

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

State of Minnesota
In Court of Appeals

In re Individual 35W Bridge Litigation.

On Appeal of Order Dated and filed: September 23, 2009
and as amended and filed on: December 23, 2009

Trial Court File Nos. (Hennepin County):
MASTER FILE NO. 27-CV-09-7519
Schwebel Personal Injury: 27 CV 09-7274
Schwebel Wrongful Death: 27 CV 08-28245

REPLY BRIEF OF APPELLANT JACOBS ENGINEERING GROUP INC.

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Table of Contents

	Page
Table of Authorities	ii
Introduction	1
Argument.....	2
I. The Statute of Repose Contained in MINN. STAT. § 541.051 Bars the State’s Claims.....	2
A. The State’s Contractual Indemnity Claim Is Time-Barred.....	2
B. The 2007 Amendments to MINN. STAT. § 541.051 Do Not Revive the State’s Claims.	5
C. The State’s “Statutory Reimbursement” Claim Is Barred by MINN. STAT. § 541.051.	6
II. This Court Cannot Properly Interpret the 2001 Amendments to MINN. STAT. § 541.051 and the 2008 Victims’ Compensation Fund Legislation to Revive Time-Barred Claims and Violate Jacobs’ Due Process Rights.....	10
III. The State’s Claims Are Barred by the Terms of the Releases.....	12
IV. The State Cannot Recover for Its Voluntary Payments.	16
V. If the Compensation Fund Is Interpreted to Permit the State to Assert a Reimbursement Claim Against Jacobs, the Statute Unconstitutionally Impairs Jacobs’ Contractual Rights.	17
Conclusion.....	20

Table of Authorities

	<u>Page</u>
<u>CASES</u>	
<i>Otto B. Ashbach & Sons, Inc. v. State</i> , 78 N.W.2d 446 (Minn. 1956)	18
<i>Bunce v. A.P.I., Inc.</i> , 696 N.W.2d 852 (Minn. Ct. App. 2005)	13, 14
<i>Calder v. City of Crystal</i> , 318 N.W.2d 838 (Minn. 1982).....	4
<i>Camacho v. Todd & Leister Homes</i> , 706 N.W.2d 49 (Minn. 2005).....	10, 11
<i>Christensen v. Minneapolis Mun. Employees Ret. Bd.</i> , 331 N.W.2d 740 (Minn. 1983).....	19
<i>Cisneros v. Alpine Ridge Group</i> , 508 U.S. 10 (1993)	9
<i>D.C. Federation of Civic Ass'ns v. Volpe</i> , 459 F.2d 1231 (D.C. Cir. 1971).....	9
<i>Frederickson v. Alton M. Johnson Co.</i> , 402 N.W.2d 794 (Minn. 1987).....	3
<i>Gomon v. Northland Family Physicians, Ltd.</i> , 645 N.W.2d 413 (Minn. 2002)	7
<i>Holen v. Minneapolis-St. Paul Metropolitan Airports Com'n</i> , 84 N.W.2d 282 (Minn. 1957).....	11
<i>Independent Sch. Dist. No. 197 v. W.R. Grace & Co.</i> , 752 F. Supp. 286 (D. Minn. 1990).....	7, 12
<i>Lesmeister v. Dilly</i> , 330 N.W.2d 95 (1983).....	15
<i>Lienhard v. State</i> , 431 N.W.2d 861 (Minn. 1988)	16
<i>Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co.</i> , 870 F.2d 443 (8th Cir. 1989)	4
<i>McClelland v. McClelland</i> , 393 N.W.2d 224 (Minn. Ct. App. 1986).....	11, 12
<i>Oregon Natural Resources Council v. Thomas</i> , 92 F.3d 792 (9th Cir. 1996).....	9
<i>Osgood v. Medical, Inc.</i> , 415 N.W.2d 896 (Minn. Ct. App. 1987)	15
<i>Pierringer v. Hoyer</i> , 124 N.W.2d 106 (Wis. 1963).....	13

<i>Ploog v. Ogilvie</i> , 309 N.W.2d 49 (Minn. 1981).....	15
<i>Richards v. Gold Circle Stores</i> , 501 N.E.2d 670 (Oh. Ct. App. 1986).....	3
<i>Rudolph Moravian Church v. Michels Pipe Line Constr., Inc.</i> , No. 81-1069, 1982 WL 171750 (Wis. Ct. App. Oct. 4, 1982)(A.247-52).....	15
<i>Sartori v. Harnischfeger Corp.</i> , 432 N.W.2d 448 (Minn. 1988).....	4
<i>Schneider v. United States</i> , 27 F.3d 1327 (8th Cir. 1994).....	9
<i>Seward Housing Corp. v. Conroy Bros. Co.</i> , 573 N.W.2d 364 (Minn. 1998).....	14, 15
<i>Shadburne-Vinton v. Dalkon-Shield Claimants Trust</i> , 60 F.3d 1071 (4th Cir. 1995).....	12
<i>Snyder v. City of Minneapolis</i> , 441 N.W.2d 781 (Minn. 1989).....	16
<i>State ex rel. South St. Paul v. Hetherington</i> , 61 N.W.2d 737 (Minn. 1953).....	8
<i>U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.</i> , 749 N.W.2d 98 (Minn. Ct. App. 2008), <i>rev. denied</i> (Minn. Aug. 5, 2008).....	5, 6, 11
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977).....	19
<i>Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.</i> , 876 F.2d 119 (D.C. 1989).....	12
<i>Westerson v. State</i> , 291 N.W. 900 (Minn. 1940).....	18
<i>Weston v. McWilliams & Assocs., Inc.</i> , 716 N.W.2d 634 (Minn. 2006).....	6, 11, 12
<i>Yaeger v. Delano Granite Works</i> , 84 N.W.2d 363 (Minn. 1957).....	19
<i>Zuehlke v. Indep. Sch. Dist. No. 316</i> , 538 N.W.2d 721 (Minn. Ct. App. 1995).....	19, 20

STATUTES

MINN. STAT. § 3.7391.....	20
MINN. STAT. § 3.7393 11(b).....	16
MINN. STAT. § 3.7394.....	19, 20

MINN. STAT. § 541.051 *passim*

MINN. STAT. § 645.17(1) 8

MINN. STAT. § 645.21 6

OTHER AUTHORITIES

TOBIAS A. DORSEY, LEGISLATIVE DRAFTER’S DESKBOOK § 9:41 (2006) 8, 9

Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*,
20 WM. MITCHELL L. REV. 1, 36 (1994) 13, 14

Introduction

The State takes positions that are long on rhetoric but short on legal support. The State repeatedly argues that the rule of law should be ignored because in this case the Bridge collapse was an event of “historic magnitude.” According to the State, Jacobs ignores the “historic magnitude of the Bridge collapse and seeks to escape accountability for its actions by advancing a series of flawed, *technical* arguments.” *State’s Br. at 8* (emphasis added). But, if nothing else, history has taught us that simply because an event of historic magnitude occurs, that fact alone does not provide reason to abandon the rule of law. An event of historic magnitude also does not provide reason for the Court to ignore Jacobs’ “technical arguments”—many of which are grounded in Jacobs’ constitutional rights and long-standing precedent.

In its Response Brief, the State disparages Jacobs’ “technical arguments,” which are based upon Minnesota’s statute of repose, Jacobs’ contractual and due process rights, and the State’s voluntary payments to plaintiffs and subsequent *Pierringer* releases. The State’s Response Brief has a common theme—it essentially ignores the authorities cited by Jacobs and instead mischaracterizes Jacobs’ arguments and misapplies the law. The State’s arguments, if accepted, would deprive Jacobs of numerous legal and constitutional safeguards and would create dangerous precedent. As discussed in detail below, Jacobs’ statutory, common law, and constitutional rights are more than mere “technical arguments.” Rather, they are central protections that must be provided to Jacobs. The State’s arguments should therefore be rejected.

Argument

I. The Statute of Repose Contained in MINN. STAT. § 541.051 Bars the State's Claims.

The State's claims are barred by MINN. STAT. § 541.051 because they were commenced more than ten years—in fact, more than four decades—after substantial completion of construction. The statute applies broadly to extinguish causes of action arising in “tort, contract or otherwise.” There is no exception for claims based on contractual indemnity agreements, or for “statutory reimbursement.” Moreover, because any claims against Jacobs were extinguished long before the Bridge collapse or the enactment of the Compensation Fund legislation, the general authorizing language of that legislation— “[n]otwithstanding any statutory or common law to the contrary”—is plainly insufficient to revive an expired cause of action.¹

A. The State's Contractual Indemnity Claim Is Time-Barred.

The State's contractual indemnity claim against Jacobs is barred by the statute of repose contained in MINN. STAT. § 541.051. The State claims, however, that MINN. STAT. § 541.051 does not apply because the 1962 Contract predates the 1965 effective date of the statute's original version, and the statute was not made retroactive. *State's Br. at 15*. But the State ignores the fact that, by its express terms, the operative event under the statute is the prescribed period after “substantial completion of construction,” *not* contract signing. By the time the Bridge was substantially completed in 1967, Minnesota had already adopted a repose statute; it is therefore unnecessary for this Court to consider the State's claim that

¹ And, as explained in further detail below, allowing the revival of previously time-barred claims would violate Jacobs' due process rights.

principles of retroactive statutory application are implicated if the statute of repose is applied to bar the State's contractual indemnity claim against Jacobs. Moreover, even under the State's erroneous interpretation of the repose statute, there is no plausible way Jacobs can be viewed as arguing for a retroactive application of the statute. Claims against Jacobs were not extinguished until 1977, ten years *after* substantial completion, twelve years *after* the repose statute became effective, and 15 years *after* contract signing.

The State, however, refuses to recognize that the simple and straightforward application of § 541.051 bars its contractual indemnity claim and instead makes a number of elaborate and misplaced arguments regarding the retroactivity of § 541.051. The State repeatedly relies on an Ohio Court of Appeals case, *Richards v. Gold Circle Stores*, 501 N.E.2d 670 (Oh. Ct. App. 1986), to argue that § 541.051 does not apply to its contractual indemnity claim. *Richards* is simply not on point because it only addressed whether the Ohio statute of repose applied to actions sounding in tort or applied to both tort and contract actions. *Id.* at 674 (“Nor do we find anything [in the Ohio statute] indicating that it applies to breach of express written contracts.”). In fact, the court found it unnecessary to resolve the issue of retroactivity since retroactivity had no application to the case before it. *Id.* at 675. The Minnesota statute, of course, applies expressly to actions in “contract, tort, or otherwise.” *See also Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 796-97 (Minn. 1987) (§ 541.051 applied to bar contractual indemnity claim). There is therefore no reason for the Court to consider *Richards* in deciding this appeal.

Even if this Court were to decide—contrary to the clear language of the statute—that contract signing rather than “substantial completion of construction” is the operative event,

§ 541.051 would still apply to bar the State's claims. Minnesota courts have repeatedly found that § 541.051, which covers both tort and contract actions, applies to extinguish claims for improvements to real property that were substantially completed before Minnesota enacted its first repose statute. For instance, in *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982), the Minnesota Supreme Court applied § 541.051 to a project that had been substantially completed in 1958; in *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988), the Minnesota Supreme Court applied § 541.051 to a project substantially completed in 1964; in *Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443 (8th Cir. 1989)(applying Minnesota law), the Eighth Circuit applied § 541.051 to a project completed in 1959. The State seeks to distinguish these cases on the grounds that none of them addressed a contractual indemnity claim or the issue of retroactivity with respect to any such rights. *State's Br. at 16*. The State misreads the cases and there is no basis for this Court to rely on an inapposite Ohio case in view of this Minnesota precedent.

In *Lourdes*, recovery was sought on both contract and tort theories. 870 F.2d at 444. *Sartori* involved both warranty and tort claims, 432 N.W.2d at 450-51; and *Calder* involved both indemnity and contribution claims which certainly arose out of a construction contract inasmuch as the case involved the installation of a municipal water system. 318 N.W.2d at 839. Thus, *Lourdes* clearly involved a contract claim and *Sartori* and *Calder* are, at best, ambiguous. And there is good reason for the ambiguity—Minnesota courts do not distinguish contract claims from tort claims in giving § 541.051 retroactive effect because,

after all, § 541.051 does not distinguish contract claims from tort claims.² Further, the State's contention that the cases relied on by Jacobs do not address the issue of retroactivity is absurd. The Minnesota Supreme Court and the Eighth Circuit did better than address the retroactivity of § 541.051; they *applied* § 541.051 to improvements completed before any repose statute existed.

B. The 2007 Amendments to MINN. STAT. § 541.051 Do Not Revive the State's Claims.

Contrary to the State's claim, the 2007 amendments to MINN. STAT. § 541.051 did not have the effect of reviving claims that had expired before the retroactive effective date (June 30, 2006) of those amendments. The State relies largely on this Court's ruling 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). As explained in Jacobs' opening brief, however, it does not appear that the parties in *U.S. Home* asked the Court to consider the distinction between interpreting the amendments to revive causes of action extinguished *before* the June 30, 2006, retroactive date, and interpreting them to revive those extinguished only *after* that date. *See Jacobs' Initial Br. at 19*. In both instances, applying the amendments to such actions would give them retroactive effect, but the latter application would be much more narrowly tailored so that the amendments would not impair long-ago acquired repose rights. The Court should consider the significance of this distinction and reject the far reaching retroactive application that the State urges here. The more limited application would still

² Since § 541.051 applies to extinguish causes of action arising in "tort, contract or otherwise," § 541.051 also bars the State's claim for statutory reimbursement. Jacobs addresses the State's contention that its reimbursement claim survives based on its "notwithstanding any statutory or common law to the contrary" language argument in Section C *infra*.

give effect to remedying the situation present in both *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006) and *U.S. Home*, but not in this case, *viz.*, where the timeliness of a contribution claim might depend on the fortuity of when the plaintiff chooses to bring suit against a defendant. Given that the retroactive effective date is one day after the filing of the *Weston* decision, there cannot be any serious doubt that this is the issue that the legislature sought to address with the amendments. Where, as here, however, the repose statute has extinguished both direct and contribution claims, there is no variability or fortuity in the timeliness of contribution claims. Hence, the 2007 amendments should not be interpreted to apply to circumstances for which they were not intended.

C. The State's "Statutory Reimbursement" Claim Is Barred by MINN. STAT. § 541.051.

Throughout its Response Brief, the State argues that MINN. STAT. § 541.051 does not apply retroactively to bar its contractual indemnity claim because § 541.051 does not contain language clearly and manifestly indicating that the legislature intended that it apply retroactively. Curiously, however, when it turns to its statutory reimbursement claim, the State does an about-face and insists that no such manifestation of intent is necessary for the Compensation Fund legislation to have retroactive effect. Under MINN. STAT. § 645.21 "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Nothing in the legislation purporting to create the State's statutory reimbursement claim states that it is to have retroactive effect, which is precisely the effect the State urges here by seeking to impose liability which had long ago been extinguished. The State faults Jacobs for focusing on the fact that the legislature did not use language reflecting retroactivity, such as "retroactive" or "revive" when it drafted the legislation.

Language, however, is the means by which the legislature expresses intent; and when the legislature has intended a statute to have retroactive effect, it has said so. When the Minnesota legislature years ago passed a law to revive certain extinguished asbestos property claims, it expressed its intent through explicit and unmistakable language. See *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990). Moreover, the State's reliance on *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W. 2d 413 (Minn. 2002), is misplaced. *Gomon* involved the extension of a statute of limitations that specifically changed the time period for bringing claims from two years to four years and clearly stated an effective date from which time the new statute of limitations would be operative.

The plain language of the Compensation Fund legislation gives no indication that the legislature intended to give the Compensation Fund legislation retroactive effect. While its "notwithstanding any statutory . . . law to the contrary" language is most certainly broad, it is silent on retroactivity, which is one area of the law that demands specificity. The State, without any support in the legislative record, insists that the legislature "manifestly reached back" and "necessarily created a cause of action based upon past causative acts" in enacting the reimbursement statute. *State's Br. at 20*. But these are the State's words, based on what the State wishes the Compensation Fund legislation to be, not the words of the legislature, or words evidencing that the legislature intended the Compensation Fund legislation to have retroactive effect.

The State further alleges that should the Compensation Fund legislation be deemed ambiguous it would be absurd not to give it the retroactive effect of trumping the statute of repose to allow a claim against Jacobs. The State has an odd sense of absurdity given the

troubling breadth which the State assigns to the authorizing language “notwithstanding any statutory or common law to the contrary.” The State’s interpretation of this language in one fell swoop abrogates the common law, supplants the principle of *stare decisis*, and provides a vehicle for chaos. That is an absurd result. See MINN. STAT. § 645.17(1) (providing that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”); see also *State ex rel. South St. Paul v. Hetherington*, 61 N.W.2d 737 (Minn. 1953) (holding that a statute is not to be given an absurd construction if its language will reasonably bear any other construction).

The phrase “notwithstanding any other provision of law” is a catchall phrase, often used by legislatures for emphasis. As one treatise on legislation observes:

The phrase “notwithstanding any other provision of law” is popular with people who have not really thought through a problem. They think that it is an effective way to ensure that a new rule prevails over an old rule—but they are wrong.

Courts do not take the phrase very seriously, and for good reason: Even when Congress does use the phrase, Congress usually does not intend that all other laws are to be disregarded. When Congress says, “Notwithstanding any other provision of law, the Secretary shall ensure that X, Y, and Z happen,” Congress usually does not mean that the secretary may violate criminal laws and appropriations laws and administrative procedure laws and personnel laws and a whole host of other general laws. And yet that is literally what Congress seems to have said.

A definitive statement from the Supreme Court is hard to come by, but several federal appeals courts have held that the phrase is not always to be taken literally and does not require that all otherwise applicable laws be disregarded.

TOBIAS A. DORSEY, LEGISLATIVE DRAFTER'S DESKBOOK § 9:41 (2006).³ And yet that is this nonsensical interpretation of the authorizing language in the Compensation Fund legislation that the State seeks. The “notwithstanding” clause at issue here was added to the Compensation Fund legislation by the State so that the State could recover (from three specific entities) funds that it voluntarily paid to claimants. Even case law giving effect to “notwithstanding” clauses makes clear that such clauses cannot override a party’s constitutional rights. *See Schneider v. United States*, 27 F.3d 1327, 1332 (8th Cir. 1994) (finding that appellants did not have a valid constitutional claim, but noting that a valid constitutional claim would trump the statutory provision at issue).

For example, when Congress passed a law that required the award of timber sale contracts “notwithstanding any other provision of law,” Congress meant to disregard environmental laws only; Congress did not mean to disregard other laws, such as federal contracting requirements. *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792 (9th Cir. 1996). Likewise, when Congress directed that a bridge be constructed “notwithstanding any other provision of law,” Congress did not mean to disregard historic preservation laws. *D.C. Federation of Civic Ass’ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971). For all of these reasons, § 541.051 bars the State’s statutory reimbursement claim.

³ There certainly are decisions that give effect to “notwithstanding” clauses. *See, e.g., Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (noting that, when construing statutes, the use of a “notwithstanding” clause “signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section” of the statute). However, these cases do not involve the unusual situation that is present here: the State is attempting to use the “notwithstanding” clause retroactively to trample Jacobs’ statutory, common law, and constitutional rights.

II. This Court Cannot Properly Interpret the 2001 Amendments to MINN. STAT. § 541.051 and the 2008 Victims' Compensation Fund Legislation to Revive Time-Barred Claims and Violate Jacobs' Due Process Rights.

MINN. STAT. § 541.051 should not be interpreted to revive long-ago-expired claims against Jacobs; such an interpretation would violate Jacobs' due process rights. The State, however, mischaracterizes Jacobs' constitutional argument. Jacobs does not claim that MINN. STAT. § 541.051 or its 2007 amendments should be declared unconstitutional. Nor does Jacobs claim that the 2008 Victims' Compensation Fund legislation is unconstitutional as applied to entities other than Jacobs. To the contrary, Jacobs has instead only argued (both on appeal and before the trial court) against an unconstitutional interpretation or application of the 2007 amendments and the Compensation Fund legislation to the facts of the State's (and URS') case against Jacobs. Indeed, the application of the 2007 amendments and the Compensation Fund legislation sought by the State is unconstitutional as it would violate Jacobs' due process rights by reviving time-barred claims. Contrary to the State's assertion, this constitutional violation is not cured simply because the legislature may have a "rational" basis for acting. *See Jacobs' Initial Br. at 24.*

In an attempt to circumvent well-established precedent, the State claims that, although the statute of repose in MINN. STAT. § 541.051 is a "substantive right," Jacobs does not have a "vested property interest" in the protection provided to it by the statute of repose. *See State's Br. at 22.* Again, the State is wrong: the Minnesota Supreme Court recognizes that statutes of repose create a vested right to immunity from suit. *See, e.g., Camacho v. Todd & Leister Homes*, 706 N.W.2d 49, 55 (Minn. 2005) (statutes of repose create "a substantive right in those protected to be free from liability after the legislatively-

determined period of time”) (citation omitted). The substantive–procedural distinction between statutes of repose and statutes of limitations is a crucial one with constitutional significance. See *Weston*, 716 N.W.2d at 641.

Moreover, the State incorrectly claims, relying on *U.S. Home*, that Jacobs’ interest in its repose rights is not vested until a “final judgment” has been entered. But—as mentioned in Jacobs’ opening brief and ignored by the State—a “final judgment” is only one way to obtain a vested right. Jacobs also has a vested property interest as a result of the commencement of the substantive repose period in its favor. See, e.g., *Camacho*, 706 N.W.2d at 55.

In addition, the cases relied upon by the *U.S. Home* court for the proposition that there is no vested right until a final judgment has been entered—the *Holen* and *McClelland* cases—are distinguishable from the present situation (and, in fact, support Jacobs’ position, rather than the State’s). *Holen v. Minneapolis-St. Paul Metropolitan Airports Comm’n*, 84 N.W.2d 282, 289-90 (Minn. 1957), unlike the situation here, involved changes made by an amended statute to a *public* rather than a *private* right. Indeed, the *Holen* court noted—as Jacobs argues here—that “[r]etrospective or curative legislation is, of course, prohibited under U.S. Const. Amend. XIV, when it divests any *private vested interest*.” *Id.* at 287 (emphasis added). *McClelland v. McClelland*, 393 N.W.2d 224, 227 (Minn. Ct. App. 1986), also did not involve retroactive legislation that sought to divest previously vested property rights. In *McClelland*, the court found that the “law of the case doctrine” did not prevent the trial court from applying an amended statute that allowed for the award of permanent spousal maintenance. *Id.* at 226-28. Importantly, however, the *McClelland* court noted that a court should not

“apply the law in effect at the time it renders its decision” if doing so “would alter rights that had matured or become unconditional, would impose new and unanticipated obligations on a party, or would work some other injustice due to the nature and identity of the parties.” *Id.* at 226-27 (citation omitted). Here, if the 2007 amendments and Compensation Fund legislation are applied in the manner sought by the State, Jacobs’ right to immunity from suit, which—decades earlier—had “matured or become unconditional,” would be impermissibly “alter[ed.]” *Id.*

Many of the other cases that the State relies upon are also distinguishable from the present situation. For example, *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. 1989), and *Shadburne-Vinton v. Dalkon-Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995), two non-Minnesota cases, rejected the significance of the substantive-procedural distinction between statutes of repose and statutes of limitations embraced by the Minnesota Supreme Court in its *Weston* opinion. Other cases relied upon by the State, such as *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990), were decided before *Weston*. Accordingly, while it is not necessary for this Court to reach the constitutional issue, if it does, the 2007 amendments and 2008 Victims’ Compensation Fund legislation must be struck down as an unconstitutional violation of due process as applied in these cases to Jacobs.

III. The State’s Claims Are Barred by the Terms of the Releases.

The State’s claim against Jacobs also fails as a result of the *Pierringer* releases entered into by the State and plaintiffs/claimants, which preclude the State from seeking to recover those payments from Jacobs. The State concedes that “the release has aspects of a *Pierringer*,

including that the Plaintiffs will indemnify the State against claims by others for contribution and indemnity in relation to the State's percentage of fault determined by the fact-finder," but contends that it is entitled to contribution because it "expressly preserves the State's right to statutory reimbursement." *State's Br. at 38*. Under *Bunce v. A.P.I., Inc.*, this is exactly what a *Pierringer* release *cannot* do—a party to a *Pierringer* agreement may not "craft[] its own legal theory to attempt to build in a chance to recoup more money." *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 858 (Minn. Ct. App. 2005).

The position that the State urges—that the State can be party to a settlement that equates payments to its own share of fault, while seeking to recover all or a portion of the payment to the extent of the alleged fault of another—is thoroughly untenable and lacking in logic and principle. The State seeks to use a *Pierringer* as both a shield and a sword, which Minnesota courts have not permitted. It is well established that a settling defendant cannot attempt to recover any portion of its settlement payments from non-settling parties. *Bunce*, 696 N.W.2d at 855-56. "Allowing a settling defendant a right to contribution would effectively subject the nonsettling defendant to liability for its own share of fault and for the settling defendant's share of fault. This would be an outright betrayal of the *Pierringer* promise." Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 WM. MITCHELL L. REV. 1, 36 (1994).

The State thus misconstrues the "purpose of a *Pierringer* release," *State Br. at 38*, which is not just to allow a plaintiff to continue its action against non-settling tortfeasors, but also to buy the peace of the settling party by creating a mechanism to take the settling parties out of litigation, *see Pierringer v. Hoyer*, 124 N.W.2d 106, 111-12 (Wis. 1963), and to assure "a fair

result to the nonsettling defendant.” Knapp, *supra*, at 4. What the State proposes would have the opposite effect of continuing its claims through litigation while imposing liability on Jacobs for the State’s share of fault. Moreover, the State’s claim that *Pierringer* does not apply because Jacobs is not subject to direct suit by the plaintiffs blatantly ignores Minnesota law, which makes no distinction between non-settling third-party defendants and non-settling defendants whom the plaintiff has sued directly. *Bunce*, 696 N.W.2d at 855.

Like the statutory reimbursement claim, the State’s contractual indemnity recovery is limited to the State’s proportional fault, because the 1962 Contract does not clearly and unequivocally express intent for Sverdrup & Parcel and Associates, Inc. (“S&P”) to indemnify the State for its own negligence. *Jacobs’ Initial Br. at 39-40*. Contractual indemnity agreements that give the settling defendant *independent* claims should be treated differently. *See Knapp, supra*, at 38. Thus, the State’s reliance on *Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364 (Minn. 1998), actually supports Jacobs’ argument, not the State’s. In *Seward, Conroy Bros* (“Conroy”) paid \$400,000 to the plaintiff in exchange for a *Pierringer* release. Conroy had a contractual indemnity agreement with another party requiring that party to procure a \$250,000 policy insuring Conroy against its own fault. *Id.* at 365. After the settlement, Conroy commenced an action for indemnity for the amount of the policy, which had never been procured. Significantly, Conroy did not seek to recover the full \$400,000, and for all the reasons explained above, the terms of its *Pierringer* release foreclosed such a claim. *Id.* The contractual agreement to procure insurance, however, was an independent undertaking not based on comparative fault principles. Hence, Conroy had a claim to the extent of that independent agreement. The court ruled in the end, however, that the kind of

policy for which the promise to procure had been made would not have covered Conroy's liability, so its claim for indemnification was dismissed. *Id.* at 368. The case offers no support to the State's position because in these cases it is not seeking indemnity for the failure to procure insurance or for any other undertaking independent of comparative fault principles.⁴

The other Minnesota cases cited by the State are also factually inapposite. *Osgood v. Medical, Inc.*, 415 N.W.2d 896 (Minn. Ct. App. 1987), does not support the State's claim, because in that case, both the manufacturer and the purchaser entered into a *Pierringer* settlement with the plaintiff in which *both* parties "left open the cross-claims between [them] for later resolution." *Id.* at 899. It was in consideration of those cross-claims that the court enforced the indemnification agreement. *Id.* Neither *Lesmeister v. Dilly*, 330 N.W.2d 95 (1983)⁵, nor *Ploog v. Ogilvie*, 309 N.W.2d 49 (Minn. 1981), is apposite because neither case involved a contractual obligation that was based on the proportional fault of the parties.

The State is left only with its fallback position that by legislative fiat all statutory and common-law defenses have been negated through the simple words "Notwithstanding any

⁴ The State also cites two Wisconsin unpublished decisions that likewise fail to support its position. Among other things, as one of those cases demonstrates, Wisconsin law permits a party to obtain indemnification from another for its own fault. See *Rudolph Moravian Church v. Michels Pipe Line Constr., Inc.*, No. 81-1069, 1982 WL 171750, at *2 (Wis. Ct. App. Oct. 4, 1982)(A.247-52). In such circumstances, unlike under Minnesota law, the formula of a *Pierringer* release would not of necessity extinguish an indemnity claim because the settling party would be seeking to recover for its own fault, not that of others.

⁵ In addition to being inapposite, the court in *Lesmeister v. Dilly* specified that the decision was limited to the facts of that case and that it was not to have precedential value. *Id.* at 100.

statutory or common law to the contrary.” These words cannot sweepingly apply to exempt the State from the rule of all law. *See section I(C), above, at 6-10.*

IV. The State Cannot Recover for Its Voluntary Payments.

In dramatically circular reasoning, the State argues that its payments to the plaintiffs were not made voluntarily because they were required by the terms of the Compensation Fund legislation—and it goes on to identify all of the requirements imposed on the State by—itsself. The State concedes that, by implementing the Compensation Fund legislation, the State “created a process wherein the claims and demands of survivors were made and resolved.” *State’s Br. at 35.* Of course, the passage of the legislation after the collapse is precisely what makes the payments voluntary. Prior to passage of the legislation (and at the time of the collapse), the State had by law a \$1 million aggregate limit of liability; and it voluntarily agreed to increase that amount by 37 times on a one-time basis for a past event.

The State’s position that its waiver in MINN. STAT. § 3.7393 11(b) of the statutory liability cap of \$1 million was not voluntary because of the “substantial uncertainty” as to whether a court would uphold the liability cap is disingenuous. *State’s Br. at 32.* The State or its subdivisions have successfully defended the validity of the statutory tort liability cap in numerous cases, including in cases involving large damages. *See, e.g., Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989); *Lienhard v. State*, 431 N.W.2d 861, 868 (Minn. 1988). The State provides no law or facts—besides rote recitation that the collapse was a “catastrophe of historic proportions”—to support its conjecture that absent the

Compensation Fund legislation it would have been subject to any legal duty to compensate the plaintiffs beyond the \$1 million aggregate limit.⁶

V. If the Compensation Fund Is Interpreted to Permit the State to Assert a Reimbursement Claim Against Jacobs, the Statute Unconstitutionally Impairs Jacobs' Contractual Rights.

The State also misconstrues Jacobs' impairment-of-contract argument. Jacobs does not contend that the indemnity provision of the 1962 Contract confers upon and guarantees Jacobs a right to absolute tort immunity or that Jacobs has a contractual right to sovereign immunity; rather, Jacobs argues that *the State's* sovereign immunity from tort liability at the time of the 1962 Contract defines the scope of Jacobs' contractual liability to *the State* for indemnity. The existence of this contractual right defining the scope of liability does not render the indemnity provision meaningless. In 1962, the State was exposed to potential liability in numerous areas of the law for which it might conceivably seek indemnification—but not in tort. The State also confuses Jacobs' fixed contractual right with the State's evolving tort exposure and completely ignores its own self-dealing.

In 1962, the doctrine of sovereign immunity barred all claims in tort against the State. It would have been unimaginable to include an indemnity provision covering suits in tort when there could be none, just as it would be pointless for a contractor today to agree to indemnify the State against liability for its own intentional or wanton acts which, for reasons of public policy, are not subject to indemnification. Indeed, to suggest that an indemnity

⁶ The State is wrong in assuming that the voluntariness of the payments is not a defense to the contractual indemnity claim. *State's Br. at 34-36*. The indemnity provision makes clear that indemnity is contemplated only where the State is presented with certain legal obligations or liabilities to others, and not, as here, where the State has made voluntary undertakings.

provision for tort claims was necessary might itself have undermined the immunity. Even though the indemnity provision did not contemplate indemnity for the then-non-existent tort liability of the State, the provision was far from illusory. It provided indemnification for *non-tort* claims against the State arising out of the design work. It might, for example, compel S&P to indemnify the State for a breach of contract claim brought by the construction contractor if the design made construction impossible. *See, e.g., Otto B. Ashbach & Sons, Inc. v. State*, 78 N.W.2d 446 (Minn. 1956). It might also compel S&P to indemnify the State if the design had caused the bridge to impinge upon a property owner's property rights. *See, e.g., Westerson v. State*, 291 N.W. 900, 902 (Minn. 1940). Hence, the State's contention that Jacobs' reading of the indemnity provision would "render[] an essential term of the contract . . . meaningless and the contract illusory" is just plain wrong. *State's Br. at 44.*

The State is also wrong in arguing that Jacobs' *vested* right to immunity from State claims of contribution-indemnity in tort under the 1962 Contract can somehow become unvested through evolving tort law. While it is true that "the State's liability to others was not fixed by the terms of the contract," and that the State's tort liability is determined by the tort law in effect at the time the State commits a tort, it does not follow that Jacobs' contractual indemnity obligation to the State "corresponding[ly]" evolves. *State's Br. at 44.* Contracts, by their nature, "fix" things, whether those things are prices or liability. The same is true regarding contractual limitations of liability. As explained at length in its initial brief, Jacobs has a vested *contractual* right to immunity *vis-à-vis* State claims for contribution or indemnity in tort that has nothing to do with the State's exposure under prevailing *tort* law. A vested contractual right "in such determined liability may not be destroyed by legislation

which imposes a new obligation or an additional liability.” *Yaeger v. Delano Granite Works*, 84 N.W.2d 363, 366 (Minn. 1957).

The State also fails to distinguish the extensive case law cited in Jacobs’ initial brief in which courts subject a challenged statute to heightened scrutiny when the State is a party to the impaired contract. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977); *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 751 (Minn. 1983). *Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 727 (Minn. Ct. App. 1995). These cases undermine the State’s claim that the Compensation Fund statute is reasonably and appropriately tailored to serve a broad public purpose. Judicial deference to legislative assessments of reasonableness and necessity—contrary to the State’s contention (*see State’s Br. at 46*)—is inappropriate in such circumstances. The reason is simple: “[T]he State’s self-interest is at stake.” *United States Trust*, 431 U.S. at 26; *Christensen*, 331 N.W.2d at 751.

The State claims that the cases cited by Jacobs are inapposite because they “involve circumstances wherein a statute statutorily voids its own financial obligations for its self-interest[.]” *State’s Br. at 47*. But that is precisely what the State is attempting to do. The State’s self-interest is on display in the Compensation Fund statute, in the State’s response brief, and—contrary to the State’s claim—in its attempt to abandon a fundamental premise of the 1962 Contract: S&P’s immunity from tort indemnity based on the State’s sovereign immunity. In the Compensation Fund statute, the State voluntarily spent \$37 million to benefit a narrow class and then, in an attempt to have others pay for it, included a reimbursement provision claiming that it is “entitled” to recover this money just because it says so, “[n]otwithstanding any statutory or common law to the contrary.” MINN. STAT.

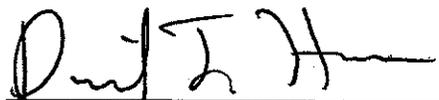
§ 3.7394, subd. 5. The State disguises its self-interest in its response brief by claiming that the statute is narrowly tailored to “recoup taxpayer funds” (*State’s Br. at 47*), but that is not even one of the self-serving stated purposes of the statute. See MINN. STAT. § 3.7391. As the Minnesota Court of Appeals has warned, “courts should closely scrutinize state statutes affecting public contracts to make certain that a state is not attempting to escape *from its own financial obligations*”—as the State is attempting to do here. *Zuehlke*, 538 N.W.2d at 727 (emphasis added).

Conclusion

For all of these reasons, the trial court decision should be reversed, and judgment of dismissal ordered.

Dated: March 30, 2010.

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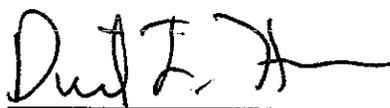
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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 5,869 words. This brief was prepared using Microsoft Word 2003.

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