governing the scope of the coverage provided by the Minnesota Life and Health Insurance Guaranty Association). In the post-*Lochner* era, economic legislation, including retroactive legislation, is presumed to be constitutional and is subjected to only rational basis review. *See Honeywell*, 110 F3d at 554-555. The U.S. Supreme Court has allowed retroactive changes in the law, even changes which create new liabilities for past acts.

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 5 (1976), the United States Supreme Court considered the constitutionality of aspects of the Federal Coal Mine Health and Safety Act as amended by the Black Lung Benefits Act of 1972. The plaintiffs, who operated coal mines, complained that “to impose liability upon them for former employees’ disabilities is impermissibly to charge them with an unexpected liability for past, completed acts”. *Id.* at 15. The Supreme Court recognized the Act did have some retroactive effect, but stated that:

[O]ur cases are clear that the legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Id. at 16 (citations omitted). Applying the rational basis test, the Supreme Court upheld the Act, concluding that “the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor.” *Id.* at 19.

Then, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 17 (1984), the Supreme Court upheld a law creating liability for employers who withdrew from pension plans even though the law applied retroactively to employers who withdrew before the enactment of the law. Relying upon *Usery*, the Court held that legislation imposing retroactive liabilities need only be supported by a rational legislative purpose. *Id.* at 728-730. Finally, in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), the Court upheld a retroactive change in Michigan’s workers’ compensation law that required employers to refund monies that they had withheld under the prior law.

Jacobs claims it cannot be subjected to liability for contribution and indemnification by the retroactive change in the statute of repose. That argument fundamentally misunderstands the limited protection afforded by the due process clause. *Usery*, *General Motors*, and *Pension Benefit Guaranty Corp.*, which are instructive because Minnesota's due process clause is identical in scope to federal due process, (Jacobs Br. at 29), stand for the proposition that legislatures can create entirely new liabilities for past acts, so long as they have a rational basis for doing so. In this case, the Minnesota legislature did not go that far. It allowed claims that would have been barred under the previous law, but did not create wholly new liabilities.

After the *Weston* decision, the legislature decided that defendants in construction defect cases should be able to seek contribution and indemnity regardless of whether the ten-year repose period has run.¹³ In its brief, Jacobs describes the purpose of the construction statute of repose in glowing terms (Jacobs Br. at 23-24), but it is the legislature's role to weigh among competing policy interests and make appropriate judgments and compromises. *See Lent v. Doe*, 47 Cal.Rptr.2d 389, 394-395 (Cal. Ct. App. 1996) (holding in a retroactive revival case that it was for the California legislature to resolve the competing policy considerations of repose and redress). The legislature had legitimate and rational reasons for enacting Minn. Stat. § 541.051, *see Sartori v.*

¹³ Jacobs may argue the 2007 amendments were irrational because the specific problem in *Weston* could have been fixed with a less sweeping amendment. The legislature, however, may have anticipated cases, such as this one, where the direct claims arise after the running of the repose period. The rational basis test does not obligate the legislature to narrowly tailor the laws and fix only those problems which have already arisen.

Harnischfeger, 432 N.W.2d 448, 454 (Minn. 1988), but it also had legitimate reasons for amending the statute in 2007. The legislature decided that equity among defendants was more important than complete repose. Interestingly, the Minnesota Supreme Court made a similar judgment in the *City of Willmar* case when it concluded that the equitable interest in not allowing a defendant to evade liability at the expense of a codefendant was more important than the protection granted by the statute of limitations. 512 N.W.2d at 875. In 2007, the legislature had a rational basis for re-creating potential liability for contribution and indemnity.

E. Jacobs Relies on Cases From Other Jurisdictions That are Inapposite or No Longer Good Law.

Jacobs cites a number of cases from federal district courts and appellate courts in other states in support of its argument that the Minnesota legislature could not retroactively change the statute of repose. (Jacobs Br. at 34-35). Those cases, however, provide no insight into either the Minnesota or United States Constitutions.

The holdings in three of the cases Jacobs cites are based on state constitutions that have due process clauses that differ in scope from those in the Minnesota and United States Constitutions. See *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1245 (Ill. 1994) (holding, based on the Illinois constitution, that legislature may not revive cause of action barred by the statute of limitations, and recognizing that Illinois has rejected the Federal view of the matter); *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958, 967-968 (Kan. 1992) (recognizing that change in statute of repose did not conflict with the Fourteenth Amendment but holding that it did conflict with the Kansas Constitution); *Sch. Bd. of the*

City of Norfolk v. United States Gypsum Co., 360 S.E.2d 325, 329 (Va. 1987) (concluding, in response to a question certified by a federal court, that a retroactive change in a statute of repose violated the Virginia constitution).¹⁴ Three other cases cited by Jacobs are based on *Danzer*. See *In re Alodex Corp. Secs. Litig.*, 392 F.Supp. 672, 680-81 (S.D. Iowa 1975);¹⁵ *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276-277 (N.C. Ct. App., 1984); *Haase v. Sawicki*, 121 N.W.2d 876, 880-881 (Wis. 1963).¹⁶ *Danzer*, however, is no longer good law. See *Int'l Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (allowing for retroactive change in limitation period for purely statutory cause of action); *Nachtsheim*, 411 N.W.2d at 887-88 (recognizing that *Robbins* tacitly overruled *Danzer* and holding that a retroactive change to the statute of limitations for Minnesota's statutory cause of action for wrongful death was constitutional).¹⁷

¹⁴ Notably, the Virginia court indicated that its constitution protects substantive rights that may someday ripen into vested rights. *Sch. Bd. of the City of Norfolk*, 360 S.E.2d at 328. The formulation suggests, contrary to Jacobs' claims, that not all substantive rights are vested rights.

¹⁵ *Alodex* is not even a statute of repose case. The court was discussing a change to the "statute of limitations" for Iowa's blue sky law, not a statute of repose. 392 F. Supp at 680.

¹⁶ *Haase* is also not a statute of repose case. The Wisconsin Supreme Court held that a retroactive change to the statute of limitations for wrongful death actions was unconstitutional. 121 N.W.2d 876, 880-881. This Court reached the opposite conclusion in *Nachtsheim*, 411 N.W.2d at 887-888.

¹⁷ Even if *Danzer* were good law, it would not affect the outcome in this matter. The *Danzer* rule held that if a law both creates a *statutory* liability and puts a limitation period on that liability, the limitation period cannot be changed. 286 U.S. at 636-37. URS has *equitable* claims for contribution and indemnification.

The three remaining cases cited by Jacobs do not even provide insight into the relevant *state* law on point. *Gross v. Weber*, 112 F.Supp. 2d 923 (D.S.D. 2000) misinterpreted South Dakota law.¹⁸ See *DeLonga v. Diocese of Sioux Falls*, 329 F. Supp. 2d 1092, 1100-1101 (D.S.D. 2004). Indeed, South Dakota does allow for the revival of claims through a retroactive application of its revised sexual abuse statute of limitations. *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220 (S.D.1997); *Zephier v. Catholic Diocese of Sioux Falls*, 752 N.W.2d 658, 663 n.4 (S.D. 2008).

The Texas Supreme Court in *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009), actually found that “[s]tatutes of repose are created by the Legislature, and the Legislature may, of course, amend them or make exceptions to them,” but concluded the revival statute at issue was intended to apply only to statutes of limitation, not to statutes of repose. In contrast, the changes to Minn. Stat. § 541.051 clearly affected the statute of repose.

The final case cited by Jacobs suggests, contrary to Minnesota law, that a newly enacted statute of repose could not remove a cause of action that has already accrued, which is a completely different issue. *Allstate Ins. Co. v. Furgerson*, 766 P.2d 904, 907-908 (Nev. 1988). Significantly, unlike the cases Jacobs relies upon, which are inapposite or no longer good law, every Minnesota and Federal case to consider the matter has concluded that statutes of repose can be retroactively amended so as to allow claims that would have been otherwise barred. *Shadburne-Vinton*, 60 F.3d at 1075-1077; *Wesley*

¹⁸ Like *Haase* and *Allodex*, *Gross* is also a statute of limitations case, not a statute of repose case. 112 F. Supp. 2d at 925.

Theological Seminary, 876 F.2d at 122-123; *Independent Sch. Dist. No. 197*, 752 F Supp. at 298; *U.S. Home*, 749 N.W.2d at 101-103; *Larson*, 525 N.W.2d at 591; *see also Commonwealth v. Owens-Corning Fiberglass Corp.*, 650 N.E.2d 365 (Mass. Ct. App. 1995) (holding that asbestos revival statute applied to a statute of repose and citing to the earlier decision in *Boston v. Keene Corp.*, 547 N.E.2d 328 (Mass. 1989), for the constitutionality of the revival statute). Even the Kansas Supreme Court concluded in *Harding*, one of the cases cited by Jacobs, that the Fourteenth Amendment does not prohibit such a retroactive change in the law. 831 P.2d at 967. The 2007 amendments to Section 541.051 are constitutional and entitle URS to assert contribution and indemnity claims against Jacobs regardless of when those claims accrued.

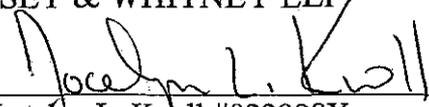
CONCLUSION

For all the above reasons, this Court should affirm the district court's decision denying Jacobs' motion to dismiss.

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