

Nos. A09-1776 & A09-1778

STATE OF MINNESOTA  
IN SUPREME COURT

In Re: Individual 35W Bridge Litigation

APPELLANT/CROSS-RESPONDENT URS CORPORATION'S  
RESPONSE/REPLY BRIEF

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## STATEMENT OF LEGAL ISSUES ON CROSS-APPEAL<sup>1</sup>

1. **Did the prior version of the Minn. Stat. § 541.051 prevent URS from bringing contribution claims against Jacobs Engineering Group Inc. (“Jacobs”), even though the amendment permitting such claims was enacted prior to the collapse (and the subsequent accrual of URS’s claims) and was intended to apply retroactively?**

This issue was raised in the district court in Jacobs’ motion to dismiss URS’s third-party complaints and URS’s response thereto. The district court held the 2007 amendments to Minn. Stat. § 541.051 had removed the ten-year repose barrier for contribution claims. Jacobs then preserved the issue for appeal by bringing an interlocutory appeal. The court of appeals based its decision on the common liability rule and did not, therefore, address this question. Jacobs raised this issue in its response to URS’s petition for review.

**Apposite Authority:** 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29; *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002).

2. **Did the 2007 amendments to Minn. Stat. § 541.051 violate the due process clauses of the Minnesota and United States Constitutions?**

This issue was raised in the district court in Jacobs’ motion to dismiss URS’s third-party complaints and URS’s response thereto. The district court held that the 2007

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<sup>1</sup> URS stated the issues for its appeal in its opening brief. This statement is confined to the issues on which Jacobs has cross-appealed.

amendments did not violate due process because Jacobs did not have a vested property interest in the prior repose statute and the 2007 amendments were rationally related to the purpose of allocating liability among tortfeasors. Jacobs preserved the issue for appeal with its interlocutory appeal. The court of appeals based its decision on the common liability rule and did not, therefore, reach the constitutional issue. Jacobs raised this issue in its response to URS's petition for review.

**Apposite Authority:** *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996); *Wesley Theological Seminary v. United States*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

#### **STATEMENT OF FACTS RELEVANT TO THE CROSS-APPEAL<sup>2</sup>**

During the early 1960s, engineering firm Sverdrup & Parcel and Associates, Inc. ("Sverdrup") designed the 35W Bridge. A021. Sverdrup performed its work pursuant to a 1962 contract with the State of Minnesota and certified its final design plans for the 35W Bridge in March 1965. A139. As a result of a series of mergers and name changes, Jacobs is the successor to Sverdrup. A020-21.

The Minnesota legislature first enacted Section 541.051 which contains a statute of repose for claims arising out of the unsafe or defective condition of improvements to

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<sup>2</sup> There is a more comprehensive statement of the facts in URS's opening brief at pages 5-11. This section includes only those additional facts relevant to Jacobs' cross-appeal.

real property in 1965, 1965 Minn. Laws ch. 564, § 1, at 803, three years after Sverdrup agreed to design the 35W Bridge and the same year that Sverdrup completed its design work. The original version of the statute contained a two-year statute of limitations and a ten-year statute of repose. *Id.* Both limitation periods explicitly applied to actions for contribution and indemnification. *Id.* In 1977, this Court held Section 541.051 unconstitutional because it granted immunity to only a certain class of defendants without a reasonable basis for the classification. *Pac. Indem. Co. v. Thompson-Yaeger, In.*, 260 N.W.2d 548, 555 (Minn. 1977). In 1980, the legislature amended the statute so as to cure the constitutional defect. *See* 1980 Minn. Laws ch. 518, §§ 2-3; *see also Calder v. City of Crystal*, 318 N.W.2d 838, 839 (Minn. 1982). In that same amendment, the legislature also extended the repose period to fifteen years. 1980 Minn. Laws ch. 518, § 2. In 1986, the legislature shortened the repose period to ten years, 1986 Minn. Laws ch. 455, § 92, and in 1988 the legislature added language providing that a cause of action for contribution or indemnity accrues “upon payment of a final judgment, arbitration award or settlement arising out of the defective and unsafe condition.” 1988 Minn. Laws ch. 607, § 1.

The legislature’s most recent amendments to Section 541.051 were enacted in May 2007, before the collapse of the 35W Bridge. The 2007 amendments eliminated the statute of repose for contribution and indemnity claims and affirmatively provided that, “[n]otwithstanding paragraph (a),” (which prevents the accrual of direct claims after a ten-year repose period), contribution or indemnity claims “may be brought” within two years of their own accrual, “regardless” of whether they accrued “before or after” the ten-

year repose period applicable to direct claims for damages. 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29; codified at Minn. Stat. § 541.051. As amended, the statute also specifies that claims for contribution and indemnity now accrue upon the earlier of commencement of the action against the party seeking contribution or indemnity or payment of the judgment, award, or settlement. Minn. Stat. § 541.051, subd. 1(c). One of the laws amending Section 541.051 provided it was “effective retroactively from June 30, 2006,” 2007 Minn. Laws, ch. 105, § 4, and the other provided it was “effective retroactive to June 30, 2006.” 2007 Minn. Laws, ch. 140, art. 8, § 29.

## ARGUMENT

### **I. Introduction**

In its attempt to avoid taking any responsibility for its role in causing the 35W Bridge collapse, Jacobs asks this Court to disregard the plain language of Minn. Stat. § 541.051, subd. 1(b). Although Jacobs is personally immune to direct suits from the plaintiff victims of that collapse because of the statute of repose in paragraph (a) of § 541.051, subd. 1, the same legislature that left that provision intact specifically amended the statute to direct that a party in the position of URS “may” bring its contribution claims “notwithstanding” that personal immunity for direct claims and “regardless” of the fact that the contribution claims accrued after the 10-year repose period on direct claims had run. Minn. Stat. § 541.051, subd. 1(b). And this Court has said, in *Horton v. Orbeth, Inc.*, 342 N.W.2d 112, 114 (Minn. 1984), that a personal immunity such as that enjoyed by Jacobs here does not destroy common liability for the purpose of contribution. As will

be shown below, Jacobs' arguments to the contrary are unavailing, and URS is allowed to bring a contribution claim.

In its cross-appeal, Jacobs contends the legislature's amendment of Minn. Stat. § 541.051 in 2007, before the Bridge collapsed, had no effect with regard to that collapse, even on claims, such as those of URS here, that did not accrue until after that event. Again asking this Court to disregard the plain meaning of the words the legislature used, Jacobs argues those words were not good enough, and insists a specific set of words had to be used by the legislature if it *really* wanted to change a law that would previously have barred a claim. Jacobs is wrong. In *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417 (Minn. 2002), this Court explained the legislature only needed to indicate that a new law is to apply retroactively. Specific words of "revival" are not required. *Id.* In this case, the legislature explicitly provided for retroactive application of the 2007 amendments to Minn. Stat. § 541.051, 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29, thus, to the extent there is thought to be any need for "retroactive" application of a law for it to apply to a claim first accruing after its passage, this Court's standard from *Gomon* is satisfied, and the prior version of the statute does not bar URS's claims.

Finally, Jacobs claims, without any authority, it has a vested right in the prior version of the statute of repose, making the 2007 amendments to Minn. Stat. § 541.051 unconstitutional. This Court, however, has only found vested rights in a limited set of circumstances, and it should not adopt Jacobs' implicit invitation to expand the scope of substantive due process. The changes to Minn. Stat. § 541.051 did not upset any

fundamental rights or interfere with any protected class. The changes are constitutional because they serve the rational purpose of having those parties whose conduct results in an injury contribute to the resulting verdict or settlement. URS has a valid contribution claim under Minnesota law, which it should be allowed to pursue in the district court.

## **II. URS Has Common Liability with Jacobs for Purposes of a Contribution Claim**

### **A. Jacobs' Immunity to the Plaintiffs' Direct Claims Did Not Destroy Common Liability**

Jacobs' statute of repose defense gives it a personal immunity from what would otherwise be its "direct obligation to compensate the plaintiff[s]." *Horton*, 342 N.W.2d at 114. But this Court stated more than twenty-seven years ago that personal immunities do not extinguish common liability. *Id.* Jacobs' statute of repose defense is wholly extrinsic to Jacobs' professional negligence in failing to correctly design the 35W Bridge. That defense is, therefore, precisely the sort of defense that does not extinguish common liability. *See Horton*, 342 N.W.2d at 114.

Jacobs asks this Court to ignore the clear language of *Horton*, this Court's most recent and comprehensive explanation of the defenses that do and do not extinguish common liability, and instead look to when Jacobs' defense arose. By focusing on the acts and omissions of the defendants, the *Horton* standard is consistent with the underlying equitable interest that contribution is a remedy "used to secure restitution and fair apportionment of loss among those whose activities combine to produce injury." *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 686 (Minn. 1977). Jacobs' personal immunity here, derived from its statute of repose defense, is based on nothing other than

the passage of time. As with the statute of limitations, that passage of time does not change the acts or omissions of a defendant, and so a personal immunity conferred by that passage does not eliminate common liability for contribution purposes. *See Horton*, 342 N.W.2d at 114.

**B. Minnesota Law Has Traditionally Allowed Parties in URS's Position—Facing Potential Liability for Failing to Discover or Prevent the Negligence of Another—to Recover From the Party Whose Negligence Caused the Injury**

Early in its brief, Jacobs appeals to “venerable” principles of common law. Jacobs’ Br. at 6. One such principle is that parties in URS’s position, facing potential liability for failing to discover or prevent another’s negligence, can recover from the persons whose primary negligence caused the injury in question. *See Hendrickson v. Minn. Power & Light Co.*, 104 N.W.2d 843, 848 (Minn. 1960). Traditionally, the equitable remedy used in such situations was indemnity, *id.*, so common liability was not required. *United States v. J&D Enter.*, 955 F. Supp. 1153, 1157 (D. Minn. 1997) (quoting *Hermeling v. Minnesota Fire & Cas. Co.*, 548 N.W.2d 270, 273 n.1 (Minn. 1996) (overruled on other grounds)). This Court switched such claims from indemnification to contribution, but only so that each party responsible for a plaintiff’s injury would “bear the cost of compensating plaintiff in proportion to its relative culpability.” *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 (Minn. 1977). The version of the common liability requirement urged by Jacobs would allow Jacobs to avoid contributing to the settlement with the plaintiffs despite its obvious culpability.<sup>3</sup>

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<sup>3</sup> Jacobs suggests this Court should disregard the facts pled by URS in considering URS’s

Such an outcome would be directly contrary to the policy motivating the change made by this Court in *Tolbert*. Accordingly, if this Court, despite the *Horton* standard, were now to generally adopt the definition of common liability urged by Jacobs, it should also allow a party in URS's position to recover contribution from the party whose negligence it allegedly failed to discover or prevent regardless of common liability.

Jacobs contends that *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3 (Minn. 1981) already disposes of URS's argument in this regard, but Jacobs is incorrect. In *Vesely*, a lawyer liable for failing to file a medical malpractice suit within the statute of limitations sought indemnity and contribution from the physician who had allegedly committed medical malpractice. *Id.* at 4. This Court did not allow contribution because the legal and medical malpractice were two entirely separate and distinct torts and there was, therefore, no common liability. *Id.* at 5-6. The Court did not allow the lawyer's indemnity claim because the lawyer and doctor were not joint tortfeasors and because indemnity claims under Category 4 of *Hendrickson* had been eliminated by *Tolbert*. *Vesely*, 311 N.W.2d at 6.

*Vesely* thus involved significantly different claims and a different set of policy concerns. The lawyer and doctor had committed completely separate torts, and there was a strong public interest in not allowing lawyers to use contribution or indemnity claims to

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equitable contribution claim. Jacobs' Br. at 10. Jacobs' claim is contrary to well-established Minnesota law regarding motions to dismiss. *E.g. Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). This Court must assume Jacobs' professional negligence caused the collapse of the 35W Bridge. A022-23. URS should be given the opportunity to prove those allegations at trial.

escape responsibility for their malpractice. *See id.* at 4. Although this Court briefly mentioned *Hendrickson* Category 4 in connection with the lawyer's indemnity claim, *id.* at 6, *Vesely* did not actually involve the lawyer's failure to discover or prevent the doctor's malpractice. Medical malpractice lawyers do not generally have the responsibility (or medical expertise) to prevent medical malpractice from occurring; instead, they seek compensation for clients who have already been injured as a result of medical malpractice.

URS, in contrast to the defendant lawyers in *Vesely*, did, in fact, face potential tort liability for failing to discover Jacobs' negligence. URS settled those claims. Now, this Court should allow URS to collect from Jacobs the portion of that settlement for which Jacobs is equitably responsible. Unlike the lawyer in *Vesely*, URS is no longer seeking complete indemnification; it recognizes and accepts this Court's determination in *Tolbert* that contribution based on respective degrees of fault is the appropriate mechanism in these situations. 255 N.W.2d at 368. Accordingly, URS is seeking contribution from Jacobs, and this Court, which did not (and did not need to) consider the matter in *Vesely*, should now hold, at the least, that common liability is not required for this kind of contribution claim.

Such a holding would be consistent with the venerable common law of this State. The concern in *Tolbert* was that indemnity required either the original tortfeasor or the party that failed to catch the error to be wholly liable. 255 N.W.2d at 367-368. Jacobs is asking this Court to overlook that concern and allow precisely that sort of outcome. If Jacobs prevails, URS will bear the entire cost of settlement with the plaintiffs, despite

Jacobs' professional negligence in improperly designing the 35W Bridge. It would be contrary to basic notions of equity and this State's traditional common law doctrines to allow Jacobs to escape all liability for the harm resulting from its professional negligence, at the literal expense of URS.

**C. The Plain Language of Section 541.051 Allows URS to Bring its Claims**

Paragraph (b) of Minn. Stat. § 541.051, subd. 1 provides in plain words that URS “may” bring its claims for contribution “[n]otwithstanding” the portion of the statute establishing the statute of repose for direct claims and “regardless” of the ten-year repose period for direct claims. The same paragraph also specifically contemplates, in the regardless clause, that claims for contribution can accrue after passage of that ten-year repose period. Jacobs nonetheless contends the “notwithstanding” and “regardless” clauses in paragraph (b) do not mean what they say, and instead merely mean that the statute of repose in paragraph (a) does not apply to contribution and indemnification claims. Jacobs' Br. at 39-40.

To begin with, the legislature's words should be given their plain and ordinary meaning, rather than what a litigant thinks they should mean in spirit. *See Johnson v. Cook County*, 786 N.W.2d 291, 293 (Minn. 2010). And this Court has itself recently reiterated, with regard to this very statute, that “[i]n interpreting the statute of repose, we ‘strive to give effect to the plain meaning of the words of the statute without resort to technical legal constructions of its terms.’” *Siewert v. Northern States Power Co.*, Nos. A07-1975 & A07-2070, slip op. at 23 (Minn. Jan. 26, 2011) (citations omitted); *see also* Minn. Stat. § 645.08(1).

There is, moreover, no need for the “notwithstanding” and “regardless” clauses to have the meaning for which Jacobs argues. The prior version of Minn. Stat. § 541.051 specifically listed contribution and indemnification claims as being subject to the statute of repose in paragraph (a). Minn. Stat. § 541.051, subd. 1(a) (2006), amended by 2007 Minn. Laws, ch. 105, §4; 2007 Minn. Laws, ch. 140, art. 8 § 29. The 2007 amendments explicitly struck the references to contribution and indemnification claims from paragraph (a), 2007 Minn. Laws, ch. 105, §4; 2007 Minn. Laws, ch. 140, art. 8 § 29, which itself communicated the legislative intent not to have the ten-year statute of repose apply to such claims. Nothing more was needed to effectuate that intent.

Further, if the “notwithstanding” clause merely indicated the repose limitation in paragraph (a) does not apply to contribution and indemnification claims, the “regardless” clause would be superfluous, doubly so if it, too, merely meant the same thing. Yet it is settled law that, “[w]henver it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Jacobs has also failed to address the legislature’s understanding, as expressed in the “regardless” clause, that contribution claims can accrue after passage of the ten-year repose period for direct claims. Under the strained reading given the statute by Jacobs, such an accrual could not occur due to a lack of common liability once the repose period has run.<sup>4</sup> URS should be allowed to prosecute its contribution claim, as

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<sup>4</sup> Contrary to Jacobs’ suggestion, Jacobs’ Br. at 40-41, *Weston v. McWilliams Assocs. Inc.*, 716 N.W.2d 634 (Minn. 2006) does not demonstrate otherwise. Accrual now occurs at the earlier of the time the direct claim is brought or payment is made, Minn.

explicitly provided for in Minn. Stat. § 541.051.

**D. URS's Settlement is a Matter for the District Court to Consider**

Jacobs argues that it would be improper to allow URS's contribution claim to proceed against it because URS *might not* have had to pay more than its fair share of the plaintiffs' damages if URS had elected to go to trial with the plaintiffs rather than settle their claims. Jacobs' Br. at 27-29. This argument flies in the face of the principle that parties who settle litigation are favored in the law. It also is contrary to well-settled Minnesota law allowing defendants to seek contribution after settlement and not only after a final judgment.

“[A] party who seeks contribution ‘need not make payment pursuant to a judgment, but may settle by a fair and provident payment and then seek contribution from other joint tortfeasors for their fair share of the settlement price.’” *Roemhildt v. Gresser Cos., Inc.*, 729 N.W.2d 289, 298 (Minn. 2007) (quoting *Employers Mut. Cas. Co., v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 50 N.W.2d 689, 693 (Minn. 1951)). The reasonableness of a settlement is a question of fact, to be decided by the trial court as factfinder. *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990). “[A]ppellate courts may not ‘sit as factfinders,’ and are ‘not empowered to make or modify findings of fact.’” *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (internal quotations and citations omitted). The question of the reasonableness of

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Stat. § 541.051, subd. 1(c), so under today's statutory scheme a party in the position of the contribution plaintiff in *Weston* would have its claim accrue during the ten-year repose period, not afterwards.

URS's settlement with the plaintiffs is, therefore, for the district court to decide, in the first instance.

The question for the district court will not be whether URS *would have* been held jointly and severally liable, and therefore required to pay more than its fair share. Instead, it will be whether URS *could have* been held jointly and severally liable. Even parties who settle claims that eventually prove to be ill-founded are not necessarily volunteers. *Lemmer v. IDS Props., Inc.*, 304 N.W.2d 864, 869 (Minn. 1980); *Lametti v. Peter Lametti Constr. Co.*, 232 N.W.2d 435, 439 (Minn. 1975). That rule is "in accord with the principle that parties who settle litigation are favored in the law, and that 'each tortfeasor accept responsibility for damages commensurate with its own relative culpability.'" *Lemmer*, 304 N.W.2d at 869 (citations omitted). In *Lemmer*, this Court held a settlement was reasonable where the defendants settled at a time when a "jury *could* have found them liable and damages *could have* been well in excess of the amount of settlement." *Id.* at 869 (emphasis added). "The test as to whether the settlement is reasonable and prudent is what a reasonably prudent person in the position of the defendant would have settled for on the merits of plaintiff's claim." *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982).

Jacobs does not and cannot argue URS could not have been held jointly and severally liable as a matter of law. A jury could have found URS more than fifty percent at fault, either on its own or in a common scheme or plan with the State under the facts alleged in the plaintiffs' complaints. *See* A001-18. Such a verdict would have made URS jointly and severally liable. Minn. Stat. § 604.02, subd. 1. That URS denied all

liability, and denied a common scheme or plan with any defendant, does not mean it would have prevailed on those issues at trial. As this Court held in *Lametti*,

The fact that plaintiff made payment only when faced with an imminent trial of the personal injury lawsuit and a potentially large verdict, and insisted on the preservation of its claim to contribution against defendant, negates any inference that plaintiff was acting as a volunteer in the sense that would, under the maxim that equity will not aid a volunteer, render it without remedy in contribution.

232 N.W.2d at 439. The reasonableness of URS's settlement with the plaintiffs will be determined in district court. The *fact* of the settlement with the plaintiffs does not bar URS's contribution claims against Jacobs.<sup>5</sup> Jacobs is, in essence, contending URS should be penalized for settling with plaintiffs. This Court should follow its traditional policy of favoring settlors and leave this issue of fact for the district court to address.

### **III. 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**

The amendments to Section 541.051 were effective before URS's contribution claim accrued. Their application to that claim is not, therefore, retroactive. Before May 2007, Jacobs had only a hypothetical affirmative defense that it might plead if it were ever to face claims for its work designing the 35W Bridge. By the time URS was sued by victims of the collapse, that potential defense had already been abrogated. URS merely

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<sup>5</sup> Jacobs is also incorrect in claiming the reallocation mechanism in Minn. Stat. § 604.02, subd. 2 disposes of this issue. The issue is whether Jacobs is liable to URS, not whether Jacobs could have been forced to pay plaintiffs through the reallocation provision. URS faced potential liability for more than its share of fault. If URS had been forced to pay more than its proportionate share of plaintiffs' injuries as a result of joint and several liability, it would have been entitled to recover directly from Jacobs.

seeks to have the law applied that has been in force continually since before the collapse. Despite that, Jacobs claims the amendments do not allow URS's claims to be brought against it now because those claims would have been barred under the prior version of the statute if they would have otherwise accrued and been brought while that version of the statute was in effect. In addition to not reflecting what actually happened here, Jacobs' argument is based on application of the wrong legal standard.

Jacobs argues that if claims would have been barred under a previous version of the statute, they are not permitted under an amended version of that statute unless the legislature specifically expresses such an intent in certain words. But Jacobs' approach was rejected by this Court in *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417 (Minn. 2002)

In *Gomon*, this Court considered a change to the statute of limitations for medical malpractice actions, passed in 1999, that was to be "effective on August 1, 1999, for actions commenced on or after that date." 645 N.W.2d at 415. The plaintiffs' claim, which had accrued in 1996, would have been barred by the prior two-year statute of limitations, but was within the new four-year period of limitation when they commenced their action in December 1999. *Id.* at 415. The defendants in *Gomon* argued that even if a statute is generally intended to be retroactive, "it should not be applied retroactively to *revive* a previously time-barred claim unless intent to revive is specifically expressed." *Id.* at 417 (emphasis in the original). This Court rejected that argument and held because the legislature had "clearly and manifestly expressed its intent that the four-year statute of limitations . . . be applied retroactively," the plaintiffs would be allowed to proceed

because they had brought their claim within the new four-year limitation period. *Id.* at 420.<sup>6</sup>

*Gomon* supports URS's claims for contribution and indemnity in this matter. The Minnesota legislature provided the 2007 amendments are to apply retroactively, 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29, and URS brought its claims against Jacobs within the two-year statute of limitations required under the amended statute. Jacobs points out that the exact language of the law considered in *Gomon* is different than that used in the 2007 amendments to Minn. Stat. § 541.051, Jacobs' Br. at 32-3, which is true but immaterial.<sup>7</sup> In *Gomon*, this Court made it clear the crucial question was whether the legislature expressed an intent to have the statute apply retroactively. *Id.* at 417. It did not require the legislature to use a specific set of magic words in order to communicate its intent. *See id.*

In this case, the legislature passed two separate laws, both of which amended Section 541.051, and both of which provided the amendment was to apply retroactively (one law provided for retroactive application from June 30, 2006 and the other required it to June 30, 2006).<sup>8</sup> 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8,

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<sup>6</sup> As noted, URS is not seeking to have claims "revived." This is not a situation in which URS had claims, let them lapse, and is now the beneficiary of a revival statute. The law here was changed before URS's claims even accrued.

<sup>7</sup> The amendment considered in *Gomon* provided it applied to actions "commenced on or after" August 1, 1999. 645 N.W.2d at 416. That language demonstrated an intent to have the statute apply retroactively. *Id.* at 420.

<sup>8</sup> Jacobs seems to imply there was a single law amending Section 541.051 containing different wording in the versions passed by the House and Senate. Jacobs' Br. at 33.

§ 29. The legislature thus satisfied the test set forth in *Gomon*. The 2007 amendments are intended to apply retroactively and do, therefore, allow claims that would have been barred under the prior version of the statute (let alone claims which, as here, first accrued after the amendments were passed).

Jacobs also focuses on the date of June 30, 2006, and claims the 2007 amendments must not apply to a case arising out of its negligent work on a project completed before that date. Jacobs Br. at 30-35. Jacobs is, however, focusing on the wrong period: URS's claims accrued when it was sued by the victims of the collapse, which occurred in 2008 and 2009. At that time, the law in effect provided URS "may" bring its contribution claim "notwithstanding" the statute of repose in Minn. Stat. § 541.051, subd. 1(a) and "regardless" of the fact the claim had accrued after passage of the ten-year repose period for direct claims. Jacobs focuses on whether the 2007 amendments to Minn. Stat. § 541.051 were to apply retroactively from June 30, 2006 infinitely into the past. The question in this case, however, is only whether the amendments were to apply retroactively in 2008 and 2009. Clearly, they were. In 2008 and 2009, the 2007 amendments were in force, and applied retroactively, 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29, which this Court held in *Gomon* is sufficient. 645

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That is incorrect. Two separate laws amending Section 541.051 were enacted and signed into to law. 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29. Each is a validly enacted law. They should be read to have complimentary effect.

N.W.2d at 417.<sup>9</sup>

#### **IV. The 2007 Amendments to Section 541.051 Do Not Violate Due Process**

##### **A. Jacobs Cannot Overcome the Heavy Burden of Proving Unconstitutionality**

Jacobs claims the 2007 amendments to Minn. Stat. § 541.051 unconstitutional. As the party challenging the statute, Jacobs has the “very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional.” *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999) (quoting *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990)). Minnesota statutes are presumed to be constitutional, *State v. Netland*, 762 N.W.2d 202, 211 (Minn. 2009) (quoting *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000)), and this Court has stated its “power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.” *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Debatable questions as to the statute’s “reasonableness, wisdom, and propriety” are for the legislative body, not for the courts, *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 191 (1938), and this Court has been “reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area

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<sup>9</sup> Jacobs contends the amendments to Minn. Stat. § 541.051 could flood the courts with suits involving structures completed decades ago. Jacobs’ Br. at 36-37. Statutes of limitation and repose are legislative creations, however, and Jacobs’ arguments are more appropriately directed to the legislature. Indeed, there was no statute of repose at all, until 1965, and since then the length of the repose period has varied, and was even non-existent between 1977 and 1980. See pages 2-4. Moreover, any public policy analysis would need to also consider the interest in not having parties in URS’s position pay for the personal injury, death, and property damage caused by the negligence of another. Balancing those concerns is a matter for the legislature as it is the body that creates, and changes, statutes.

are scarce and open-ended.” *Netland*, 762 N.W.2d at 208 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Jacobs cannot satisfy its heavy burden.

**B. Prior Minnesota and Federal Cases Recognize that Changes to a Statute of Repose Do Not Violate Due Process**

Jacobs contends it has a vested right in the prior version of the statute of repose and the amendments to Minn. Stat. § 541.051 are, therefore, unconstitutional. Jacobs is again incorrect. Every Federal and State court in Minnesota to consider the matter has concluded that statutes of repose can be changed so as to allow claims that would have been barred. *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 102 (Minn. Ct. App. 2008) (analyzing the 2007 amendments to Minn. Stat. § 541.051 and holding “the legislature can revive a claim that was otherwise barred by a repose period”); *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591 (Minn. Ct. App. 1994) (stating in a discussion of a statute of repose that the “legislature can constitutionally modify time limitations and thereby divest a party of previously obtained rights”); *see also Indep. Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 298 (D. Minn. 1990) (considering a constitutional challenge to a law reviving asbestos claims previously barred under the statute of repose and stating, “the Court will follow the leading cases which have sustained retroactive modification of time limitations, and affirm the revival statute against defendant’s due process challenge”). In the related appeal involving the State of Minnesota’s claims against Jacobs, the court of appeals held there was no due process violation stating, “[w]hat 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.” A151.

The two federal appeals courts to have considered the issue have also held it does not violate due process to revive claims that had been barred under a previous statute of repose. *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1076 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996); *Wesley Theological Seminary v. United State.*, 876 F.2d 119, 123 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). These cases are particularly persuasive authority because, as Jacobs recognized at page twenty-nine of its opening brief for the court of appeals, “Minnesota’s Due Process Clause is identical in scope to the federal clause.”<sup>10</sup>

In *Wesley*, the plaintiff’s building was built with tiles containing asbestos that had been purchased from the defendant. 876 F.2d at 120. While the case was pending, a new law was enacted that removed the defendant from the scope of the statute of repose. *Id.* at 120-21. The D.C. Circuit applied the rational basis test to determine the constitutionality of the retroactive application of the new statute and concluded that it was not irrational “to decide that the losses due to defects in building materials discovered long after installation should fall on the supplier rather than the building’s owner.” *Id.* at 122. Jacobs has tried to distinguish *Wesley* by noting the D.C. Circuit was not convinced a statute of repose was substantive law (as it is in Minnesota); however,

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<sup>10</sup> In *Weston*, this Court similarly concluded there was no reason to differentiate between the due process guaranties of the Minnesota and United States Constitutions when considering the prior version of Section 541.051. 716 N.W.2d at 644.

the D.C. Circuit actually stated, “we need not tarry with these theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim.” *Id.* at 123. Further, the D.C. Circuit noted the defendant had sold the tiles without relying on the statute of repose. *Id.* at 122.<sup>11</sup>

In *Shadburne-Vinton*, the Fourth Circuit considered a retroactive change to Oregon’s statute of repose. 60 F.3d at 1072-73. The defendant argued it would violate due process to give force to the retroactive amendment enacted by the Oregon legislature. *Id.* at 1074-75. Relying on the U.S. Supreme Court’s cases on retroactive lawmaking, the Fourth Circuit applied a rational basis test. *Id.* at 1075-77. It concluded the Oregon legislature had amended the statute to give women injured by IUDs a fair opportunity to litigate their claims, and held the statute was rationally related to that legitimate purpose. *Id.* at 1077. As Part D below will show, this Court should reach the same conclusion here.

### **C. Jacobs Has No Vested Right in the Prior Version of the Statute of Repose**

Jacobs’ constitutional argument is premised on its claim to have had a “vested right” in the prior version of the statute. Certainly, statutes of repose are matters of substantive (and not procedural) law. *Weston v. McWilliams & Assocs., Inc.*, 716

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<sup>11</sup> Jacobs cannot credibly claim to have relied on the statute of repose here either. Jacobs did not rely on the statute of repose when it agreed in 1962 to design the 35W Bridge, as it was not yet in force, and later could not reasonably have relied on the continued and unmodified existence of a statute that has been amended so many times and was not even in force for a period after it was declared unconstitutional by this Court. See pages 2-4.

N.W.2d 634, 641 (Minn. 2006). That, however, does not mean they create vested rights. This Court has recognized a limited set of traditional vested rights protected by the due process clause against retroactive lawmaking, and it should not expand substantive due process by recognizing the novel vested right Jacobs claims. *See Netland*, 762 N.W.2d at 208.

This Court noted in *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 356-57 (Minn. 1969) that while retroactive laws are usually upheld as long as they do not interfere with vested legal rights, “the difficulty comes in defining what is a vested right.” Even the three factors set forth in *Peterson* as a guide to determine whether a law may constitutionally be retroactive were described by this Court in that same case as “nebulous.” *Id.* at 357. *See also Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 845 (Minn. Ct. App. 2007) (court was disinclined to rest its analysis primarily on a vested rights theory because it relied on “vague concepts”). The third factor in the test (“the nature of the right the statute alters”) essentially asks whether a right is vested, and was described in *Peterson* as the “main difficulty” in the constitutional analysis. 173 N.W.2d at 357.

Jacobs asserts that an examination of case law related to vested rights and the retroactive application of law will demonstrate that it was “demonstrably wrong” for the district court to hold that there was no vested right in the old statute of repose. *See Jacobs’ Br.* at 48. Jacobs, however, was unable to cite any Minnesota case directly supporting its contention. *Id.* at 48-51. There are only a limited number of Minnesota cases in which a new or modified law was found to impair vested rights. The

constitutionally protected vested rights found by this Court when considering retroactive laws fit into a limited number of traditional categories, which are discussed below. Jacobs' asserted right in an old statute of repose defense does not fall into any of those categories.

First, Minnesota courts have long recognized a vested right in final judgments. *See Beaupre v. Hoerr*, 13 Minn. 366 (1868) (new law extending time for appeal from six months to one year could not be applied to a final judgment where the right of the respondent had become fixed by passage of the 6 month period); *Wieland v. Shillock*, 24 Minn. 345 (1877) (change in time period during which a judgment could be challenged on the basis it was based on a fraudulent act could not be applied to a final judgment obtained almost three years earlier); *Tillotson v. Millard*, 7 Minn. 513 (1862) (act expanding homestead exemption was unconstitutional as applied to judgments obtained prior to its passage).<sup>12</sup>

Parties have vested rights in final judgments because the separation of powers between the legislature and the judiciary prevents the legislature from nullifying final decisions made by the judiciary. *See State ex rel. Flint v. Flint*, 63 N.W. 1113, 1113 (Minn. 1895). In *State ex rel. Flint*, the decision in a habeas corpus proceeding was being appealed when an act was passed that effectively granted a new trial upon appeal. *Id.*

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<sup>12</sup> Similarly, this Court has recognized there are vested rights in situations akin to final court judgments. *See Johnson v. Jefferson*, 255 N.W. 87, 87-88 (Minn. 1934) (amendment to the Workmen's Compensation Act granting a right to rehearing could not be retroactively applied).

This Court ruled the previous decision was a binding adjudication which estopped both parties until it was set aside for cause judicially found in the same court or on appeal. *Id.*<sup>13</sup> Application of the act to the proceeding at hand would have been unconstitutional as “[t]he legislature had no more power to grant a new trial in such a case than it would have to render the original decision. One is as much a judicial act as the other.” *Id.* Jacobs has no similar claim that the legislature overstepped its powers and encroached upon the powers of the judiciary when it changed the statute of repose in Minn. Stat. § 541.051.

Second, the most common type of vested rights cases are those based on rights to real property. The underlying theme of these cases is that there is a vested right in an acquired interest, use, possession, or title to property. *See e.g., Young v. Mall Inv. Co.*, 215 N.W. 840, 841 (Minn. 1927) (city ordinance imposing an unreasonable restriction on use of real property impaired vested right in the broader use of property permitted by state common law); *Shell v. Matteson*, 83 N.W. 491, 492 (Minn. 1900) (new law declaring owners of land bordering dried-up lake bed to be owners in common unconstitutionally impaired vested rights since it was already established law that owners owned the bed to the center in severalty). Obviously, legislative action suddenly divesting a party of previously-acquired rights to real property implicates the takings

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<sup>13</sup> *Holen v. Minneapolis-St. Paul Metro. Airports Comm’n*, 84 N.W.2d 282, 287 (Minn. 1957) later held that, “amendatory or curative legislation, though enacted after the rendition of a judgment and pending the appeal, must govern the final disposition of the case upon appeal.”

clause, in addition to the due process clause. *See* Minn. Const. Art. I, § 13.

Within this category, there is a series of older Minnesota cases involving curative acts passed to forgive prior failures to comply with certain legal restrictions. Such acts were allowed, but only if they did not impair existing property rights. *See Meighen v. Strong*, 6 Minn. 177 (1861) (curative act could not be applied to invalidate attempt to convey property as it would affect a person who subsequently acquired title to the property); *Thompson v. Morgan*, 6 Minn. 292 (1861) (act curing defects in mortgage could not be applied where an interest in the land was acquired prior to passage); *Snortum v. Snortum*, 193 N.W. 304, 306 (Minn. 1923) (curative act could not validate attempted conveyance between spouses when wife had died prior to passage and children already had right to inheritance); *Fuller v. Mohawk Fire Ins. Co.*, 245 N.W. 617, 618 (Minn. 1932) (invalid mortgage foreclosure could not be validated by curative act passed five months later as the owner had a vested right in possession and title to property); *see also McCord v. Sullivan*, 88 N.W. 989, 991 (Minn. 1902) (legislature may cure defects in tax proceeding, but defects which go to jurisdiction of the officers to act and affect the substantial rights of the property owner cannot be cured by subsequent litigation). Jacobs has no real property interest at issue here.

Third, there is a series of cases where rights are vested in contracts and impairment of such rights would violate the Contracts Clause. *See, e.g., Caley v. Thornquist*, 94 N.W. 1084, 1085 (Minn. 1903) (tenant who held over was found to have executed the option in the lease to continue the lease for two additional years, and this vested contractual right could not be impaired by subsequently passed law). As this

Court determined in *Yaeger v. Delano Granite Works*, 84 N.W.2d 363, 366 (Minn. 1957), workers' compensation law cases fall under this category as they are contractual in nature, and "any statute which purports to alter a substantial term of the contract which was in effect at the time the controlling event occurred (the death of the employee in these cases) impairs the obligation of such contract and is therefore unconstitutional." See also *Miller v. Norris Creameries*, 235 N.W.2d 203, 205 (Minn. 1975) (right to reimbursement under special compensation fund vested at date of registration by employee as suffering from preexisting physical impairment, and new definition of physical impairment could not be applied retroactively); *Broos v. Portec*, 376 N.W.2d 688, 691 (Minn. 1985) ("The employer's liability having been fixed by the law in effect on the date of employee's injury, it had a vested right to that fixed liability.") Application of the new statute of repose to Jacobs would not impair any vested contractual right.

Minnesota has, therefore, traditionally recognized vested rights in three types of retroactive law cases: (1) cases involving final judgments; (2) cases involving rights to real property; and (3) cases involving retroactive changes to contractual rights. Notably, outside of those three categories, each of which implicates constitutional concerns in addition to due process, this Court has not held parties have vested rights to claims or defenses. To the contrary, defenses, even substantive defenses, do not vest before judgment is entered. See *Olsen v. Special Sch. Dist. No. 1*, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988) (holding that no person has a vested right in an exemption from a

remedy);<sup>14</sup> see also *United Realty Trust v. Prop. Dev. & Research Co.*, 269 N.W.2d 737, 741 (Minn. 1978) (upholding the retroactive removal of the complete defense that had previously been afforded the defendant under Minnesota's usury laws).

Similarly, there is no vested right to a cause of action. *State v. Chicago Great Western Ry. Co.*, 25 N.W.2d 294, 298 (Minn. 1946) ("There is no vested right in an action until final judgment has been entered therein."). See also *Maxwell Commc'ns v. Webb Publ'g Co.*, Case Nos. c4-92-1882, c5-92-1926, c9-92-2092, and C8-92-2259, 1993 WL 165676 at \*3 (Minn. Ct. App. May 18, 1993) (holding there was no vested right in a contribution claim). In *Weston*, this Court held the legislature's abrogation of a claim for contribution (resulting from the statute of repose) did not violate due process. 716 N.W.2d at 644. If it does not violate due process for the legislature to remove a claim for contribution, surely it does not violate due process for the legislature to remove a defense to such a claim.

In essence, although Jacobs claims to have a property right in the protection afforded by the prior version of the statute of repose, in reality Jacobs merely had an expectation (and not an entirely reasonable one, given the statutory history) the law would not change. See *Holen*, 84 N.W.2d at 287 (Minn. 1957); see also *Olsen*, 427 N.W.2d at 711 (a "right is not 'vested' unless it is something more than a mere expectation, based on an anticipated continuance of present laws") (quoting *Schwartzkof*

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<sup>14</sup> Contribution is an "equitable remedy." *Jones v. Fisher*, 309 N.W.2d 726, 730 n.4 (Minn. 1981) (quoting *Lambertson*, 257 N.W.2d at 688). Jacobs is claiming that it had a vested right to be exempt from that remedy.

v. *Sac County Bd. of Supervisors*, 341 N.W.2d 1, 8 (Iowa 1983)).

Jacobs draws this Court's attention to its opinion in *Donaldson v. Chase Securities Corp.*, 13 N.W.2d 1 (Minn. 1943), *aff'd*, 325 U.S. 304 (1945). Jacobs Br. at 45-46. In *Donaldson*, however, this Court only recognized two situations in which a limitations statute creates a vested right: (1) when the passing of an adverse possession period has vested a person with title to property, and (2) when there is a statutory cause of action and that same statute also contains a limitation period.<sup>15</sup> *Donaldson*, 13 N.W.2d at 4-5. The immunity afforded Jacobs under the prior version of Section 541.051 does not fit within either category. Jacobs did not obtain title to property when the repose period in Section 541.051 passed, and contribution is a common law cause of action. *City of Willmar v. Short-Elliot-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). Jacobs is asking this Court to expand the scope of substantive due process and recognize an entirely new variety of vested right. The Court should reject the invitation and follow its traditional understanding of substantive due process.

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<sup>15</sup> This second category involving statutory causes of action was also the subject of the United States Supreme Court's decision in *William Danzer & Co., Inc. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633, 636-37 (1925). Later, in *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 244 (1976), the Court upheld the revival of a claim that had been barred under a prior limitation period in Title VII. The holding in *Robbins & Myers* demonstrates *Danzer* is no longer good law. See *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 887-88 (Minn. Ct. App. 1987), *overruled on other grounds*, *Powell v. Anderson*, 660 N.W.2d 107, 114 (Minn. 2003) (concluding that *Danzer* has been tacitly overruled and holding a retroactive change to the statute of limitations for Minnesota's statutory cause of action for wrongful death was constitutional); see also *Shadburne-Vinton*, 60 F.3d at 1076 (finding that analysis used by the United States Supreme Court in the *Danzer* and *Chase* cases is no longer valid in light of more recent Supreme Court cases).

**D. The Legislature Had a Rational Basis for Amending Section 541.051 and Making its Amendment Retroactive**

Under this Court's due process jurisprudence, "[a]bsent a fundamental right or suspect class, minimal judicial scrutiny is appropriate." *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983). Under that standard, if a law "is rationally related to achievement of a legitimate governmental purpose, it should be upheld." *Id.* Jacobs, a large engineering corporation, is not a member of any suspect class, and the only right affected by the amendment to Section 541.051 was its "right" under a prior version of Section 541.051 not to be held liable for the deaths and injuries resulting from its professional negligence. The amendments to Section 541.051 are constitutional because they are rationally related to the legitimate governmental purpose of equitably sharing responsibility between parties potentially responsible for a loss. Even if Jacobs is deemed to have had a "vested" right, the legislature could still alter the law provided it had a rational basis for doing so.<sup>16</sup>

The Fourth Circuit and the D.C. Circuit have applied the rational basis test when

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<sup>16</sup> Jacobs contends due process forbids any interference with vested rights. That argument is inconsistent with this Court's modern constitutional jurisprudence, which allows for interference with even fundamental rights provided the law in question is narrowly tailored to serve a compelling governmental interest. *E.g. In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (holding civil commitment under the Sexually Dangerous Persons Act did not violate substantive due process). A "vested right" to the immunity provided by a statute of repose is not more fundamental than an individual's right to be free from incarceration. The amendments to Section 541.051 would, in fact, satisfy even strict scrutiny. The State has a compelling and constitutionally recognized interest in providing remedies, Minn. Const. art. I, § 8, and the statute is narrowly tailored in that parties in Jacobs' situation will only face liability in proportion to their fault.

considering retroactive changes in statutes of repose. *Shadburne-Vinton*, 60 F.3d at 1075-77; *Wesley*, 876 F.2d at 122; see also *Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass'n*, 110 F.3d 547, 554-55 (8th Cir. 1997) (en banc) (applying the rational basis test to a retroactive change in the Minnesota law governing the scope of the coverage provided by the Minnesota Life and Health Insurance Guaranty Association). Economic legislation, including retroactive legislation, is presumed to be constitutional and is subjected only to rational basis review. See *Honeywell*, 110 F.3d at 554-55.

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

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

*Id.* at 16 (citations omitted). Applying the rational basis test, the Supreme Court upheld the Act, concluding that “the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor.” *Id.* at 18.

Then, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Supreme Court upheld a law creating liability for employers who withdrew

from pension plans even though the law applied retroactively to employers who withdrew before the enactment of the law. Relying upon *Usery*, the Court held that legislation imposing retroactive liabilities need only be supported by a rational legislative purpose. *Id.* at 728-30. Finally, in *General Motors Corp. v. Romein*, 503 U.S. 181, 191-192 (1992), the Court upheld a retroactive change in Michigan's workers' compensation law that required employers to refund monies they had withheld under the prior law.

Jacobs claims it cannot be subjected to contribution claims resulting from the amendment to Section 541.051. That argument fundamentally misunderstands the limited protection afforded by the due process clause. *Usery*, *General Motors*, and *Pension Benefit Guaranty Corp.* show legislatures can create entirely new liabilities for past acts, so long as they have a rational basis. In this case, the Minnesota legislature did not go that far. Jacobs may not have expected the change to Minn. Stat. § 541.051, but liability for engineers who fail to carry out their duties with the appropriate care, skill, and diligence is not a novel concept. *E.g. Cowles v. City of Minneapolis*, 151 N.W. 184, 186 (Minn. 1915). In fact, Jacobs agreed to design the 35W Bridge at a time when there was no statute of repose.

Jacobs suggests the legislature could have no rational reason to amend the law in such a way as to subject it to liability for conduct that occurred decades ago. The facts of this case and the history of the 2007 amendments demonstrate that is not the case. *Weston* showed the statute of repose for contribution claims could have the unhappy effect of leaving one defendant paying for damages potentially caused by another. If it were not for the 2007 amendments to Minn. Stat. § 541.051, such would be the outcome

in this matter. Certainly, Jacobs is no longer fully protected by the statute of repose. However, URS is now able to seek contribution from the party responsible for the design flaw that led to the collapse of the 35W Bridge. Jacobs may disagree with that outcome, and may argue that it is undesirable as a matter of public policy that it be forced to pay for the losses resulting from its professional negligence, but the legislature's decision to allow for contribution is rational. If someone is going to pay for the harm caused by Jacobs' negligence, it is not irrational that it be Jacobs.

**E. The Out of State Cases Cited by Jacobs Are Inapposite**

Finally, Jacobs cites a few cases from appellate courts in other states in support of its argument that the Minnesota legislature could not retroactively change the statute of repose. (Jacobs' Br. at 51-52). Those cases, however, provide no insight into either the Minnesota or United States Constitutions.

The holdings in two of the cases Jacobs cites are based on state constitutions that have due process clauses that differ in scope from those in the Minnesota and United States Constitutions. *See Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967-68 (Kan. 1992) (recognizing that change in statute of repose did not conflict with the Fourteenth Amendment but holding that it did conflict with the Kansas Constitution); *Sch. Bd. of the City of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 329 (Va. 1987) (concluding, in response to a question certified by a federal court, that a retroactive change in a statute of repose violated the Virginia constitution).<sup>17</sup> Jacobs has not provided any reason why this

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<sup>17</sup> Notably, the Virginia court indicated that its constitution protects substantive rights

Court should place weight on other state courts' interpretations of their own constitutions, which differ from Minnesota's. This Court should, instead, look to its case law and the federal judiciary's due process jurisprudence.

The Texas Supreme Court in *Galbraith Engineering Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867, 869 (Tex. 2009), actually found that “[s]tatutes of repose are created by the Legislature, and the Legislature may, of course, amend them or make exceptions to them,” but concluded the revival statute at issue was intended to apply only to statutes of limitation, not to statutes of repose. Here, the Minnesota Legislature clearly intended to change the statute of repose when it amended Section 541.051 in 2007. This Court should give effect to that amendment and allow URS to proceed with its contribution claim against the engineering firm responsible for the faulty design of the 35W Bridge.

### CONCLUSION

The Minnesota Legislature expressed its intent in the clear language of Minn. Stat. § 541.051, subd. 1(b), that contribution claims “may be brought” “[n]otwithstanding” and “regardless” of the ten-year repose period for direct claims. The legislature had a rational basis for changing the law, and Jacobs did not have a vested property right in the

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

protection afforded by the prior statute of repose. Jacobs should not be allowed to escape paying its share of the settlement with the victims of the collapse of the 35W Bridge. For the reasons argued in this brief and URS's prior brief, this Court should reverse the court of appeals.

Dated: February 21, 2011

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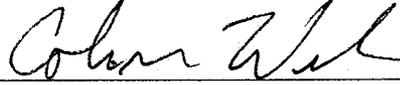
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**CERTIFICATION OF BRIEF LENGTH**

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. The length of this brief is 9,968 words. This brief was prepared using Microsoft Word 2003.

Dated: February 21, 2011

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