

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

STATE OF MINNESOTA

IN SUPREME COURT

In re: Individual 35W Bridge Litigation

Court of Appeals Opinion filed August 24, 2010

BRIEF OF RESPONDENT STATE OF MINNESOTA

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LEGAL ISSUES

1. Does the statute of repose in Minn. Stat. § 541.051 bar the State's claims against Jacobs for statutory reimbursement and contractual indemnity where the reimbursement statute unambiguously provides the State with a right to reimbursement "[n]otwithstanding any statutory or common law to the contrary," the indemnity contract pre-dates the statute of repose, and the 2007 amendments to the statute of repose revived contribution and indemnity claims?

The court of appeals held that the 2007 amendments to the statute of repose retroactively revived the State's claims.

Apposite Authority:

Minn. Stat. §§ 3.7394, subd. 5(a); 541.051, subd. 1(b); 645.21;
Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413 (Minn. 2002);
Baertsch v. Minnesota Dept. of Revenue, 518 N.W.2d 21 (Minn. 1994);
Richards v. Gold Circle Stores, 501 N.E.2d 670, 674 (Oh. Ct. App. 1986).

2. Does due process bar the State's statutory reimbursement and contractual indemnity claims against Jacobs where Jacobs had no vested property interest in freedom from liability for its malfeasance in causing the collapse of the I-35W Bridge, and the reimbursement statute and the 2007 amendments to the statute of repose are rationally related to legitimate governmental purposes?

The court of appeals held that Jacobs had no "vested right not to be sued" and therefore due process was not violated.

Apposite Authority:

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976);
Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984);
National R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985);
Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

3. Does Jacobs have a contractual right to "zero tort liability" arising out of its promise to indemnify the State for any claims or demands "of whatsoever nature or character," and if so, was that right unconstitutionally impaired by the State's reimbursement statute which seeks to hold Jacobs accountable for its malfeasance?

The court of appeals held that the reimbursement statute did not unconstitutionally impair any contractual rights of Jacobs arising out of the indemnity agreement.

Apposite Authority:

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983);
Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868 (Minn. 1986), *cert. denied*,
479 U.S. 1060 (1987);

United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977);

Spanel v. Mounds View School Dist. No. 621, 118 N.W.2d 795 (Minn. 1962).

4. Does the common law *Pierringer* doctrine preclude the State's claims where the reimbursement statute explicitly applies "[n]otwithstanding any statutory or common law to the contrary," where Jacobs was not a nonsettling tortfeasor which could benefit from a *Pierringer*-type release, where the releases were statutorily mandated by the compensation fund legislation, and where the State has a contractual right of indemnity?

The court of appeals held that Minn. Stat. § 3.7394, subd. 5(a) supersedes the common law *Pierringer* doctrine.

Apposite Authority:

Minn. Stat. § 3.7394, subd. 5(a);

Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993);

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Isles Wellness, Inc. v. Progressive Northern Ins. Co., 703 N.W.2d 513 (Minn. 2005);

Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978).

5. Does the common law voluntary payment doctrine preclude the State's claims where the reimbursement statute explicitly applies "[n]otwithstanding any statutory or common law to the contrary," where the payments were not voluntary within the meaning of the voluntary payment doctrine, where the compensation fund legislation is rationally based, and where the indemnity agreement provides coverage for all "claims" and "demands"?

The court of appeals held that Minn. Stat. § 3.7394, subd. 5(a) supersedes the common law voluntary payment doctrine.

Apposite Authority:

Minn. Stat. § 3.7394, subd. 5(a);

Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993);

Enright v. Lehmann, 735 N.W.2d 326 (Minn. 2007);

Isles Wellness, Inc. v. Progressive Northern Ins. Co., 703 N.W.2d 513 (Minn. 2005);

Minnesota State Bd. of Health v. City of Brainerd, 241 N.W.2d 624 (Minn. 1976).

STATEMENT OF THE CASE

This interlocutory appeal arises out of the tragic collapse of the I-35W Bridge (the “Bridge”) on August 1, 2007. The predecessor to Appellant Jacobs Engineering Group Inc. (collectively “Jacobs”) entered into a contract with the State in 1962 to design the Bridge. The design contract included a broad indemnification provision, requiring Jacobs to indemnify the State for “any and all claims . . . of whatsoever nature or character arising out of or by reason of the execution or performance of the work . . . provided for under this agreement.” (A. 235.)¹ The State alleges that Jacobs severely under-designed the Bridge, resulting in its collapse. (A. 140-141, 142, ¶¶ 15-18, 22.)

Subsequent to the collapse, the Legislature appropriated \$37 million to promptly compensate victims of the collapse and settle their claims against the State. Minn. Laws 2008, c. 288. Through this compensation fund legislation, the Legislature also provided for a right of reimbursement to the State against any third party, to the extent the third party caused or contributed to the collapse. Minn. Stat. § 3.7394, subd. 5(a). 179 survivors² filed claims for compensation and all of them were made and accepted offers of settlement with the State. (A. 143, ¶ 28.)

Subsequent to the enactment of the legislation, many of the survivors (the “Plaintiffs”) brought suit against URS Corporation and PCI Corporation, contractors

¹ “A.” refers to Jacobs’ Appendix, and “Add.” refers to the Addendum to Jacobs’ Brief.

² The legislation defines “survivors” as natural persons present on the Bridge at the time of the collapse, parents, legal guardians (for minors) and legally appointed representatives of survivors, and surviving spouse and next of kin. Minn. Stat. § 3.7392, subd. 8.

which had performed work on the Bridge pursuant to contracts with the State.³ (A. 5, 9-12.) PCI thereafter impleaded the State and Jacobs, and URS cross-claimed against Jacobs. (A. 55, 64.) The State also cross-claimed against Jacobs for reimbursement pursuant to Minn. Stat. § 3.7394, subd. 5(a) and contractual indemnity, with respect to the \$37 million paid by the State to the survivors.⁴ (A. 138, 148-149.)

Jacobs moved to dismiss the State's claims based upon the statute of repose and due process arguments. (A. 152-153.) Jacobs also argued that it had a contractual "right to zero tort liability" which was unconstitutionally impaired by the reimbursement statute. (A. 173.) Finally, Jacobs asserted that the State's claims should be dismissed because the payments to the victims were "voluntary" and settlement releases with the victims required by the legislation released Jacobs, despite language in the settlements and the legislation to the contrary. (A. 160, 167.) The district court denied Jacobs' motion to dismiss against the State on all grounds. (Add. 20-40, 43-44.)

Jacobs then brought an interlocutory appeal of the district court's ruling on its motion to dismiss to the court of appeals. (A. 264.) By Order dated August 24, 2010, the court of appeals affirmed the district court's decision to deny Jacobs' motion to dismiss the State's claims. (Add. 19.) The court of appeals held that the State's claims were not barred by the statute of repose because 2007 amendments to that statute revived the claims. (Add. 13, 19.) The court found that Jacobs' due process rights were not violated

³ The Plaintiffs did not bring suit against Jacobs because a claim by the Plaintiffs against Jacobs is barred by the 10-year period set forth in Minn. Stat. § 541.051, subd. 1(a).

⁴ The State also brought claims against PCI and URS, which were subsequently settled.

because it had no vested right to repose. (Add. 14, 19.) The court determined that the reimbursement statute did not impair the 1962 design contract because Jacobs' contractual agreement to indemnify the State included tort claims. (Add. 17-19.) The court rejected Jacobs' voluntary payment and settlement release arguments based on the plain language of the reimbursement statute manifesting the Legislature's intent to supersede any conflicting statutes and common law. (Add. 18-19.)

Jacobs brought a timely petition for review to this Court on September 23, 2010. On November 16, 2010, the Court granted review.

STATEMENT OF FACTS

In 1962, the State of Minnesota entered into a contract with Sverdrup & Parcel and Associates, Inc. ("Sverdrup"), Jacobs' predecessor, for the design of the I-35W Bridge to span the Mississippi River. (A. 138, 140, ¶¶ 3, 11, 13.) The contract contained Sverdrup's agreement to indemnify the State from all liability associated with Sverdrup's work. The contract states, in pertinent part:

The Consultant indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of the Consultant provided for under this agreement.

(A. 148, ¶ 59; A. 235.)

Sverdrup certified the final design plans in March 1965. (A. 57, ¶ 101.) Although the Bridge's design was to conform to the applicable American Association of State Highway Officials' Standard Specifications for Highway Bridges, Sverdrup designed gusset plates of insufficient strength and half the thickness required by the Specifications.

(A. 140, ¶¶ 12, 15, 16.) The gusset plates are critical components of the Bridge which connect the main members in the Bridge's superstructure. Unaware of Sverdrup's improper design, the State constructed the Bridge as Sverdrup designed it. (A. 140-141, ¶¶ 17, 18.)

On September 28, 1999, Jacobs acquired Sverdrup, assuming all of Sverdrup's liabilities. (A. 138-139, ¶¶ 3, 9-10.) Jacobs is a large publicly-traded company that performs engineering services throughout the world.

On August 1, 2007, as a result of Sverdrup's improper design, the Bridge collapsed, killing 13 people, injuring more than 145 others, and resulting in significant damages to the State. (A. 142, ¶¶ 22, 24.)

In response to this catastrophe, the Minnesota Legislature enacted the Bridge compensation fund legislation, Minn. Stat. § 3.7391, *et seq*, appropriating approximately \$37 million to settle the claims of the Bridge collapse victims against the State. Minn. Laws 2008, c. 288. The stated purpose of the legislation was to "further the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors." Minn. Stat. § 3.7391, subd. 2. The compensation fund legislation also provides that the "state is entitled to recover from any third party, including an agent, contractor or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe." Minn. Stat. § 3.7394, subd. 5(a).

Pursuant to the legislation, the Chief Justice of this Court established a special master panel to consider the survivors' claims and make offers of settlement. Minn. Stat. § 3.7393, subd. 1. (A. 142, ¶ 27.) 179 survivors made claims for compensation, and all were made and accepted offers of settlement. (A. 143, ¶ 28.) In total, the State paid to survivors over \$37 million, \$36,640,000 through the compensation fund legislation, and \$398,984.36 from an emergency relief fund which was created by the State on November 30, 2007. (A. 143, ¶ 32; Minn. Stat. § 3.7392, subd. 4.) All survivors executed settlement agreements required by the compensation fund legislation (A. 143, ¶ 33; A. 182-183), which released the State, its municipalities and their respective employees from liability. *See* Minn. Stat. §§ 3.7393, subd. 13; 3.732, subd. 1(1); 3.7392, subd. 7. The compensation fund legislation and the settlement agreements with the survivors also preserve all rights of the State against third parties. Minn. Stat. §§ 3.7393, subd. 13; 3.7394, subd. 5. (A. 143-144, ¶ 33; A. 186-187.)

SUMMARY OF THE ARGUMENT

This appeal involves Jacobs' attempt to avoid responsibility for perhaps the most tragic and horrific catastrophe ever seen in the State of Minnesota, the collapse of the I-35W Bridge. The collapse caused 13 deaths and injured more than 145 people. (A. 142, ¶ 24.) Jacobs severely under-designed the Bridge, creating a ticking time bomb that ultimately caused the Bridge to collapse. (A. 140-142, ¶¶ 15-17, 22.) That Jacobs was negligent and breached its contract with the State in designing the Bridge, and that Jacobs' negligence and breach of contract caused the Bridge to collapse (A. 140-142, ¶¶ 17, 22), are deemed to be true facts for purposes of this appeal.

Due to the historic nature of the collapse and the “devastating physical and psychological” effect on the victims and the entire State, Minn. Stat. § 3.7391, subd. 1, the Legislature appropriated approximately \$37 million to promptly compensate victims in return for a release of liability. Minn. Stat. § 3.7393, subd. 13; Minn. Laws 2008, c. 288, § 6. (A. 143-144, ¶¶ 28, 32, 33.) An important aspect of the legislation was that the State was given the right to seek reimbursement of some or all of the \$37 million of public money paid to victims of the collapse from any third party, including “an agent, contractor or vendor retained by the state . . . to the extent they caused or contributed to the catastrophe.” Minn. Stat. § 3.7394, subd. 5(a). Recognizing potential statute of repose arguments and other statutory and common law defenses, the Legislature specifically provided that the State’s right of reimbursement existed “[n]otwithstanding any statutory or common law to the contrary.” *Id.*

Jacobs summarily dismisses the Legislature’s authority to hold it accountable for the public monies paid to the victims to the extent of Jacobs’ culpability. It simply ignores the clear language and purpose of the legislation, as well as the presumption that the law is constitutional and Jacobs’ burden to prove beyond a reasonable doubt that the legislation violates the constitution. The Legislature has the authority to hold entities accountable for the consequences of their malfeasance, without regard to a statute of repose, just as it has properly held asbestos manufacturers accountable for their wrongful past conduct. *See Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 297-298 (D. Minn. 1990) (upholding constitutionality of Minnesota law which revived claims against asbestos manufacturers that would otherwise be precluded by

statute of repose and stating “[a]n interest in freedom from civil liability is not a constitutionally protected property right.”).

The statute of repose does not bar the State’s claims for several alternative reasons. First, the State’s statutory reimbursement right applies “[n]otwithstanding any statutory or common law to the contrary.” Minn. Stat. § 3.7394, subd. 5(a); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (stating “notwithstanding” language supersedes all conflicting laws). *See also* Add. 18-19 (“[T]he legislature has clearly stated its intent to supersede all statutes and the common law in allowing the state to pursue reimbursement of payments made under the compensation statutes.”). Indeed, the legislation separately revived the State’s claim against Jacobs. *See, e.g., Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417-18 (Minn. 2002).

Second, as the district court determined (Add. 43), the State’s contractual right of indemnity is not subject to repose because the State’s 1962 contract with Jacobs predates the 1965 enactment of the statute of repose and that law was not made retroactive. *See* Minn. Stat. § 645.21. *See also Richards v. Gold Circle Stores*, 501 N.E.2d 670, 674 (Oh. Ct. App. 1986) (rejecting applicability of statute of repose in part because “[t]o hold otherwise would enable [the defendant] to avoid the contractual obligation of indemnity, which it undertook when it executed the contract in question, by virtue of a statute [of repose] enacted subsequent to the execution of the contract.”).

Finally, as the court of appeals and the district court determined, the 2007 amendments to the statute of repose were made retroactive and revived the State’s claims. (Add. 11-13, 19; 48-50.)

The court of appeals (as well as the district court) also properly rejected Jacobs' due process challenge to the State's claims because Jacobs had no "vested right not to be sued." (Add. 14; 49-50.) The court's conclusion is supported by the long-standing U.S. Supreme Court precedent that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (quoting *Dodge v. Board of Educ. of City of Chicago*, 302 U.S. 74, 79 (1937)). Moreover, as the district court concluded, both the compensation fund legislation and the statute of repose amendments are rationally based and therefore constitutional for that reason as well. (Add. 31-33, 50.) *See also Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (stating that "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.").

Jacobs' concocted impairment of contract claim turns the State's contractual right of indemnity on its head. Jacobs contends that the 1962 contract granted it a "right of zero tort liability," but the indemnity obligation runs in favor of the State, not Jacobs. (A. 235.) Jacobs promised to indemnify the State for "all claims, demands, actions or causes of action of whatsoever nature or character." *Id.* Jacobs was given no rights under this contractual provision, let alone a "right of zero tort liability." As the court of appeals (and the district court) recognized, the 1962 contract is not impaired by the compensation fund legislation. (Add. 17-18; 31.) Instead, "the statutes enforce the

bridge designer's open-ended obligation to indemnify the state," and Jacobs could reasonably expect a change in the State's immunity law. (Add. 17-18.) See *Energy Resources Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983) (stating that in heavily legislated area, parties can reasonably expect that contracts may be affected by future legislation). As the district court determined, the compensation fund legislation is not an unconstitutional impairment of contract for the additional reasons that it furthers legitimate State interests and is properly tailored to serve those public interests. (Add. 31-33.)

The court of appeals also correctly applied the "notwithstanding" language of section 3.7394, subd. 5(a), and the Legislature's clear authority to abrogate common law principles, to Jacobs' *Pierringer* release and voluntary payment arguments. (Add. 18-19.) Jacobs fails to acknowledge the Legislature's well-established authority to abrogate the common law in circumstances it deems appropriate. See, e.g., *Enright v. Lehmann*, 735 N.W.2d 326, 334 (Minn. 2007); *Isles Wellness, Inc. v. Progressive Northern Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005).

In addition, the Legislature authorized an appropriate release of liability from the victims of the collapse to address this extraordinary situation, by allowing for immediate payments to the victims, a release of the State's liability and the State's right to seek reimbursement of the public funds from culpable parties. Minn. Stat. §§ 3.7393, subds. 9, 11, 13; 3.7394, subd. 5(a). Moreover, a *Pierringer* release has no application to Jacobs, which cannot be sued by the victims of the collapse due to the statute of repose, and which has contractual indemnity obligations to the State. See *Frey v. Snelgrove*,

269 N.W.2d 918 (Minn. 1978) (stating *Pierringer* release allows plaintiffs to maintain a legal action against non-settling tortfeasors who are subject to suit); Knapp, Peter B., *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 Wm. Mitchell L. Rev. 1, 40 n.132 (1994) (stating a claim for contractual indemnity “survive[s] a *Pierringer* settlement.”).

There is also no doubt that the \$1 million aggregate cap would have been challenged in this extraordinary case and its validity placed in jeopardy. Jacobs’ voluntary payment argument is really nothing more than a second-guessing of the Legislature’s judgment without acknowledgment of the deference due the Legislature and Jacobs’ heavy burden to prove that the law has no rational basis.

The Legislature acted well within its constitutional authority in enacting legislation to deal with the catastrophe of the Bridge collapse. Jacobs is properly accountable for its culpability in causing the collapse, and its arguments to the contrary should be rejected by this Court, as they were by the court of appeals and the district court.

ARGUMENT

I. THE LEGAL STANDARD FOR GRANTING A MOTION TO DISMISS IS DIFFICULT TO SATISFY AND DISMISSAL IS RARELY GRANTED.

The legal standard for deciding a motion to dismiss is a difficult one to satisfy, and Jacobs fails to do so. A motion for dismissal is rarely granted. The only question before this Court is whether the State’s complaint sets forth a legally sufficient claim for relief, and it is immaterial to that consideration whether the State can establish the facts alleged

or other facts consistent with the legal theory. *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

If *any* theory of recovery is available to the State, the motion must be denied. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 14 (Minn. 2001). The complaint should be construed liberally, and all assumptions and inferences must be made in favor of the State opposing the motion to dismiss. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). Therefore, all of the alleged facts in the complaint are taken as true for purposes of deciding the motion, and dismissal of the complaint is inappropriate “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005).

II. THE STATUTE OF REPOSE DOES NOT BAR THE STATE’S CLAIMS FOR STATUTORY REIMBURSEMENT OR CONTRACTUAL INDEMNITY.

For multiple reasons, the statute of repose does not bar the State’s claims for statutory reimbursement or contractual indemnity. First, the statute of repose does not apply because the Legislature created a right of reimbursement “[n]otwithstanding any statutory or common law to the contrary,” Minn. Stat. § 3.7394, subd. 5(a), and specifically revived a claim against Jacobs that might have otherwise been subject to repose. Second, the statute of repose, enacted in 1965, and not made retroactive by the Legislature, is inapplicable to the State’s indemnity right derived from Jacobs’ contractual obligations entered in 1962. Third, even if the statutory right of reimbursement is analyzed as a contribution or indemnity claim subject to the statute of

repose, and the statute of repose applies to the State's pre-existing contractual right to indemnity, retroactive amendments to the statute of repose in 2007 made the statute inapplicable to contribution and indemnity claims.

A. The Statute Of Repose Does Not Apply To The State's Statutory Right Of Reimbursement.

The compensation fund legislation provides the State with a right of reimbursement, “[n]otwithstanding any statutory or common law to the contrary.” Minn. Stat. § 3.7394, subd. 5(a). As the court of appeals determined, “the legislature has clearly stated its intent to supersede all statutes and the common law in allowing the state to pursue reimbursement of payments made under the compensation statutes.” (Add. 18-19.) *See, e.g., Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (stating that the use of a “notwithstanding” clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override the conflicting provisions of any other section” and finding it “difficult to imagine” a clearer statement of intent to supersede conflicting laws); *Campbell v. Minneapolis Public Housing Authority ex rel. City of Minneapolis*, 168 F.3d 1069, 1075 (8th Cir. 1999) (citing *Cisneros* and stating that “[t]he phrase notwithstanding any other provision of law signals that the Extension Act supersedes other statutes that might interfere with or hinder the attainment of this objective”); *Rukavina v. Pawlenty*, 684 N.W.2d 525, 534 (Minn. Ct. App. 2004) (giving plain language of “notwithstanding” phrase of statute superseding effect); *Baughman v. Mellon Mortg. Corp.*, 621 N.W.2d 776, 780 (Minn. Ct. App. 2001) (referring to

“notwithstanding” language in statute as having a “superseding effect”). Accordingly, the statute of repose does not apply to the State’s right of statutory reimbursement.

Jacobs argues that the State’s reimbursement statute does not revive a claim against it despite the use of the phrase “notwithstanding any statutory law to the contrary,” because the statute does not use the words “retroactive” or “revive.” (Jacobs Br. 23.) Jacobs, however, ignores the plain language of the statute and its obvious purpose.⁵ See *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002) (holding that plain language of statute controls and that statute is unambiguously retroactive where not subject to a contrary interpretation).

The reimbursement statute manifestly refers to past events which led up to and “caused or contributed” to the Bridge collapse, itself a past event at the time the statute was enacted. Minn. Stat. § 3.7394, subd. 5(a) (State entitled to recover from any third party, including an “agent, contractor or vendor” of the State, to extent the third party caused or contributed to the Bridge collapse). The statute cannot be read any other way, and in such a situation, the use of the words “retroactive” or “revive” would be superfluous. See *Gomon*, 645 N.W.2d at 417, 419 (citing Minn. Stat. § 645.21, and finding no express language of revival is necessary where intent to revive is clearly and

⁵ Jacobs completely misreads the statute by arguing that the “notwithstanding” provision should be interpreted to refer to the fact that the statute provided compensation to tort claimants beyond the usual tort cap. (Jacobs Br. 23-24.) The compensation fund legislation has two essential parts: compensation for victims as part of the settlement of claims against the State (Minn. Stat. § 3.7393); and reimbursement of the State from parties which were culpable in causing the Bridge collapse. (Minn. Stat. § 3.7394, subd. 5). The “notwithstanding” language undeniably is found in the reimbursement provision. See Minn. Stat. § 3.7394, subd. 5(a).

manifestly expressed in plain language of statute). The intent of the Legislature is clear: the State's right to recoup public monies from parties who caused the Bridge collapse applies notwithstanding an alleged statute of repose defense.⁶

B. The Statute Of Repose Does Not Apply To The State's Contractual Indemnity Claim Because The Contract Predated The 1965 Enactment Of The Statute Of Repose, Which Was Not Made Retroactive.

The contract between the State and Jacobs' predecessor expressly provides for indemnity to the State. The 1962 contract has no specific time limit or restriction for asserting an indemnity claim. In fact, Article VI, Section 8 of the contract provides that "termination shall not affect any legal right of the State against the Consultant for any breach of this Agreement." (A. 233.)

Three years after the contract was executed, and two months after Jacobs completed its work on the contract (A. 57, ¶ 101), the Minnesota Legislature enacted a statute of repose with respect to improvements to real property, codified as Minn. Stat. § 541.051. Minn. Laws 1965, c. 564, § 1. In enacting this law in 1965, the Legislature did not provide for its retroactivity. *Id.* See also Minn. Stat. § 645.21 ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature).

⁶ The court of appeals upheld Jacobs' motion to dismiss URS Corp.'s common law contribution claim because of the lack of common liability between Jacobs and URS. *In re Individual 35W Bridge Litigation*, 786 N.W.2d 890, 901 (Minn. Ct. App. 2010), *rev. granted* (Minn. Nov. 16, 2010). Jacobs does not and cannot make this argument against the State. The law is clear in Minnesota that common liability is not required for the State's contractual indemnity claim. See *Blomgren v. Marshall Mgmt. Servs., Inc.*, 483 N.W.2d 504, 506 (Minn. Ct. App. 1992) (indemnity does not require common liability). Moreover, the statutory right of reimbursement, section 3.7394, subd. 5(a), applies "notwithstanding any statutory or common law to the contrary," which includes the common law principle of common liability.

Therefore, the statute of repose applied only prospectively from May 22, 1965, the day following final enactment. *See* Minn. Stat. § 645.02 (1961). The 1965 statute of repose was subsequently declared unconstitutional in *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 555 (Minn. 1977). In 1980, the Legislature amended the statute of repose to address the constitutional infirmity. Minn. Laws 1980, c. 518, §§ 2-4. Like the initial 1965 statute of repose, the 1980 version of the statute was not made retroactive. *Id.*

The statute of repose is inapplicable to Jacobs' indemnity obligations under the 1962 contract because the statute was not made retroactive. *See Cooper v. Watson*, 187 N.W.2d 689, 693 (Minn. 1971) (indicating that presumption against retroactivity ensures that newly enacted legislation does not create “a new disability, *in respect of transactions or considerations already past*” unless legislation clearly expresses such an intent) (emphasis in original; citation omitted); *see also Richards v. Gold Circle Stores*, 501 N.E.2d 670, 674 (Oh. Ct. App. 1986) (rejecting applicability of statute of repose in part because “[t]o hold otherwise would enable [the defendant] to avoid the contractual obligation of indemnity, which it undertook when it executed the contract in question, by virtue of a statute [of repose] enacted subsequent to the execution of the contract.”).

The court of appeals did not reach this issue. However, the district court agreed that “[t]he statute of repose in Minn. Stat. § 541.051 is inapplicable to the parties' pre-existing contractual indemnity provision.” (Add. 43.)⁷

⁷ Jacobs cites to *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982) for the proposition that the 1980 version of the statute of repose was applied to construction

C. The Plain Language Of The 2007 Amendments To The Statute Of Repose Allows The State's Claims Against Jacobs.

Even if the State's statutory right of reimbursement is analyzed as a contribution or indemnity claim to which Minn. Stat. § 541.051 applies, and even if the subsequently enacted statute of repose applies to the State's contractual right of indemnity, the court of appeals correctly held that "retroactive application of the current version of section 541.051 revives" the State's claims against Jacobs. (Add. 13.)

Prior to 2007, Minn. Stat. § 541.051, subd. 1(a) provided both a statute of limitations (two years after discovery) and a statute of repose (ten years after substantial completion of construction) for contribution and indemnity actions arising out of the defective and unsafe condition of improvements to real property. *See Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006) (construing the statute of repose to bar contribution and indemnity claims which had not accrued within the 10-year repose period).

In response to the *Weston* decision, in 2007 the Legislature created a separate subd. 1(b) to section 541.051, which provides only a statute of limitations for contribution and indemnity claims:

work performed prior to the enactment of the statute. (Jacobs Br. 13 n.2.) However, *Calder* did not involve a claim for contractual indemnity or the issue of retroactivity with respect to any such contract rights. *Id.* at 844 (addressing common law right of action). Jacobs' reliance on *Calder* is therefore misplaced. Jacobs also cited below to *Satori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988) and *Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443 (8th Cir. 1989) for this proposition. These cases are inapposite for the same reason, since they do not involve contractual indemnity claims.

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

Minn. Stat. § 541.051, subd. 1(b). By way of two session laws, this provision was explicitly made effective retroactive “to” and “from” June 30, 2006, the day following the decision in the *Weston* case. Minn. Laws 2007, c. 105, § 4; Minn. Laws 2007, c. 140, art. 8, § 29 (the “2007 amendments”).⁸

Under the plain language of the current statute of repose, which was in effect at the time of the August 1, 2007 Bridge collapse, there is no repose for contribution and indemnity claims. The 2007 amendments retained the statute of limitations for contribution and indemnity claims, but removed entirely the repose aspects of the former statute. The amendments therefore provided for a contribution or indemnity claim to be brought, “regardless of whether it accrued before or after the ten-year period referenced in paragraph (a),” so long as it satisfies the two-year statute of limitations.⁹

⁸ Contrary to Jacobs’ argument (Jacobs Br. 15-17), the court of appeals’ decision did not depend upon its footnote commentary regarding the “to” and “from” language in the two session laws relating to the 2007 amendments. Rather, citing to its decision in *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008), and this Court’s decision in *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002), the court properly found the Legislature’s intent to revive prior claims was clear from its use of the word “retroactive” in the effective date provisions. (Add. 11-13.)

⁹ Jacobs mistakenly argues that the Legislature intended the 2007 amendments to address only the precise type of fact situation involved in *Weston*. (Jacobs Br. 20.) Such a purported limitation is not reflected in the unambiguous statutory language. See Minn. Stat. § 645.16 (“When the words of a law in their application to an existing situation are

The explicit “retroactive” language of the 2007 amendments also confirms that the State’s claims against Jacobs were revived, even if they had previously been barred by repose. *See U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 101-103 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008) (citing *Gomon* and finding that the 2007 amendments applied retroactively to revive claims for contribution and indemnity that previously had expired). The court of appeals in this case similarly relied on *Gomon* and stated that “[t]he legislature’s power to enact retroactive legislation extends to the revival of claims that have already been barred by the passage of time.” (Add. 12-13.)

In *Gomon*, the plaintiffs’ medical malpractice cause of action accrued in 1996. At that time, a two-year statute of limitations was in force. In March 1999, the legislature amended the statute of limitations to provide a four-year limitations period. The legislature made the amendment effective “on August 1, 1999, for actions commenced on or after that date.” 645 N.W.2d at 415. The plaintiffs filed suit in December 1999. The defendant argued that since the claim already would have been barred under the prior limitations period, the amendment did not apply retroactively to revive the plaintiffs’ claims. *Id.*

This Court disagreed, recognizing the legislature’s power to revive claims that otherwise would have been barred by the passage of time. *Id.* at 417. The Court found that the plaintiffs had complied with the new statute of limitations, and that “[n]othing in

clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”).

Minn. Stat. § 541.076 or its effective date provision suggests any limitations or exceptions from the four-year limitations period.” *Id.* at 417. As a result, the Court determined that the plain language of the statute manifested the legislature’s intent to revive claims, and that the legislature was not required to “*specifically* express its intent to revive time-barred claims over and above a clear and manifest expression of its intent that a statute apply retroactively.” *Id.* at 418 (emphasis in original).

The Court’s decision in *Baertsch v. Minnesota Dept. of Revenue*, 518 N.W.2d 21 (Minn. 1994), further establishes that the 2007 amendments, which had an effective date of June 30, 2006, apply to the State’s claims. In *Baertsch*, the Legislature made the amendment at issue effective before the date of its enactment but without stating that the amendment was “retroactive.” *Id.* at 24. The Court concluded that the fact that the Legislature had provided a specific effective date for the statute was “a clear manifestation [that] the legislature intended the statute to apply from that date forward . . . to all cases filed on or after” the effective date. *Id.*

Based on *Gomon* and *Baertsch*, the 2007 amendments permit all claims filed after June 30, 2006, so long as they are filed within the two-year statute of limitations, as were the State’s claims.¹⁰ (*See* A. 130, 150.) Since, just as in *Gomon*, nothing in the current

¹⁰ As noted above, the June 30, 2006 effective date selected by the Legislature was the day after the decision in *Weston*. In so doing, the Legislature provided that the 2007 amendments did not affect the rights of the particular parties adjudicated in the *Weston* decision. *See also* U.S. Home, 749 N.W.2d at 101 (applying the 2007 amendments to contribution and indemnity claims that were not subject to final judgment dismissing claims based on statute of repose grounds prior to June 30, 2006). Whether the June 30, 2006 date applies to claims that had not been previously subject to such a final judgment, or to the date the claim is filed, or even the date accrued, the State’s claims comport with

Minn. Stat. § 541.051 “suggests any limitations or exceptions” from the two-year limitations period, this Court should similarly “decline [Appellants’] request to graft a limitation-- exclusion of expired claims” onto the plain language of section 541.051. 645 N.W.2d at 417, 420.

III. THE REIMBURSEMENT STATUTE AND THE 2007 AMENDMENTS DO NOT VIOLATE DUE PROCESS.

Jacobs’ due process challenges to the reimbursement statute and the 2007 amendments to the statute of repose are without merit for two alternative reasons.¹¹ First, Jacobs has no vested right not to be sued and, as a result, due process is not implicated. Second, even if a vested right to repose existed, the statutes satisfy due process because they are rationally based.

“[E]very legislative enactment comes to the court with a presumption in favor of its constitutionality.” *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986), *cert. denied*, 479 U.S. 1060 (1987). The burden to prove a statute unconstitutional is substantial; the challenger must prove beyond a reasonable doubt that the statute

the 2007 amendments. There obviously is no final judgment yet as to the State’s claims against Jacobs, and the State’s claims against Jacobs were timely brought. (See A. 130, 150.)

¹¹ Jacobs asserts a violation of due process under the Minnesota constitution as well as under the United States constitution. (Jacobs Br. 24.) As Jacobs conceded in its memorandum of law to the district court, the due process protections provided under the Minnesota constitution are “identical” to those under the United States constitution. (A. 169.) See *McCollum v. State*, 640 N.W.2d 610, 618 (Minn. 2002), *quoting Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988); *AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 574 n. 21 (Minn. 1983) (noting that state due process clause is not more restrictive than federal due process clause and therefore the Court applies a common standard to challenges brought under both clauses).

violates a constitutional provision. *Id.* Jacobs has not, and cannot, overcome the statutory presumption of constitutionality.

A. Jacobs Has No Vested Right Immunizing It From Liability.

Although a statute of repose did not exist at the time of Jacobs' contract with the State, and the 2007 amendments in effect at the time of the collapse allow the State to make its claims, Jacobs asserts that a statute of repose in effect before the 2007 amendments protects it from all liability to the State. Jacobs erroneously contends that because it would have had a statute of repose defense to claims brought after 1980 (the year the Legislature enacted a statute of repose that was found to be constitutional, *see* p. 17, *supra*), it necessarily has that defense now. (Jacobs Br. 12-13.)

As the court of appeals properly held, Jacobs does not possess a vested right to freedom from civil liability. (Add. 14.) Since Jacobs has no vested right not to be sued, the State's reimbursement statute and the 2007 amendments to the repose statute do not contravene due process.

Jacobs attempts to equate "substantive right" with "vested property right." (Jacobs Br. 28.) The Minnesota courts which have addressed the issue of the constitutionality of retroactive revision of a statute of repose have properly rejected this argument. *See, e.g., U.S. Home*, 749 N.W.2d at 103 (acknowledging the substantive nature of the statute of repose, but expressly holding that the right to repose is not "vested" for Fourteenth Amendment purposes until final judgment is entered). In this case, the court of appeals also concluded that "[t]he legislature's power to enact retroactive legislation extends to the revival of claims that have already been barred by the passage of time." (Add. 12,

citing *Gomon*, 645 N.W.2d at 417.) Thus, the court correctly determined that Jacobs “has no vested right”:

What Jacobs characterizes as a vested right not to be sued is merely Jacobs’s expectation that a repose provision-- enacted in 1965, declared unconstitutional in 1977, reenacted in 1980, and altered several times since-- would protect it indefinitely.

(Add. 14.) The federal district court in Minnesota likewise decided that “[a]n interest in freedom from civil liability is not a constitutionally protected property right.” *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 297-298 (D. Minn. 1990) (citation omitted) (holding that Minnesota’s asbestos revival statute revived claims otherwise barred by Minn. Stat. § 541.051 without depriving defendant of a property right).

The analysis of these cases is consistent with longstanding principles. Any party claiming a vested right “must overcome the well-established presumption that ‘a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.’” *Nat’l R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 456 (1985) (quoting *Dodge v. Board of Educ. of City of Chicago*, 302 U.S. 74, 79 (1937)); *Peterson v. Humphrey*, 381 N.W.2d 472, 475 (Minn. Ct. App. 1986), *rev. denied* (Minn. Apr. 11, 1986) (same). Applying these principles, the court in *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), upheld the retroactive repeal of a statute of repose in circumstances similar to this case.

In *Wesley*, the defendant sold asbestos-laced ceiling tiles which were used in the construction of the plaintiff's buildings up to 1960. *Id.* at 120. In 1972, a statute of repose for defective improvements to real property was passed, barring actions for injury occurring more than ten years after the improvement's completion. In 1984, the plaintiff learned that the tiles were releasing asbestos, and sued in 1985. *Id.* The defendant argued that the statute of repose barred the plaintiff's claim, given that the injury occurred more than ten years after the buildings' completion. *Id.* However, in 1987, the legislature amended the statute so it no longer protected manufacturers of a component to an improvement, making the amendment applicable to actions pending in court as of July 1, 1986. *Id.* at 120-121.

Although the defendant asserted that its right not to be sued had previously vested, the court disagreed and found no vested right. The court rejected any due process distinction between statutes of limitations and repose, or between "substantive" and "procedural" laws with respect to any rights of the defendant. 876 F.2d at 123 (noting that determining whether a statute of repose is "substantive" or "procedural" "would not advance our resolution of the constitutional claim"). The court then relied on United States Supreme Court authority upholding legislation creating new liability for past acts. *Id.* at 121-122 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) and *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984)). The court also held that the equities did not favor the defendant since the statute of repose became law after the buildings at issue were completed, and the defendant therefore could not have sold the defective tiles in reliance on the statute. 876 F.2d at 122.

Similarly, Jacobs can make no claim that it contracted with the State or designed the Bridge in reliance upon a statute of repose that did not yet exist. As previously discussed, Jacobs' predecessor entered into a pre-statute of repose contract with the State in 1962. It completed the Bridge design, including the faulty design of the gusset plates which caused the Bridge to collapse, in March 1965, also prior to the enactment of the statute of repose. (A. 57, ¶ 101.)

Jacobs' reliance on *Weston and Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49 (Minn. 2005), is misplaced. *Weston* characterized the repose statute as "substantive" rather than "procedural," but it never held that "substantive" meant a "vested property interest." 716 N.W.2d at 634. Rather, the issue involved in *Weston* was the constitutionality of the pre-2007 statute of repose with respect to eliminating remedies of a third party plaintiff before a cause of action accrued. *Id.* In that context, *Weston* distinguished statutes of repose, which constitutionally may eliminate common law rights before they accrue, and statutes of limitation, which must allow for a reasonable time after accrual of the cause of action for the cases to be brought. *Id.* at 641-642.

Likewise, in *Camacho*, this Court did not conclude that a statute of repose created a vested right. Instead, the case, like *Weston*, involved the elimination of plaintiffs' remedies. Contrary to Jacobs' reliance on the *Camacho* reference to *Corpus Juris Secundum* (Jacobs Br. 21, 28), the Court did not find the statute of repose at issue to create a "substantive right." Rather, it stated that the repose statute was "simply another governing procedural statute limiting the remedy available to homeowners with a substantive warranty claim against a voluntarily dissolved corporation." 706 N.W.2d at

55. The Court also acknowledged that “[i]t is the province of the legislature . . . to provide a remedy to those homeowners who may be foreclosed from bringing an action.” *Id.* See also *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1074 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996) (recognizing substance/procedure analysis for choice of law purposes is irrelevant to question of constitutionality of revival statute); *Wesley*, 876 F.3d at 122-123 (stating that distinctions between statutes of limitations and repose are “somewhat metaphysical,” and finding that substance/procedure dichotomy does not “advance our resolution of the constitutional claim”).

Based on the foregoing, Jacobs has no vested right to repose. Jacobs’ due process claim must therefore be rejected.

B. The Reimbursement Statute And The 2007 Amendments Satisfy Due Process Because They Are Rationally Related To Legitimate Governmental Purposes.

Even if a vested right exists, the reimbursement statute and the 2007 amendments do not violate due process. The United States Supreme Court has held that “our cases are clear that 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.” *Usery*, 428 U.S. at 15-16. Where retroactive legislation “adjust[s] the burdens and benefits of economic life . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” *Pension Benefit Guar. Corp.*, 467 U.S. at 729-30.

In other words, “[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.” *Id.* at 729.¹² See also *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979) (recognizing that where economic regulation is at issue, due process requires only that legislation is a reasonable means to a permissive objective); *Sisson v. Triplett*, 428 N.W.2d 565, 571 (Minn. 1988) (same); *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass’n*, 110 F.3d 547, 554 (8th Cir. 1997) (upholding retroactive legislation and stating that “the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose.”) The Legislature certainly had a rational basis in enacting both the reimbursement statute and the 2007 amendments to the statute of repose.

1. The Legislature acted rationally in enacting the reimbursement statute and the 2007 amendments to the statute of repose.

Through the compensation fund legislation, the Minnesota Legislature responded to a “catastrophe of historic proportions” which resulted in “devastating physical and psychological impact” to the victims of the Bridge collapse. Minn. Stat. § 3.7391,

¹² Jacobs erroneously relied below on *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925), which involved a unique set of facts. *Danzer* is no longer good law, even under its own facts. See *Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976); *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 887-888 (Minn. Ct. App. 1987), *overruled on other grounds*. See also *Shadburne-Vinton*, 60 F.3d at 1076 (recognizing *Danzer* is no longer valid for purposes of analyzing constitutionality of retroactive legislation).

subd. 1. The compensation fund legislation enabled the victims of this extraordinary and horrific event to settle with the State and receive payment promptly without protracted litigation against the State. Indeed, the Legislature specifically found that the compensation fund process “furthers the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors.” Minn. Stat. § 3.7391, subd. 2.

As a necessary corollary to the compensation process, the Legislature created a mechanism through the reimbursement statute for the public money paid to the victims to be recouped from those who are ultimately shown to have caused or contributed to the collapse. Any potential liability of Jacobs is based upon its fault, since the State will recover “to the extent” Jacobs caused or contributed to the collapse. Minn. Stat. § 3.7394, subd. 5(a). The reimbursement statute is clearly supported by a rational legislative purpose.

The 2007 amendments are similarly rationally based. They allow for a contribution or indemnity claim “regardless of whether it accrued before or after the ten-year [repose period],” Minn. Stat. § 541.051, subd. 1(b), thus providing for fair apportionment of damages amongst responsible parties. *See* A. 50 (district court concluded that “[t]he 2007 amendment is rationally related to the purpose of allocating liability among all tortfeasors”).

While the Legislature had legitimate policy reasons for creating a statute of repose, the Legislature also acted rationally to limit that repose to prevent parties from

bearing responsibility for the negligence of others and to prevent those at fault from avoiding their contractual obligations. *See City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 875 (Minn. 1994) (finding cross claim for contribution and indemnity not barred by UCC limitations period because “equity deems it more important that a defendant not evade its liability at the literal expense of a codefendant”); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 358 (Minn. 1969) (upholding retroactive application of comparative fault statute).

Various other courts have upheld the retroactive application of liability laws. For example, *Pension Benefit Guar. Corp.*, using rational basis review, upheld retroactive application of provisions of the Multiemployer Pension Plan Amendments Act which penalized employers who withdrew from pension plans prior to the statute’s enactment. 467 U.S. 717. *See also Usery*, 428 U.S. at 15-16 (applying rational basis review and upholding against due process challenge legislation imposing new liability on mine operators for miners’ illnesses caused by work done long before legislation); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (applying rational basis review to uphold statute requiring retroactive repayment of workers’ compensation benefits withheld in reliance on earlier statute).

In *Lundeen v. Canadian Pacific Ry. Co.*, 532 F.3d 682 (8th Cir. 2008), the Eighth Circuit upheld against due process challenge a retroactive statute imposing liability on railroads. The law allowed railroads to be sued for negligence arising out of a particular previous train derailment, even though under the prior version of the statute the railroad was immune at the time of the derailment based on federal preemption. The amendment

was effective retroactive to the date of the derailment. *Id.* at 688. The railroad argued that due process was violated because Congress specifically had targeted it and “upset its settled expectations about the state of the law governing its business activities.” *Id.* at 689. The Eighth Circuit, reviewing “legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review,” concluded that Congress had acted rationally in providing injured parties the chance to seek recovery in state courts against the railroads, and that due process was not offended by legislation addressing one particular event. *Id.*

Likewise, using this same rational basis standard, the Fourth Circuit upheld the retroactive application to IUD manufacturers of a statute removing claims from a statute of repose. *Shadburne-Vinton*, 60 F.3d 1071. *Accord Wesley*, 876 F.2d 119 (upholding amendment to statute of repose reviving claims against asbestos manufacturers).

Based on the foregoing, even assuming Jacobs had a vested right to repose, both the reimbursement statute and the 2007 amendments are rationally related to legitimate legislative purposes. Accordingly, the statutes satisfy due process.

2. The cases relied on by Jacobs do not show that either the reimbursement statute or the 2007 amendments violate due process.

Jacobs’ reliance on *Peterson v. City of Minneapolis* is misplaced, which actually supports the State’s position. Indeed, *Peterson* found the retroactive application of the statute in question (the use of comparative fault instead of contributory fault) to be constitutional. 173 N.W.2d at 358. In so doing, the Court rejected the type of categorical approach advanced by Jacobs in this case. *Id.* at 357. Instead, this Court looked to the

goals of the Legislature in enacting the legislation at issue and the equity of applying such legislation retroactively to a defendant. The Court considered three factors:

- (1) the nature and strength of the public interest served by the statute;
- (2) the extent to which the statute modifies or abrogates the preenactment rights; and
- (3) the nature of the right the statute alters.

Id. at 357.

Based upon the *Peterson* analysis, the statutes at issue here are likewise constitutional. Both statutes are supported by policies that further the public interest. As discussed *supra* pp. 28-29, the reimbursement statute was passed by the Legislature to resolve the victims' claims with the State and, like the comparative fault law in *Peterson*, to ensure that State monies are recouped to the extent it is shown that others caused the collapse. The 2007 amendments to Minn. Stat. § 541.051 similarly represent a legislative policy determination that there be a fair apportionment of damages among culpable parties. *See supra* pp. 29-30.

In addition, the statutes in question abrogate Jacobs' repose in a limited way. Under the reimbursement statute, Jacobs is liable only for a singular event, and only to the extent that a fact-finder determines Jacobs to have caused or contributed to the Bridge collapse. With respect to the 2007 amendments, repose was repealed in favor of a statute of limitations solely for contribution and indemnity cases; repose with respect to direct claims was untouched by the amendments.

Finally, the nature of the right at issue is not such that "justice and equity require that the interest be preserved." 173 N.W.2d at 357. As discussed above, the abrogation

of repose only returns Jacobs to the position it occupied when it contracted with the State in 1962. No statute of repose existed at that time or when it performed its work under the contract. It therefore was liable to the State for claims arising during the natural lifetime of the bridge, a lifetime well in excess of 10 years. *See, e.g., Chase Securities Corp. v. Donaldson*, 65 S. Ct. 1137 (1945) (upholding constitutionality of retroactive statute in part because defendant “could show no reliance on the previous law.”); *Wesley*, 876 F.2d at 122 (upholding constitutionality of asbestos revival statute and noting that defendant could not show reliance since statute of repose became law only after defendant’s work was complete).

Contrary to Jacobs’ contention, the impact of the change in the statute of repose is no different than that of a retroactive change in a statute of limitations. In both situations, a cause of action which was previously time-barred is revived. Courts have repeatedly upheld the constitutionality of such legislative action. *See Gomon*, 645 N.W.2d at 419 (upholding revival of time-barred claims); *Shadburne-Vinton*, 60 F.3d at 1074 (upholding revival statute and recognizing that distinctions between statutes of limitations and statutes of repose are constitutionally irrelevant); *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. at 297-298 (upholding retroactive modification of statute of repose); *Wesley*, 876 F.2d at 122-123 (upholding revival of claim despite statute of repose and holding distinction between statutes of limitations and repose are immaterial to constitutionality of retroactive change). Indeed, *Peterson* itself upheld retroactive application of the comparative fault statute even though the Court recognized that the

legislation would result in liability for some defendants who would have had no liability under the former statute. 173 N.W.2d at 358.

Jacobs also cites to cases from other jurisdictions for the proposition that the fact that a statute of repose is “substantive” results in a prohibition against retroactive legislation, but these cases are readily distinguishable. (Jacobs Br. 32.) *School Bd. of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 329 (Va. 1987), *Ripley v. Tolbert*, 921 P.2d 1210, 1220 (Kan. 1996) and *Farber v. Lok-N-Logs, Inc.*, 701 N.W.2d 368, 376 (Neb. 2005) were decided under particular state constitutions. *See, e.g., Shadburne-Vinton*, 60 F.3d at 1077 (recognizing that *Norfolk* was decided under the Virginia constitution, a stricter standard than under the federal constitution); *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967-968 (Kan. 1992) (cited in *Ripley*, 921 P.2d at 1220) (finding retroactive change in statute of repose violated Kansas constitution but not the federal constitution, and recognizing that U.S. Supreme Court “makes no distinctions between statutes of limitations and statutes of repose”). In *Galbraith v. Engineering Consultants, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009), the court simply determined that the legislature did not intend its particular revival statute to apply to a repose provision, but it recognized that the legislature had the power to do so if its intent was clear. *Id.* at 867 (“Statutes of repose are created by the Legislature, and the Legislature may, of course, amend them or make exceptions to them.”)

The Legislature, through the reimbursement statute and the 2007 amendments, constitutionally modified the statute of repose. Since Jacobs has failed to sustain its burden to prove the legislation unconstitutional beyond a reasonable doubt, Jacobs’

motion to dismiss should be rejected and the State should be allowed its day in court to show that Jacobs' negligence caused the I-35W Bridge to collapse.

IV. THE REIMBURSEMENT STATUTE DOES NOT UNCONSTITUTIONALLY IMPAIR JACOBS' PURPORTED "RIGHT TO ZERO TORT LIABILITY."

Jacobs contends that its contractual obligation to indemnify the State somehow conferred upon *Jacobs* a contractual right to be free from liability to the State for all tort claims made against the State, which was unconstitutionally impaired by the enactment of the reimbursement statute. (Jacobs Br. 35.) Before the court of appeals and the district court, Jacobs characterized this purported right as a "right to zero tort liability." (See Add. 16-17; A. 173.) Jacobs has no such contractual right and, in any event, it cannot meet its heavy burden to show that the statute unconstitutionally impaired its purported contract right.

The United States and Minnesota constitutions contain impairment of contract provisions, neither of which are absolute. Rather, "the economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934).

The U.S. Supreme Court has adopted a three-part test for determining whether a party's contract has been unconstitutionally impaired. This test has also been adopted in Minnesota. Jacobs must show all of the following: (1) the legislation has substantially impaired a contractual obligation; (2) if a substantial impairment exists, the legislation lacks a significant and legitimate public purpose; and (3) the legislation is not reasonably

and appropriately tailored to accomplish the asserted public purpose. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *Christensen v. Minneapolis Mun. Emp. Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983). Jacobs cannot satisfy any of these factors.

A. Since Jacobs Has No Contract “Right To Zero Tort Liability,” There Is No Substantial Impairment.

As the court of appeals and district court determined, Jacobs’ contractual obligation to indemnify the State did not confer on Jacobs a “right to zero tort liability.” (Add. 17-18; 31.) Jacobs has failed to identify any contractual language in support of this contention and no such right exists in the clear contractual provision which gives rights only to the State and requires indemnity by Jacobs in the broadest terms. Since Jacobs cannot show any impairment, let alone a substantial impairment, the court of appeals’ decision should be affirmed.

“Zero tort liability” simply was not a term of the contract. To the contrary, the indemnity provision unambiguously reads:

The Consultant indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action *of whatsoever nature or character* arising out of or by reason of the execution or performance of the work of the Consultant provided for under this agreement.

(A. 235.) (Emphasis added.) This provision establishes that Jacobs must indemnify the State regardless of the type of claim asserted. As the court of appeals reasoned, it provides for Jacobs’ “open-ended obligation to indemnify the state,” Add. 18, and

conferred no rights whatsoever on Jacobs. *See also* Add. 31 (“Jacobs has no vested interest in or contractual right to Minnesota’s sovereign immunity . . . remaining static.”).

Indeed, the plain language of the contract controls. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979) (stating court must give the language in the contract its plain and ordinary meaning); *Metropolitan Sports Facilities Comm’n v. General Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991) (“Where a written contract is unambiguous, the court must deduce the parties’ intent from the language used.”). On its face, the indemnity provision provides broad protection for the State, and simply cannot be read as Jacobs suggests.

Jacobs’ reading renders an essential term of the contract-- indemnity for claims or demands of *whatsoever nature or character*-- meaningless and the contract illusory. *See, e.g., Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990) (holding that the law presumes that parties intended all language in the contract to have effect and avoids interpretation of contract that would render a provision meaningless). While Jacobs argues that the contract would not be illusory since, by its reading, non-tort claims would still be covered, nowhere does the indemnity provision contain such a limitation.

Jacobs’ purported contract right to “zero tort liability” also ignores the fact that the State’s liability to others was not fixed by the terms of the contract. Rather, the State’s tort liability, and Jacobs’ corresponding indemnity obligation, is determined by the law applicable to the third party’s claim and that law can, and did, change. The impairment of contract jurisprudence does not preclude states from repealing, amending or enacting legislation. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17

(1977) (“[T]he contract clause does not prohibit the states from repealing or amending statutes generally or from enacting legislation with retroactive effects.”); *see also General Motors*, 503 U.S. at 190 (stating contract clause does not “protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements.”).

Judicial decisions and legislative activity related to changes in standards and principles of civil liability are commonplace. As the court of appeals pointed out, even before the formation of the 1962 contract, the legislature had repeatedly “waived the state’s tort immunity for claims related to the trunk highway system.” (Add. 17-18 & n. 8.) As a result, “[Jacobs’ predecessor] reasonably should have expected that the legislature might authorize tort claims against the state related to the design of the bridge.” (Add. 18.) In fact, the continuing viability of sovereign immunity was at issue in 1962, the very year the contract was executed. *See Spanel v. Mounds View School Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962) (abolishing sovereign immunity for local governmental units subject to action by legislature). *See also Energy Reserves*, 459 U.S. at 411, 413 (finding that when an area is heavily legislated, parties can reasonably expect their contracts may be affected by future legislation). Recognizing the controversial history of sovereign immunity, this Court stated in *Spanel*:

[T]he handwriting has long been on the courtroom wall Since we have repeatedly proclaimed that this defense [of sovereign immunity] is based on neither justice nor reason, the time is now at hand when corrective measures should be taken by either legislative or judicial fiat.

118 N.W.2d at 799.

Under applicable law, as well as historical experience, at the time of the contract it was clear that the State's tort liability could subsequently be modified by judicial or legislative action and apply to the Bridge. Thus, the parties to the contract, in plain language, provided for indemnity of the State without qualification.

Since Jacobs had no contractual "right to zero tort liability," there is *no* impairment, let alone a substantial impairment, of a contract right. As the court of appeals concluded, Jacobs' impairment of contract claim is therefore without merit.

B. The Legislation Serves A Significant And Legitimate Public Purpose.

Even assuming, *arguendo*, that the State's reimbursement statute somehow substantially impairs Jacobs' contractual rights, it is nevertheless constitutional because it is supported by a significant and legitimate public purpose. The compensation fund legislation resolving the survivors' claims against the State addresses a catastrophic event—the collapse of the I-35W Bridge. It serves, in part, the significant and legitimate public purpose of providing expedited financial recovery to the survivors of the catastrophe, without requiring them to endure protracted litigation with the State. A vital corollary to this aspect of the statute is the recoupment of taxpayer money from the party or parties who were actually responsible for the Bridge collapse. This recoupment effort redounds to the benefit of all taxpayers and, therefore, serves a significant and legitimate public purpose. As the district court concluded, "Jacobs' argument, however, does not account for the catastrophic and unique impact of the collapse. Responding to an emergency situation caused by the failure of a major bridge was clearly an extraordinary burden on the State." (Add. 32.)

C. The Act Is Reasonably And Appropriately Tailored.

When evaluating the third factor of the *Energy Reserves* test, *i.e.*, whether legislation is reasonably and appropriately tailored, courts have been reluctant to second-guess any state's manner of dealing with a public issue. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987); *see also Energy Reserves*, 459 U.S. at 418; *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 440 (Minn. Ct. App. 1992). When the purpose of the legislation is furthered by the means chosen, the legislation will be upheld. *See Energy Reserves*, 459 U.S. at 418.

The statutory reimbursement provision is narrowly tailored to apply only to those who can be shown at trial to have caused or contributed to the Bridge collapse, and to recoup taxpayer funds to that extent. Jacobs' argument that the statute seeks to avoid the State's voluntarily-assumed financial obligations to the victims is unavailing. (Jacobs Br. 38-40.) As discussed *infra* p. 46, the State's payments were not voluntary in light of the likelihood that the tort cap would be challenged in this unique case. In addition, while Jacobs complains that the statute subjects it to potentially large financial exposure (Jacobs Br. 37-38, 40), such exposure is commensurate with its culpability. It is eminently reasonable that culpable entities be financially responsible to the State for expenditures of public money caused by their culpability. Therefore, the third factor in the impairment of contract analysis also supports the reimbursement statute's constitutionality.

Jacobs erroneously argues that heightened scrutiny should apply. (Jacobs Br. 38.) As the cases relied on by Jacobs indicate, such a proposition applies to contracts where a

state statutorily voids its own financial obligations to others. *See, e.g., Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 727 (Minn. Ct. App. 1995). Here, as discussed above, the State had no financial obligations to *Jacobs* arising out of the indemnity provision at issue.

V. THE COMMON LAW *PIERRINGER* DOCTRINE DOES NOT BAR THE STATE'S CLAIMS.

Jacobs argues that the terms of the settlement agreements between the State and the survivors preclude the State's claims, based on common law principles derived from *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963). (*Jacobs* Br. 41-46.) This argument fails for a number of reasons.

A. The Common Law *Pierringer* Principles Are Superseded By The Terms Of The Reimbursement Statute.

Jacobs' *Pierringer* defense is inapplicable to the State's statutory reimbursement claim according to the express language and purpose of the compensation fund legislation. As discussed *supra* p. 14, the Legislature stated its clear intent to supersede such common law defenses by providing the State a right to reimbursement "[n]otwithstanding any statutory or common law to the contrary." Minn. Stat. § 3.7394, subd. 5(a). *See, e.g., Cisneros*, 508 U.S. at 18; *Campbell*, 168 F.3d at 1075; *Rukavina*, 684 N.W.2d at 534; *Baughman*, 621 N.W.2d at 780.

Unquestionably, the legislature has the power to abrogate such common law principles. *See Enright v. Lehmann*, 735 N.W.2d 326, 334 (Minn. 2007); *Isle Wellness, Inc. v. Progressive Northern Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005) (quoting *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377-78 (Minn. 1990)). As a result, the court of

appeals properly rejected Jacobs' *Pierringer* argument, concluding that "the legislature has already stated its intent to supercede all statutes and the common law in allowing the State to pursue reimbursement of payments under the compensation statutes." (Add. 18.)

B. *Pierringer* Principles Do Not Apply To Jacobs, Which Was Never Subject To Suit By The Victims Of The Collapse, Or To The State's Contractual Indemnity Claim.

In any event, *Pierringer* principles do not bar the State's claims. A *Pierringer* release enables a plaintiff to continue an action against a nonsettling tortfeasor. See *Frey v. Snelgrove*, 269 N.W.2d, 918, 921 n. 1, 922 (stating *Pierringer* release reserves plaintiff's causes of action against nonsettling defendants and recognizing that *Pierringer* release is designed to allow contribution between joint tortfeasors); *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 856, 858 (Minn. Ct. App. 2005) (stating *Pierringer* release "protects the nonsettling defendants who choose to go to trial with the plaintiff from ever having to pay more than their fair share of the verdict"). Here, however, Jacobs was never subject to suit by the victims of the collapse because of the 10-year statute of repose limiting direct claims, Minn. Stat. § 541.051, subd. 1(a). Therefore, the *Pierringer* aspect of the State's releases with the victims has no application to Jacobs.¹³

¹³ Jacobs incorrectly asserts that because the State pled a *Pierringer* defense to PCI Corporation's third-party contribution action against the State, *Pierringer* somehow is a bar to the State's claims against Jacobs. (Jacobs Br. 43-44). PCI was a nonsettling tortfeasor to the Plaintiffs' claims. As a result, the State had a valid defense against PCI's contribution claim based on the *Pierringer* aspects of the State's settlements with the Plaintiffs. In contrast, as discussed above, Jacobs was never subject to suit by the Plaintiffs, so *Pierringer* law has no application to Jacobs.

In addition, the releases¹⁴ with the survivors expressly preserve the State's right to statutory reimbursement. (See A. 186.) This non-*Pierringer* aspect of the releases was mandated by state law, Minn. Stat. § 3.7393, subd. 13, to effectuate the very purposes of the compensation fund legislation. Jacobs' contention entirely ignores the plain language of the release and the law, and the clear legislative intent to create a right of reimbursement to recoup taxpayer monies from others who were responsible for the Bridge collapse. See, e.g., *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004) (stating court is to give effect to plain meaning of clear and unambiguous statutory language); Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions."); § 645.17 (in construing statute, courts presume legislature intends entire statute to be effective and certain and to favor the public interest against any private interest).

Finally, a *Pierringer* release does not defeat the State's contractual indemnity rights. See Knapp, Peter B., *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 Wm. Mitchell L. Rev. 1, 40 n.132 (1994) ("Nor should a *Pierringer* release extinguish a settling defendant's independent contractual right to indemnity, should one exist. . . . [A claim for contractual indemnity] survive[s] a *Pierringer* settlement.").

¹⁴ The releases provide that the survivors' claims are satisfied with respect to the percentage of causal fault ultimately determined at trial to be attributable to the State. (A. 184.) This simply means that as a function of the settlement agreement entered into between the survivors and the State, survivors can recover no more than the settlement payment from the State, even if the State is ultimately adjudged to be at greater fault. This does not, however, amount to an admission by the State that it is in fact at fault for the amount of the settlement payment.

Minnesota and Wisconsin courts (which initially upheld the *Pierringer* release) have considered several cases involving indemnity contracts and *Pierringer* releases. In none of the cases did the courts find that the *Pierringer* release nullified the contractual indemnity agreement. *See Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364, 365-368 (Minn. 1998) (court presumed that had indemnity been appropriate, indemnity contract applied notwithstanding *Pierringer* release); *Osgood v. Medical, Inc.*, 415 N.W.2d 896, 899 (Minn. Ct. App. 1987), *rev. denied* (Minn. Feb. 12, 1988) (holding purchaser required to indemnify manufacturer under indemnification clause despite *Pierringer* agreement between manufacturer and plaintiff); *Foskett v. Great Wolf Resorts, Inc.*, 2008 WL 4756643, *8 (W.D. Wis. Oct. 29, 2008) (concluding buyer must reimburse seller for settlement costs under indemnity contract despite existence of *Pierringer* agreement between seller and plaintiff) (A. 239); *Moravian v. Michels Pipe*, 1982 WL 171750 (Wis. Ct. App. Oct. 4, 1982) (allowing Wisconsin Gas to obtain contractual indemnity against its contractor after Wisconsin Gas entered into a *Pierringer* release with plaintiff) (A. 247).

Bargained-for rights of contractual indemnity are fundamentally different from a common law equitable right of contribution or indemnity. *See, e.g.*, Knapp, Peter B., *supra*. Jacobs has pointed to no authority that holds that a *Pierringer*-type agreement with a plaintiff nullifies a settling defendant's contractual indemnity rights.

Jacobs erroneously relies on *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852 (Minn. Ct. App. 2005) to contend that the State's claims must be dismissed. (Jacobs Br. 44.) Unlike this case, *Bunce* deals solely with the effect of a *Pierringer* release on a settling

defendant's common law claims for contribution and indemnity, and does not apply to a claim for statutory reimbursement or contractual indemnity. 696 N.W.2d at 854. In addition, the non-settling defendant in *Bunce* had liability exposure to the plaintiff, whereas, as discussed *supra* p. 42, Jacobs does not. 696 N.W.2d at 858.

VI. THE COMMON LAW VOLUNTARY PAYMENT DOCTRINE DOES NOT BAR THE STATE'S CLAIMS.

Jacobs argues that the compensation fund payments to the survivors were voluntarily made by the State and therefore the State is precluded from seeking recovery against Jacobs. (Jacobs Br. 46-47.) This defense is unavailing for several reasons.

A. The Voluntary Payment Doctrine Does Not Apply To the State's Statutory Reimbursement Claim.

As with Jacobs' *Pierringer* argument, the court of appeals correctly found that this common law defense is inapplicable to the State's statutory reimbursement claim. *See* Minn. Stat. § 3.7394, subd. 5(a) (providing right of reimbursement "[n]otwithstanding any statutory or common law to the contrary"). (Add. 18-19.) *See also supra* p. 14.

B. The State's Payments Were Not Voluntary As A Matter Of Law.

Even in the absence of the "notwithstanding" language of the reimbursement statute, the State's payments were not "voluntary" as a matter of law. A payment is considered voluntary where a party pays "without any obligation to do so, or . . . without any interest to protect." *Iowa Nat'l Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 464 N.W.2d 564, 567 (Minn. Ct. App. 1990). However, a payor does not become a volunteer where it "acts in *good faith* to pay the loss," even if the liability is not clear. *Northland Ins. Co. v.*

Ace Doran Hauling & Rigging Co., 415 N.W.2d 33, 39 (Minn. App. 1987) (emphasis in original).

The Legislature dealt with “a catastrophe of historic proportions” resulting from a situation in which “[n]o other structure owned by this state has ever fallen with such devastating physical and psychological impact on so many.” Minn. Stat. § 3.7391, subd. 1. In the face of substantial uncertainty as to whether a court would uphold a \$1 million aggregate tort cap for liability to the approximate 180 survivors of this catastrophe, the Legislature reasonably provided for payment beyond the cap in order to settle the claims.¹⁵ In light of the magnitude of this tragedy and the virtual certainty of lawsuits challenging the constitutionality of the tort cap, the Legislature did not act as a volunteer when it provided for the settlement of the survivors’ claims. *See Opatz v. City of St. Cloud*, 196 N.W.2d 298, 300 (Minn. 1972) (stating legislative judgment is entitled to deference).

Since Jacobs’ voluntary payment argument questions the reasonableness of the Legislature’s judgment, the contention is simply a challenge to the constitutionality of the reimbursement statute, cast in different language. As discussed above, because Jacobs cannot meet its heavy burden of proving that the law is unconstitutional, the voluntariness argument also fails. *See Minnesota State Bd. of Health v. City of Brainerd*, 241 N.W.2d

¹⁵ Jacobs misreads Minn. Stat. § 3.7394, subd. 1 to suggest that the Legislature believed it had no legal duty to make any payments to the survivors. (Jacobs Br. 46.) The statutory statement that the creation of the fund and offers of settlement do not “establish a duty” of the State must be read in context of the whole subdivision, which focuses on non-admission of liability, a common element of settlements of legal claims. This provision prevented the fund and the settlements from being construed as proof of State liability in any future litigation regarding the Bridge collapse.

624, 632 (Minn. 1976) (stating absent clear constitutional violation, court's function is not to reconsider wisdom or necessity of legislative decision).

C. The Voluntary Payment Doctrine Is Inapplicable To The State's Contractual Indemnity Claim.

In addition, the terms of the indemnity provision (A. 235), which uses broad language to provide coverage to the State for all "claims" or "demands" "of whatsoever nature or character," provide for indemnity in this case. The State's payments are covered by the indemnity agreement because they constitute payment for "claims" or "demands." Indeed, the victims of the Bridge collapse made claims to the State through the compensation fund process, and some also provided Notices of Claim to the State pursuant to the State Tort Claims Act, Minn. Stat. § 3.736. *See* Minn. Stat. § 3.7393, subd. 9 (stating "a survivor must file a claim with the panel by October 15, 2008.").

The survivors' claims under the compensation fund process clearly constitute "claims" and "demands" within the meaning of the indemnity clause. The terms "claim" and "demand" must be given their plain and ordinary meaning. *Turner*, 276 N.W.2d at 67. Black's Law Dictionary defines "claim" as "[a] demand for money, property, or a legal remedy to which one asserts a right" and "demand" as "[t]he assertion of a legal or procedural right." Black's Law Dictionary 282, 495 (9th ed. 2009). *See also Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (in the res judicata/collateral estoppel context, defining a "claim" as "'a group of operative facts giving rise to one or more bases for suing'"); *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 804

(Minn. 2004) (same and noting that the Court has “defined ‘claim’ in the context of the arbitration provisions of the No-Fault Act as ‘the amount the claimant is asking for’”).

Contrary to Jacobs’ argument that a contractual right of indemnity only arises when the indemnitee is *compelled* to pay a third party (Jacobs Br. 47), the indemnity obligation applies to reasonable settlements. *See, e.g., Osgood*, 415 N.W.2d at 903 (applying contractual indemnity provision to settlement). *See also Northland Ins.*, 415 N.W.2d at 39-40 (holding in subrogation case that a party who enters into a reasonable settlement to avoid potential liability and costs of litigation is not a volunteer, and stating that another rule would discourage settlements). The “determination of the question of reasonableness is a question of law for the court.” *Osgood*, 415 N.W.2d at 903. This determination requires the Court to “take into account the *bona fides* of the settlement” which include the circumstances of the settlement. *Id.* The question for the Court “is not whether the party seeking indemnification *would have* been liable for at least the amount of the settlement,” but rather whether the party “*could have*” been liable under the applicable facts. *Id.* (emphasis in original).

As discussed above, the Legislature acted rationally under the unique facts and circumstances of the Bridge collapse to settle with the victims for the aggregate payment of \$37 million. The State’s settlement involves 179 claims and demands, including 13 wrongful deaths and numerous other severe personal injuries and property damage. The State’s payment reflects only a portion of the victims’ total damages, as evidenced, in part, by the victims’ claims against and settlements with URS and PCI. *See also* Minn. Stat. §§ 3.7393, subd. 11 (limit on individual offer of settlement to survivors); 3.7394,

subd. 2 (compensation fund payments intended to supplement payments made by third parties to survivors). Since the State's settlement of the claims and demands of the victims of the Bridge collapse was reasonable under the circumstances, Jacobs must indemnify the State under the contract.

CONCLUSION

Based on the foregoing, Respondent State of Minnesota respectfully requests that the Court affirm the court of appeals' decision affirming the district court's denial of Jacobs' motion to dismiss.

Dated: January 18, 2011

Respectfully submitted,

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By

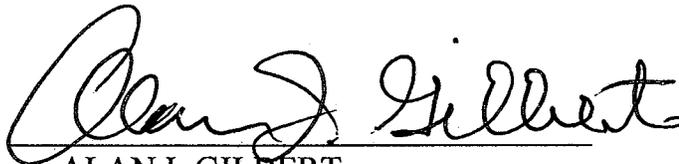


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**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 13,872 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

Dated: January 18, 2011



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