

Nos. A09-1776 & A09-1778

State of Minnesota
In Supreme Court

In re Individual 35W Bridge Litigation

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
JACOBS ENGINEERING GROUP INC.**

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Argument

I. Introduction

The court of appeals' decision should be affirmed on the grounds stated in the court's opinion, and for the reasons identified in Jacobs Engineering Group Inc.'s ("Jacobs") cross-appeal. This reply, pursuant to Minn. R. App. P. 131.01, subd. 5(d)(4), is limited to the arguments presented by the cross appeal, *viz* (1) that the 2007 amendments to section 541.051 did not revive potential liabilities of Jacobs for contribution to URS Corporation ("URS") extinguished prior to the June 30, 2006, effective date of the amendments; and (2) if the amendments are interpreted to retroactively revive such claims, they violate Jacobs' constitutional due process rights.

II. The 2007 Amendments to Minn. Stat. § 541.051 Do Not Allow URS to Recover Any Contribution from Jacobs

URS argues that because the 2007 amendments became effective prior to the accrual of any contribution claim arising from the collapse of the I-35W Bridge ("Bridge"), the application of the amendments to its claim is not retroactive and that it is wrong to characterize the amendments as having "revived" a contribution claim. URS Response Br. at 14-15, 16 n.6. The contention fails to take into account that a salient feature of a statute of repose is that it may validly extinguish a cause of action—and a party's potential liability—even before the cause of action accrues. *See Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006) ("statutes [of repose] may constitutionally eliminate causes of action even before they accrue"). That is what happened here. In fact, URS nowhere disputes that, at least prior to the enactment of the 2007 amendments, the earlier version of § 541.051 had extinguished any potential liability of Jacobs to URS long before the collapse of the Bridge

or the point in time when a contribution claim arising from the collapse could have accrued.¹ So, if URS now has a recoverable contribution claim against Jacobs, it can only be because the 2007 amendments are interpreted to have validly revived a potential liability that had been eliminated *before* the effective date of the amendments by the repose provision of the prior statute. It is quibbling for URS to deny that such an application amounts to a retroactive revival of claims.²

Of course, the legislature did intend for the 2007 amendments to have retroactive effect. URS, however, conflates that undisputed fact with the very different question of the scope of the retroactivity. It devotes nearly three pages to arguing that this Court's decision in *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002), is dispositive on the issues here. *See* URS Response Br. at 15-17. *Gomon* established that the legislature does not need to use the word "retroactive" to express a retroactive intent; it can do so with other language, which it did with respect to the statutory amendments at issue in that case (amendments "effective on August 1, 1999, for actions commenced on or after that date," *Gomon*, 645 N.W.2d at 415). *See also* *Lickteig v. Kolar*, 782 N.W.2d 810, 819 (Minn. 2010) (retroactive intent shown by providing that amendment applied to claims "pending on or

¹ The point is made succinctly in the heading for URS's argument on this issue: "The 2007 Amendments to Section 541.051 Allow URS to Bring Contribution Claims that Would Have Been Barred Under the Prior Version of the Statute." URS Response Br. at 14.

² It is not apparent why URS is evasive on this point. In its opinion regarding the State of Minnesota's claims against Jacobs (which also could have accrued, if at all, only after the passage of the 2007 amendments), the court of appeals forthrightly characterized its application of the amendments as a retroactive revival of the State's indemnity claims against Jacobs. *See In re Individual 35W Bridge Litig.*, 787 N.W.2d 643, 651 (Minn. Ct. App. 2010) ("[W]e hold that the retroactive application of the current version of section 541.051 revives the State's indemnity claims against Jacobs.") (footnote omitted), *rev. granted* (Nov. 16, 2010).

commenced on or after” effective date). But that is not the issue in this case. It is an exercise in question-begging to suggest that the scope of intended retroactivity is ascertainable solely from the fact that the legislature intended a retroactive effect.

URS mischaracterizes Jacobs’ position as being that only certain “magic words” are sufficient to divine that the legislature intended a retroactive revival of claims. URS Response Br. at 16. Instead, what Jacobs challenges is the notion that the language employed for the 2007 amendments (“retroactively from June 30, 2006” and “retroactive to June 30, 2006”³) is an “expression of clear legislative intent,” *Gomon*, 645 N.W.2d at 416, to make the amendments retroactive to revive claims extinguished *prior* to the retroactive effective date. It is neither plausible nor consistent with common usage to conclude that the use of two interchangeable prepositions (“from” and “to”) can *only* mean that the legislature really meant the far more expansive “before and after.”

URS’s interpretation of the scope of retroactivity of the 2007 amendments also ignores the history of earlier amendments to section 541.051, which lends further support to the conclusion that the legislature did not intend the 2007 amendments to effect an unlimited revival of claims—those extinguished *before* the June 30, 2006, effective date as well as those arising or extinguished after that date. For example, a 1988 amendment provided that actions governed by a prior version of the statute which had been based on construction “substantially completed between September 15, 1977 and January 1, 1978, may be brought

³ 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29. URS is wrong in stating that “Jacobs seems to imply there was a single law amending” section 541.051. URS Response Br. at 16-17 n. 8. What Jacobs disputes is that there is any substantive difference between these two laws or that they have a “complimentary [*sic*] effect,” *id.*, positions that URS did not contend for in the lower courts.

according to Minnesota Statutes 1986, section 541.051 until January 1, 1989, *notwithstanding that the action would otherwise be barred* by Minnesota Statutes 1986, section 541.051.” Laws 1988, ch. 547 § 1 (emphasis added).⁴ Similarly, when the legislature passed a law for the purpose of reviving certain asbestos property-damage claims, it used express language demonstrating an intent to revive claims. See Minn. Stat. § 541.22, subd. 2 (certain asbestos property damage claims “revived or extended”). See also Laws 1990, ch. 555, § 24 (amendments to Minn. Stat. § 541.051 made “effective the day following final enactment [May 4, 1990] and apply to all causes of action arising on or after that date”); Laws 1988, ch. 607, § 3 (amendments to Minn. Stat. § 541.051 made “effective the day following final enactment and apply to matters pending on or instituted on or after the effective date”). While here the legislature expressly made the 2007 amendments retroactive, it did not use any of these other formulations or any language expressing an intent to revive potential liability extinguished *before* the June 30, 2006, effective date.

Given that on two occasions, as identified above, the legislature expressly “revived or extended” claims “notwithstanding that the action was otherwise barred,” it is unreasonable to conclude that the legislature’s *failure* to use the same or similar language with respect to the 2007 amendments shows an intent to revive claims extinguished prior to the June 30, 2006, effective date. The retroactivity provision means no more than that the amendments are intended to be treated if they were in effect on June 30, 2006, and thereafter. Had they

⁴ The 1986 version of the statute contained a ten-year repose period (Laws 1986, ch. 455, § 92), so the intent of the 1988 amendment was to extend the repose period beyond ten years for the limited number of claims to which it applied, including those “otherwise . . . barred” by the 1986 statute.

been passed and made effective at that time, the result on the facts of this case would be the same: any contribution claims against Jacobs would have been eliminated long before that date by the repose statute, so Jacobs would be immune from suit or liability.⁵

URS also relies on the language in the 2007 amendments providing that a contribution claim “may” be brought “notwithstanding” the statute of repose for direct claims and “regardless” of the fact that the claim accrued after expiration of the repose period for direct claims. URS Response Br. at 17 (quoting Minn. Stat. § 541.051, subd. 1(b)). This is just another bootstrap argument whereby URS simply assumes that, because the amendments have some retroactive effect, they must be read to have unlimited retroactivity, applying even to revive claims and liabilities extinguished before the effective date of the amendments. For the same reasons as discussed above, this is neither a required nor plausible reading of the amendments.

⁵ The point is illustrated by the facts and outcome in *Larson v. Babcock & Wilcox*, 525 N.W.2d 589 (Minn. Ct. App. 1994). That case involved personal injuries arising from a boiler accident. Substantial completion of the boiler system had occurred in 1953. *Id.* at 591. In 1990, the legislature amended the statute of repose to exclude suppliers of equipment and machinery from the protection of the statute. The amendment was made effective the day following enactment (May 4, 1990). 1990 Laws, ch. 555, § 24. The plaintiffs’ injuries occurred after that date, on September 17, 1990. 525 N.W.2d at 591.

The court of appeals held that the amendment did not apply, so that the plaintiffs’ claims had been extinguished by the prior version of the statute of repose. *Id.* Specifically, the court noted that the legislature had not made the amendment retroactive, as it had done with respect to the statute that had “revived or extended” certain asbestos property damage claims. *Id.* at 591-92 (referring and citing to Minn. Stat. § 541.22). The court reached the correct result because (as in this case) while the accident giving rise to the claim occurred after the effective date of the amended statute, any claim against the boiler supplier had been extinguished long before the effective date of the amendment. Making the amendment effective for causes of action arising after the passage of the amendment did not indicate an intent to retroactively revive causes of action that had been extinguished before that date.

Finally, URS miscasts one of Jacobs' arguments to be a concern that a broad interpretation of the retroactive provision would "flood the courts with suits involving structures completed decades ago." URS Response Br. at 18 n.9. Instead, the consideration is that given the longstanding history of repose rights in Minnesota and the underlying public policy, including the promotion of stability and settled expectations, *see Weston*, 716 N.W.2d at 642; *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988), it should not be easily presumed that the legislature intended a revival of claims and liabilities in an open-ended fashion—for claims extinguished before as well as after the stated retroactive date. Because the language of the amendments does not require an interpretation that they apply retroactively to revive claims extinguished before the effective date, the sound reasons for not so broadly interpreting the scope of the retroactivity should prevail.

III. Interpreting the 2007 Amendments to Minn. Stat. § 541.051 to Allow URS's Contribution Claim Against Jacobs Would Violate Jacobs' Constitutional Due Process Rights

Because the decision of the court of appeals can be affirmed either on the ground on which it ruled (the absence of common liability) or the inapplicability of the 2007 amendments to URS's long ago extinguished contribution claim, it is unnecessary for this Court to reach the constitutional issue. If it does, however, then the 2007 amendments as applied to Jacobs in this case should be held to violate Jacobs' constitutional due process rights. *See State v. Traczyk*, 421 N.W.2d 299, 300 n.2 (Minn. 1988) (Court "will not determine the constitutionality of a statute unless the determination is absolutely necessary to determine the merits of the suit.").

A. Jacobs Acquired a Vested Right of Repose Prior to the Effective Date of the 2007 Amendments to § 541.051.

URS argues erroneously that there are only three categories of vested rights (those arising from final judgments; acquired interests in real property; and contract rights), and that a right to immunity from suit or liability acquired under a repose statute is not among them. *See* URS Response Br. at 23-27. If such were the case, then the three-factor analysis announced by this Court in *Peterson v. City of Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969), for determining whether vested rights were affected by retroactive legislation would be superfluous; it would only be necessary to ascertain whether one of the three identified categories was implicated. But instead, that case makes clear that the question of whether retroactive legislation impermissibly impairs vested rights requires an inquiry into (1) the nature and strength of the public interest served by the statute; (2) the extent to which the statute modifies or abrogates the pre-enactment right; and (3) the nature of the right the statute alters. *Id.*

URS acknowledges the three-factor analysis set out in *Peterson*, but treats it dismissively and undertakes no effort to evaluate the issue here in light of those factors. *See* URS Response Br. at 22. For the reasons discussed in Jacobs' opening brief, these factors all dictate a determination that Jacobs' right of repose acquired under section 541.051 is a vested right entitled to constitutional protection. *See* Jacobs Response Br. at 50-52. It is instructive to compare the interests at issue in *Peterson* and this case in light of the relevant factors. *Peterson* involved the legislature's retroactively effective replacement of contributory negligence as a complete bar to a plaintiff's recovery in tort with the rule of comparative fault. *See Peterson*, 285 Minn. at 285, 173 N.W.2d at 355. With respect to the equity of the

former contributory negligence rule, the Court observed that “[w]e have for a number of years pointed out that the comparative-negligence rule in personal injury cases would be more equitable than the contributory-negligence rule.” *Id.* at 288, 173 N.W.2d at 357. It was also important to the Court’s decision that the effect of the new law was limited, and a plaintiff’s recovery would be diminished to the extent of its comparative fault. *Id.* at 290, 173 N.W.2d at 358. Nothing like these mitigating circumstances is present if the 2007 amendments are interpreted to retroactively revive liabilities that had been extinguished under the prior version of the statute. The repose statute conferred immunity not just from liability, but from suit. The abrogation of the acquired right is therefore total. It thoroughly undermines the expectation acquired by a party, after expiration of the repose period, that it could “plan [its] affairs without the potential for unknown liability.” *Weston*, 716 N.W.2d at 642 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 978 (Ind. 2000)).⁶

For similar reasons, repose rights are more significant than the interest that was considered, for example, by the court of appeals in *Reinsurance Ass’n of Minnesota v. Dunbar Kapple, Inc.*, 443 N.W.2d 242 (Minn. Ct. App. 1989). In that case, the court applied the three-factor analysis of *Peterson* to determine the constitutionality of retroactive application of a statutory amendment depriving insurers of contribution or indemnity claims against the

⁶ URS argues that there could not have been any reliance on the right of repose at the time the 1962 contract was entered into because the first version of section 541.051 was adopted in 1965. *See* URS Response Br. at 21 n.11. This is a *non sequitur* because it ignores the fact that a party’s settled expectation of immunity from suit arises after the expiration of the repose period, not at the time the contract is signed or when the project is completed. A retroactive application of section 541.051 to the extent of reviving claims indefinitely into the past would completely upend the expectation of immunity from suit of every contractor, subcontractor, engineer, or materials supplier for every improvement in the state for which the prior repose period had expired before the enactment of the 2007 amendments.

policyholders of insolvent insurers. With respect to the extent of the abrogation, the court concluded it was confined to a narrow class of cases. *Id.* at 247-48. Moreover, as to the nature of the right impaired, the court noted that the right to contribution was only a contingent one, dependent on what the evidence at trial produced in the way of a verdict on negligence and proximate cause. *Id.* at 248. On that issue—the contingent nature of the right at issue—the right conferred by a repose statute after the expiration of the repose period is very different from the inchoate rights that a party acquires with a cause of action (either direct or for contribution or indemnity). The right of repose vests at the end of the repose period because there is no other event that needs to occur for the right to mature. Where, as here, the facts necessary to establish the right of repose are undisputed, the issue is not open to a contingency that needs to be decided after trial by a finder of fact.

URS is wrong, therefore, to equate the rights acquired under a repose statute after expiration of the repose period with those acquired through a cause of action or a contribution claim. *See* URS Response Br. at 27. In the context of this case, the difference between URS's purported contribution claim and Jacobs' right of repose is that URS never acquired any such claim because it was extinguished long before it could ever accrue, while Jacobs' right of repose became certain and final when the repose period ended many years before the Bridge collapse.

Ultimately, while URS concedes that “statutes of repose are matters of substantive (and not procedural) law,” *see* URS Response Br. at 21 (citing *Weston*, 716 N.W.2d at 641), it fails to give adequate consideration to that point in the constitutional analysis. Judicial decisions have consistently articulated the principle that “[i]t is generally held that legislation

dealing *only with remedies and procedures* are not beyond the reach of retrospective legislation.” *Peterson v. City of Minneapolis*, 285 Minn. at 288, 173 N.W.2d at 357 (emphasis added); *see also Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (“The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.”). Thus the cases withstanding a due process challenge based on the retroactive revival of claims barred by statutes of limitations—relating to remedies and procedures—do not furnish support for retroactive revival of liabilities extinguished by statutes of repose.

URS complains that some of the courts which have invalidated retroactive revival of claims extinguished by a repose statute have done so on the basis of due process protections contained in state constitutions. *See* URS Response Br. at 32-33. Significantly, however, the decisions decided on state constitutional grounds have generally based their analysis on the substance-procedure distinction between statutes of repose and statutes of limitations. *See, e.g., Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 966-69 (Kan. 1992); *Sch. Bd. of the City of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 327-29 (Va. 1987). The clear recognition of this distinction in *Weston*, together with this Court’ previously articulated vested rights analysis should lead to a determination that the legislature may not constitutionally deprived Jacobs of the vested right of repose it acquired long before the passage or effective date of the 2007 amendments to section 541.051.

B. The “Rational Basis” Test Does Not Apply to, or Permit Depriving Jacobs of, its Vested Right of Repose.

URS urges this Court to apply the “rational basis” test to the 2007 amendments, “[e]ven if Jacobs is deemed to have had a ‘vested’ right.” *See* URS Response Br. 29. It would be inappropriate to do so, however, for reasons that are apparent just from reading the cases that URS cites on vested rights. *See id.* at 23-27. In none of those cases did the courts hold that once a *vested* right was found to be implicated, the government could simply eliminate it on a showing that its reason for doing so was “rationally related to achievement of a legitimate governmental purpose.” *Id.* at 29 (quoting *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983)). “Retrospective or curative legislation is, of course, prohibited under [the Fourteenth Amendment], when it divests any private vested interest.” *Holen v. Minneapolis St. Paul Metro. Airports Comm’n*, 250 Minn. 130, 137, 84 N.W.2d 282, 287 (1957). That often-articulated principle has never been accompanied by the qualification that URS reads into it: “except when the government has a rational reason for taking a party’s vested right.”

The United States Supreme Court cases that URS relies upon involve general economic or social legislation. None of them involve the taking of a vested right in the sense that URS acknowledges the term (a right acquired in a final judgment; title to real property; or contract rights) or a right acquired by a party upon the expiration of a statutory period of repose. *See Usery v. Turner Elkborn Mining Co.*, 428 U.S. 1 (1976); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Gen. Motors Corp. v. Romein*, 503 U.S. 181 (1992). While two federal circuit courts have upheld retroactive legislation reviving claims

extinguished under a statute of repose, they should not be followed for reasons given in Jacobs' opening brief and this reply. See Jacobs Response Br. at 32-33 (discussing *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995); *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989)). The dismissive treatment in those two decisions of the importance of vested rights is neither justified by the United States Supreme Court decisions cited by them (*Uery, Pension Benefit Guar. Corp.* and *Gen. Motors Corp.*), nor consistent with this Court's framework for analyzing vested rights in light of retroactive legislation (*Peterson*). Moreover, the rejection by those two courts of the significance of any distinction between substantive statutes of repose and procedural statutes of limitation is not consistent with this Court's analysis in *Weston*.

Finally, even when considered in light of the rational basis test, retroactive application of the 2007 amendments to section 541.051 cannot survive constitutional scrutiny. This is because of the underlying policy reason for the statute of repose: allowing for an expectation of "certainty" and "finality" of immunity from suit after expiration of the repose period so that a party may "plan [its] affairs without the potential for unknown liability." *Weston*, 716 N.W.2d at 642 (quoting *McIntosh*, 729 N.E.2d at 980). While it is not beyond the power of the legislature to change this policy *prospectively*, it is inherently arbitrary and capricious for the legislature to, in the first instance, hold out to parties a policy specifically intended to create settled expectations, and then in the next instance, to suddenly reverse the policy and replace the certainty and finality acquired under the former policy for long past transactions with precisely the opposite. As applied retroactively to revive claims and liabilities that had been extinguished prior to the effective date, the 2007 amendments create the classic "Catch-22"

situation—the very certainty and finality that the original policy fostered is rendered senseless and impossible when the new and opposite policy is applied to old events. The due process clause forbids arbitrary and capricious legislation. *See Woodhall v. State*, 738 N.W.2d 357, 363 (Minn. 2007) (“A statute does not comport with due process when it is arbitrary or unreasonable.”). For that reason, if the constitutional issue is reached in this case, the 2007 amendments to section 541.05 should be invalidated on due process grounds as applied to Jacobs here.

Conclusion

For all the foregoing reasons and those expressed in its opening brief, Jacobs respectfully requests this Court to affirm the decision of the court of appeals.

Dated: March 7, 2011.

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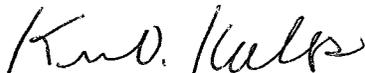
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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 4052 words. This brief was prepared using Microsoft Word 2003.

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