MINNESOTA STATE LAW LIBRARY

4

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

State of Minnesota
In Supreme Court

In re Individual 35W Bridge Litigation

BRIEF AND ADDENDUM OF APPELLANT JACOBS ENGINEERING GROUP INC.

MASLON EDELMAN BORMAN & BRAND, LLP
David F. Herr (#44441)
James Duffy O'Connor (#80780)
Kirk O. Kolbo (#151129)
Nicole Narotzky (#0329885)
Abigail Richey-Allen (#0388864)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

Attorneys for Appellant Jacobs Engineering Group Inc.

Counsel for Respondents Identified on Inside Cover

2010 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Lori Swanson
Alan I. Gilbert
Kristyn Anderson
OFFICE OF THE ATTORNEY GENERAL
1100 Bremer Tower
445 Minnesota Street
St. Paul, Minnesota 55101
(651) 296-3353

Attorneys for Respondent State of Minnesota

Jocelyn L. Knoll
Eric A. Ruzicka
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402
(612) 340-2600

Attorneys for Respondent URS Corporation

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

Table of Contents

Page

Table of Contents of Addendum & Appendix iii

Table of Authorities vi

Legal Issues 1

Statement of the Case 3

Statement of Facts 6

Summary of Argument 8

Argument 11

I. Standard of Review 11

II. The State's Claims Are Barred by the Repose Provision of Minn. Stat. § 541.051. 11

A. Jacobs Acquired a Right to Immunity from Suit by the State Decades Prior to the Collapse of the Bridge 11

B. The 2007 Amendments to Minn. Stat. § 541.051 Did Not Revive the State's Claims Against Jacobs 13

C. The 2008 Compensation Legislation Did Not Revive the State's Claims Against Jacobs 23

III. Statutory Revival of Claims for Which Jacobs Has Acquired Vested Right of Immunity From Suit and Liability Would Violate its Due Process Rights under the United States and Minnesota Constitutions 24

A. A Statute of Repose Creates a Substantive Limit on Liability and a Right of Certainty and Finality in Immunity from Suit 24

B. Jacobs Acquired under Minn. Stat. § 541.051 a Vested Right of Immunity from Suit and Liability, Entitled to Due Process Protection 28

IV. If the 2008 Compensation Legislation (Minn. Stat. §§ 3.7391-3.7395) is Interpreted to Permit the State to Assert a Reimbursement Claim Against Jacobs, the Statute Impairs Jacobs' Contractual Rights in Violation of the United States and Minnesota Constitutions 34

A. The Reimbursement Provision of the Compensation Legislation Substantially Impairs Jacobs' Rights under the 1962 Design Contract with the State 35

B. The Reimbursement Provision Lacks a Significant and Legitimate Public Purpose Sufficient to Overcome the Substantial Impairment it Inflicts on Jacobs' Rights under the 1962 Contract. 37

C. Even if the Compensation Legislation Has A Significant and Legitimate Public Purpose, the Reimbursement Provision Is Not Tailored to Accomplish it 41

V. The State's Releases from the Survivors Preclude Any Liability of Jacobs to the State 41

VI. The State's Claims Are Precluded to the Extent They Were Made Voluntarily and in the Absence of Legal Duty 46

Conclusion 47

Table of Contents of Addendum & Appendix

Page

ADDENDUM

Court of Appeals Opinion, filed August 24, 2010 ..... Add.1

Order (denying Jacobs' Motion to Dismiss Cross-Claims) dated September 23, 2009 ..... Add.20

Order (denying Jacobs' Motion to Dismiss Cross-Claims on remand) dated December 23, 2009 ..... Add.41

Amended Order (denying Jacobs' Motion to Dismiss Cross-Claims on remand) dated January 26, 2010 ..... Add.43

Order (denying Jacobs' Motion to Dismiss Third-Party Claims) dated August 28, 2009 ..... Add.45

2007 Minn. Laws ch. 105 ..... Add.54

2007 Minn. Laws ch. 140 (excerpts) Add.61

Compensation Fund Statutes, Minn. Stat. §§ 3.7391-.7395 ..... Add.61

Transcript of May 16, 2007 House Floor Session Part 3 discussion on S.F. 241 ..... Add.76

APPENDIX

TRIAL COURT ORDERS

Order for Consolidation dated August 28, 2009 ..... A.1

Amended Order (to Consolidation Order) dated September 22, 2009 ..... A.8

PLEADINGS[1]

Complaint of Michael J. Weese and Kimberly Weese (lead Schwebel personal injury case) dated March 31, 2009 (Affidavit of Richard J. Nygaard and attachments omitted) A.12

[1] In the interest of concision, the wrongful death category pleadings, which do not contain any differences pertinent to this appeal, are not included in this appendix.

URS Corporation's Answer, Cross-Claim and Third Party Complaint in (*Weese*) file no. 27-CV-09-7274 (lead Schwebel personal injury case) dated May 18, 2009 ..... A.43

PCI's Third-Party Complaint against the State and Jacobs in (*Weese*) file no. 27-CV-09-7274 (lead Schwebel personal injury case) dated May 1, 2009 ..... A.64

State of Minnesota, Department of Transportation's Answer to Third Party Plaintiff Progressive Contractors Incorporated's Amended Third Party Complaint, Counterclaim Against Third Party Plaintiff Progressive Contractors Incorporated, and Cross-Claim Against Third Party Defendant Jacobs Engineering, Inc. dated May 14, 2009 ..... A.112

State of Minnesota, Department of Transportation's Amended Answer to Third Party Plaintiff Progressive Contractors Incorporated's Third Party Complaint, Counterclaim Against Third Party Plaintiff Progressive Contractors Incorporated, and Cross-Claim Against Third Party Defendant Jacobs Engineering, Inc. dated June 3, 2009 ..... A.132

Jacobs Engineering Group Inc.'s Notice of Motion and Motion to Dismiss the State's Cross-Claims dated June 9, 2009 ..... A.152

Memorandum of Law of Jacobs Engineering Group Inc. in Support of Rule 12 Motion to Dismiss State's Cross-Claims dated July 13, 2009 ..... A.155

Affidavit of Kirk Kolbo in Support of Rule 12 Motion to Dismiss State's Cross-Claims dated July 13, 2009 ..... A.180

State of Minnesota's Response to Jacobs' Motion to Dismiss dated July 31, 2009 ..... A.190

Transmittal Affidavit of Kristyn Anderson in Support of Response to Motion to Dismiss dated July 31, 2009 ..... A.218

Jacobs Engineering Group Inc.'s Reply Brief in Support of Rule 12 Motion to Dismiss State's Cross-Claims dated August 5, 2009 ..... A.253

APPELLATE PLEADINGS

Notice of Appeal in (Weese) file no. 27-CV-09-7274 (lead Schwebel personal injury case) dated January 13, 2010 ..... A.264

Statement of the Case in (Weese) file no. 27-CV-09-7274 (lead Schwebel personal injury case) dated January 13, 2010 ..... A.267

Jacobs Engineering Group Inc.'s Petition for Discretionary Review of the District Court's Order Denying Motion to Dismiss (*Weese*) file no. 27-CV-09-7274 (lead Schwebel personal injury case) dated January 13, 2010 ..... A.276

APPELLATE ORDERS

Order (consolidating appeals A09-1776 and A09-1778) dated October 1, 2009 ..... A.289

Order (consolidating appeals A09-1830 and A09-1831) dated October 8, 2009 ..... A.295

Order (allowing appeals of A09-1776 and A09-1778 under Minn. R. Civ. P. 103.03(j)) dated November 3, 2009 ..... A.301

Order (denying petitions for discretionary review as moot in A09-1779 and A09-1781) dated November 3, 2009 ..... A.305

Order (remanding A09-1830 and A09-1831 to District Court) dated November 10, 2009 ..... A.306

Order (denying petitions for discretionary review in A09-1832 and A09-1833) dated November 24, 2009 ..... A.309

OTHER

Letter dated November 12, 2009, from Theodore V. Roberts to Clerk of Appellate Courts re: PCI will not participate in the appeal A.311

Table of Authorities

Page

CASES

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 38, 39

Amaral v. St. Cloud Hosp., 598 N.W.2d 379 (Minn. 1999) 17

Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003) 11

Bunce v. A.P.I., Inc. 696 N.W.2d 852 (Minn. Ct. App. 2005) 43, 44

Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982) 12, 13

Camacho v. Todd & Leiser Homes, 706 N.W.2d 49 (Minn. 2005) 1, 21, 28

Chase Secs. Corp. v. Donaldson, 325 U.S. 304 (1945) 27

Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740 (Minn. 1983) 2, 34, 37, 38, 39

Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993) 23

City of Willmar v. Short-Elliott-Hendrickson, 512 N.W.2d 872 (Minn. 1994) 26

Donaldson v. Chase Securities Corp., 216 Minn. 269, 13 N.W.2d 1 (1943) 26, 27

Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983) 2, 34, 39

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 39

Farber v. Lok-N-Logs, Inc., 701 N.W.2d 368 (Neb. 2005) 32

Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978) 2, 41, 42, 45

Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863 (Tex. 2009) 32

Genin v. 1996 Mercury Marquis, 622 N.W.2d 114 (Minn. 2001) 17

Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413 (Minn. 2002) 15, 27

Halverson v. Rolvaag, 274 Minn. 273, 275, 143 N.W.2d 239, 241 (1966) 29

Holen v. Minneapolis-St. Paul Metro. Airports Comm'n, 250 Minn. 130, 84 N.W.2d 282 (1957) 1, 24, 25

In re Individual 35W Bridge Litig., 787 N.W.2d 643 (Minn. Ct. App. 2010) 5

In re Individual 35W Bridge Litig., 786 N.W.2d 890 (Minn. Ct. App. 2010) 4

Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990) 32, 33

Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868 (Minn. 1986) 34, 38, 39, 40

Kratzer v. Welsh Cos., LLC, 771 N.W.2d 14 (Minn. 2009) 16

Larson v. Babcock & Wilcox, 525 N.W.2d 589 (Minn. Ct. App. 1994) 33

Lunderberg v. Bierman, 241 Minn. 354, 63 N.W.2d 355 (1954) 47

McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) 21

Midwest Family Mut. Ins. Co. v. Bleick, 486 N.W.2d 435 (Minn. Ct. App. 1992) 34, 41

Pac. Indemn. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977) 12

Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969) 1, 26, 27, 29, 30, 31

Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963) 42

Pritchard v. Norton, 106 U.S. 124 (1882) 36

Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989) 2, 43

Ripley v. Tolbert, 921 P.2d 1210 (Kan. 1996) 32

Samuelson v. Chicago, R.I. & P.R. Co., 287 Minn. 264, 178 N.W.2d 620 (1970) 2, 39, 46

Sch. Bd. of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325 (Va. 1987) 32

Shadburn-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995) 32, 33

State of Minn. v. Jackson, 742 N.W.2d 163 (Minn. 2007) 23

U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc., 749 N.W.2d 98 (Minn. Ct. App. 2008) 14, 24

U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977) 38

Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989) 33

Western States Utilities Co. v. City of Waseca, 242 Minn. 302, 65 N.W.2d 255 (1954) 35

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006) 1, 11, 18, 19, 20, 21, 26, 27

Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) 27

Woodhall v. State, 738 N.W.2d 357 (Minn. 2007) 33

Yaeger v. Delano Granite Works, 250 Minn. 303, 84 N.W.2d 363 (1957) 2, 36

Zuehlke v. Indep. Sch. Dist. No. 316, 538 N.W.2d 721 (Minn. Ct. App. 1995) 38

STATUTES (CONSTITUTION, RULES)

U.S. Const., amend. XIV 1, 25

U.S. Const., art. I, § 10, cl. 1 ..... 2, 34

Minn. Const., art I, § 7 1

Minn. Const., art I, § 11 ..... 2, 34

Minn. Stat. § 3.736 ..... 24, 40, 46, 47

Minn. Stat. § 3.7391 40

Minn. Stat. §§ 3.7391-.7395 ..... 1, 2, 7, 34, 36

Minn. Stat. § 3.7393 ..... 41, 46

Minn. Stat. § 3.7394 ..... *passim*

Minn. Stat. § 541.051 ..... *passim*

Minn. Stat. § 541.22 23

Minn. Stat. § 645.16 ..... 18, 20

Minn. Stat. § 645.17(3) 22

2007 Minn. Laws, ch. 105 14

2007 Minn. Laws, ch. 140, art. 8, § 29 14

1976 Minn. Laws ch. 331, § 33 35

Minn. R. Civ. P. Rule 12.02(e) 11

OTHER AUTHORITIES

54 C.J.S. *Limitations of Actions*, § 5 (2005) 21, 28

51 Am. Jur. 2d *Limitation of Actions* § 18 (2000) 21, 28

Michael J. Vardaro & Jennifer E. Waggoner, Note, Statutes of Repose—*The Design Professional's Defense to Perpetual Liability*, 10 St. John's J. Legal Comment. 697 (1995) 22

Legal Issues

1. Is Jacobs entitled to dismissal of the State of Minnesota's (State) cross-claims against it because Minn. Stat. § 541.051 expressly extinguished the claims prior to the collapse of the I-35W Bridge?

   The trial court held that it was not, and the court of appeals affirmed.

   Apposite Authorities:

   Minn. Stat. § 541.051
   Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006)

2. Where the State's claims were extinguished under Minn. Stat. § 541.051 long before the effective date of the 2007 amendments to the statute, as a matter of constitutional due process, may they nonetheless be revived and asserted based on the 2007 amendments to § 541.051 or the provisions of the legislation passed to compensate victims of the collapse, Minn. Stat. §§ 3.7391-.7395?

   The district court held that these extinguished claims could be asserted, and the court of appeals affirmed.

   Apposite Authorities:

   U.S. Const., amend. XIV § 1
   Minn. Const., art I, § 7.
   Minn. Stat. § 541.051
   Minn. Stat. §§ 3.7391-.7395

   Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006)
   Camacho v. Todd & Leiser Homes, 706 N.W.2d 49 (Minn. 2005)
   Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969)
   Holen v. Minneapolis-St. Paul Metro. Airports Comm'n, 250 Minn. 130, 84 N.W.2d 282 (1957)

3. If the reimbursement provision contained in Minn. Stat. §§ 3.7391–.7395 is interpreted to permit the State to recover payments made by the State to victims of the collapse, would the statute impair Jacobs' contractual rights in violation of the United States and Minnesota Constitutions?

The district court held that the statute would not impair Jacobs' rights, and the court of appeals affirmed.

Apposite Authorities:

U.S. Const., art. I, § 10, cl. 1.
Minn. Const., art I, § 11.
Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983)
Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740, 750-51 (Minn. 1983)
Yaeger v. Delano Granite Works, 250 Minn. 303, 84 N.W.2d 363 (1957)

4. Is Jacobs entitled to dismissal of the State's cross-claims because its releases from Plaintiffs preclude any liability of Jacobs to the State?

The district court held that it was not, and the court of appeals affirmed.

Apposite Authorities:

Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978)
Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989)

5. Does the voluntariness of the State's payments to the victims of the collapse preclude the State's claims?

The district court held that it does not, and the court of appeals affirmed.

Apposite Authorities:

Samuelson v. Chicago, R.I. & P.R. Co., 287 Minn. 264, 178 N.W.2d 620 (1970).

Statement of the Case

This action arises out of the collapse on August 1, 2007 of the I-35W Bridge over the Mississippi in Minneapolis ("Bridge"). *A.1.* Plaintiffs commenced 121 lawsuits for personal injuries or wrongful death in Hennepin County District Court arising out of the collapse. They sued Defendants URS Corporation ("URS") and Progressive Contractors, Inc. ("PCI"). *A.12.* In partial response, URS and PCI commenced third-party contribution and indemnity actions against Appellant, Jacobs Engineering Group Inc. ("Jacobs"), for design work performed in connection with the original construction of the Bridge in the 1960s by Sverdrup & Parcel and Associates, Inc. ("S&P"), which was acquired by Jacobs in 1999. *A.55-56, 67-69.*

PCI also filed a third-party action against Respondent State. *A.69-72.* The State in turn cross-claimed against Jacobs. Following the State's settlement with PCI, its claims against Jacobs are for contractual indemnity on a 1962 contract for the design of the Bridge; and statutory reimbursement arising out of payments made by the State to victims of the collapse pursuant to legislation passed specifically for that purpose. *A.127-129, 147-149.* The State also asserted claims for contribution and indemnity against PCI and URS, but those claims have been settled.

All of the cases were assigned to Hennepin County District Judge Deborah Hedlund, who consolidated the cases for pre-trial purposes. *A.1.* Jacobs first moved to dismiss the third-party actions brought by URS and PCI on several grounds, including the absence of common liability between Jacobs and those defendants to plaintiffs, and the provisions of Minnesota's statute of repose for improvements to real property, Minn. Stat. § 541.051. The

motion was denied by the district court on August 28, 2009. *Add.45.* Jacobs filed two appeals from the denial of that motion and separate petitions for discretionary review. The court of appeals consolidated those appeals (*A.293*) and determined that they were properly taken as appeals as of right (A-09-1776 and A-09-1778). PCI subsequently settled all the claims against it and notified the court of appeals and the parties that it would not be participating in the appeals. *A.311.* The court of appeals issued its decision on August 24, 2010, reversing the district court and ordering that Jacobs was entitled to dismissal of URS' claims because of the absence of common liability. *See In re Individual 35W Bridge Litig.*, 786 N.W.2d 890 (Minn. Ct. App. 2010).

Jacobs also served and filed in the district court a Rule 12 motion to dismiss the State's cross-claims on July 27, 2009. *A.152.* The motion was heard on August 10, 2009. Judge Hedlund denied Jacobs' motion to dismiss by Order dated September 23, 2009. *Add.20.* Jacobs filed notices of appeal and separate petitions for discretionary review. *A.264, 276.* The appeals were consolidated on October 8, 2009. *A.299.* By Order dated November 10, 2009, the court of appeals remanded the case to the district court for an order specifically ruling on the application of Jacobs' statute of repose defense to the State's contractual indemnity claim. *A.308.* The Order provided that once the district court ruled on that remanded issue, Jacobs was permitted to file new appeals as of right.

On December 23, 2009 and January 26, 2010, the district court entered an order and amended order on the remanded issue, which amended its September 23, 2009, order. *Add.41, 43.* In the December and January orders, the district court incorporated its August 28, 2009, order denying Jacobs' motion to dismiss the claims of PCI and URS. *Id.*

The order also denied Jacobs' motion to dismiss against the State on the additional ground that the statute of repose in Minn. Stat. § 541.051 did not apply to the State's contractual indemnity claim because the contract forming the basis for the State's claim was executed prior to the enactment of Minn. Stat. § 541.051. *Id.* Jacobs appealed both the September 23, 2009 and December 23, 2009, orders. The court of appeals issued its decision on August 24, 2010, affirming the decision of the district court. *Add.1* (reported at *In re Individual 35W Bridge Litig.*, 787 N.W.2d 643 (Minn. Ct. App. 2010)). This Court granted Jacobs' petition for further review on November 16, 2010, together with the petition for review of URS.

Statement of Facts

On August 1, 2007, the Bridge collapsed, injuring more than 100 persons and killing 13 persons. *Add.3, 46.* The Bridge was designed and constructed in the 1960s, and it is undisputed that substantial completion of construction occurred in 1967. *Add.23.* The Bridge has at all times been owned by the State. *A.65, 133.* The State contracted in 1962 with S&P for design services in connection with the construction of the Bridge. *Add.23.* S&P was acquired by Jacobs in 1999.

Plaintiffs commenced 121 actions for damages arising out of the collapse. *A.1.* Plaintiffs sued URS and PCI. *A.12.* At the time of the collapse and for several years prior, URS had been providing consulting services to the State in connection with the Bridge. *A.12.* PCI is a construction company that was performing construction work on the Bridge at the time it collapsed. *A.12-13.* URS and PCI impleaded Jacobs. *A.55-56, 65-69.* PCI also impleaded the State. *A.69-72.* The State asserted claims against PCI, URS and Jacobs. *A.118-29, 138-49.* All the Plaintiffs later settled with URS and PCI, and the State has settled its claims with URS and PCI. Because any claims of the injured plaintiffs against Jacobs were long ago barred by the statute of repose, none of the plaintiffs asserted claims against Jacobs.

All claims against Jacobs are premised on the design services furnished by S&P in the 1960s. *A.118-19, 139.* The State's claim for contractual indemnity is based on the following provision contained in the 1962 contract between the State and S&P:

> [Sverdrup] indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by

> reason of the execution or performance of the work of [Sverdrup] provided for under this agreement.

Add.23.

The State has also asserted a claim for reimbursement pursuant to the provisions of statutes passed by the Minnesota legislature in response to the collapse of the Bridge. *See* Minn. Stat. §§ 3.7391-.7395 ("compensation legislation" or "compensation statutes"). *Add.66-75.* The compensation legislation established a fund and a process to compensate "survivors" of the collapse, defined as those persons present on the Bridge, or their parents, natural guardians, representatives, or wrongful death heirs. Minn. Stat. § 3.7392, subd. 8. The State paid approximately $37 million to the survivors and obtained releases from all of them which incorporated language prescribed by the compensation legislation. *Add.75-76, A.182.* The State's claim for statutory reimbursement is based on the following provision contained in the compensation legislation:

> **Subd. 5. Reimbursement of state:**
> (a) Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party, including an agent, contractor or vendor retained by the state any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe.

Minn. Stat. § 3.7394, subd. 5(a).

The other statute at issue in this case is Minnesota's statute of repose for improvements to real property. *See* Minn. Stat. § 541.051. All the claims against Jacobs are based on services performed by S&P on or before substantial completion of the Bridge in 1967. *Id. A.57-60, 148-49.* When Jacobs acquired S&P in 1999, all claims against it had been extinguished by the repose provisions of the statute.

In May 2007, the governor signed into law amendments made by the legislature to § 541.051 with respect to contribution and indemnity claims. The amendments eliminated the repose period for contribution and indemnity claims and changed the law with respect to when indemnity and contribution claims accrue. The legislature gave the amendments a retroactive effective date of June 30, 2006. *Add.54-65.* At issue in this case is the scope, applicability and validity of the amendments.

Summary of Argument

The State's claims against Jacobs are barred because they were extinguished decades ago under the repose provision of Minnesota's statute of repose for improvements to real property, Minn. Stat. § 541.051. The Bridge was substantially completed in 1967, so by the time Jacobs acquired S&P in 1999, it was immune from any suit or liability because the statutory repose period had ended long before. The repose statute operates equally to extinguish any of the State's claims against Jacobs, including those for contractual indemnity and statutory reimbursement under the compensation statutes.

While the Minnesota legislature amended § 541.051 in 2007 with respect to when contribution and indemnity claims accrued and could be brought, and the amendment was made retroactive to June 30, 2006, by that time the claims against Jacobs had already been long extinguished. A retroactive date to or from June 30, 2006, does not indicate that the legislature intended to revive claims indefinitely into the past, before the June 30, 2006, effective date; indeed it implies the contrary. Had the legislature intended such a timeless revival, it could easily have used language that it has used before when, for example, reviving a remedy previously barred by a statute of limitations.

Even, however, if the legislature had intended with the 2007 amendments to revive claims extinguished under the prior repose statute, the State's claims must be dismissed because such an interpretation would deprive Jacobs of its vested right to repose in violation of the due process clause of the United States and Minnesota Constitutions. Under this Court's precedents, it is well-settled that a statute of repose is a substantive limitation on liability—eliminating both the right and the remedy—unlike statutes of limitations, which furnish merely a procedural defense eliminating the remedy only. This qualitative difference between statutes of repose and limitations has important constitutional significance. The legislature may validly effect a retroactive change to the procedural bar of a statute of limitations, such that previously barred claims may again become timely. But it cannot, consistent with due process, make a law retroactive so that it deprives a person of a substantive right of immunity from suit and liability that it has acquired under a statute of repose.

The State's statutory reimbursement claim is barred for the additional reason that to permit recovery against Jacobs for the sums paid by the State to the personal injury and wrongful death survivors would unconstitutionally impair the 1962 contract entered into between S&P and Jacobs. While the contract contained a provision for S&P to indemnify the State in certain circumstances, the State at that time and for more than a decade later was immune from liability in tort under principles of sovereign immunity. Allowing the State's statutory reimbursement claims would redefine the objective 1962 contract definition of "indemnity" to mean something entirely different than what it meant at the time of contracting. The impairment is particularly substantial and egregious given that the State

voluntarily undertook to pay the survivors many millions of dollars of more than it could ever have been obligated to pay under the statutes that in all cases other than this one govern and limit the State's liability in tort. Under the three-part test that this Court uses to evaluate whether there has been an unconstitutional impairment of contract, Jacobs should prevail because the impairment is substantial; there is no legitimate public purpose in allowing the State to recover its voluntary payments to the survivors from a third person; and the reimbursement provision of compensation statutes is not necessary or narrowly tailored to accomplish any valid public purpose that the statutes might have.

The terms of the releases obtained from all of the survivors in exchange for the payments from the State also bars the State's claims against Jacobs. The State's claim for recovery is limited by a provision in the compensation statutes that it is entitled to recover from a third party "to the extent the third party caused or contributed to the catastrophe." Minn. Stat. § 3.7394, subd. 5(a). Yet the releases given to the State by all the survivors contain the elements of a *Pierringer* release. Such releases are an acknowledgement that the released party's payment is co-extensive with and extinguishes the released party's liability to the extent of the causal fault of the released party. The State, therefore has no entitlement to a recovery from Jacobs because by its own admission and actions, its payments are for the State's causal fault only.

Finally, the voluntariness of the State's payment to the survivors—exceeding what it could have been obligated to pay under the statutory tort limit that would have applied in the absence of the compensation legislation—precludes its claim for contractual indemnity or reimbursement.

Argument

I. Standard of Review.

In reviewing a decision involving a motion to dismiss based on failure to state a claim upon which relief can be granted under Minn. R. Civ. P. Rule 12.02(e), this Court undertakes *de novo* review to determine the legal issue of whether there is a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted).

II. The State's Claims Are Barred by the Repose Provision of Minn. Stat. § 541.051.

A. Jacobs Acquired a Right to Immunity from Suit by the State Decades Prior to the Collapse of the Bridge.

For more than forty years, the State of Minnesota has had a statute of repose relating to claims for damages arising out of the defective and unsafe condition of improvements to real property. *See* Minn. Stat. § 541.051. The statute, while amended from time to time, has contained both a limitations of action provision, commencing from the date of the discovery of the injury, and a repose provision, which operates to extinguish claims and confer immunity from suit after a specified number of years from the date of substantial completion of construction of the improvement. Because the event that determines the commencement of the repose period is the date of substantial completion of construction, a cause of action can be extinguished and a defendant can acquire immunity from suit even before the injury occurs and the cause of action accrues. *See Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 640 (Minn. 2006). That is the result here, which requires dismissal of the State's claims against Jacobs.

The first version of the repose statute, enacted in 1965, provided that actions could not be brought more than two years after discovery of the injury or more than 10 years after substantial completion of construction (or more than 11 years if the injury occurred during the tenth year after substantial completion). In 1977, this Court held the 1965 statute unconstitutional on equal protection grounds. *Pac. Indemn. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 555 (Minn. 1977). The legislature enacted a new version in 1980 to cure the constitutional defect, and the statute was upheld by this Court in *Calder v. City of Crystal*, 318 N.W.2d 838, 843-44 (Minn. 1982). The 1980 version of the statute also changed the repose provision to 15 years, or 17 years for causes of action accruing during the fourteenth or fifteenth year after substantial completion of construction. In 1986, the legislature again amended the statute, shortening the repose provision to 10 years, or 12 years if the cause of action accrued in ninth or tenth year after substantial construction. In each of these versions of the statute, the statute applied broadly to actions in "contract, tort or otherwise," and operated to extinguish both direct claims and those based on contribution or indemnity against persons furnishing or performing design or construction services for the improvement.

Substantial completion of the Bridge occurred in 1967. The Bridge collapsed on August 1, 2007. Under the repose provisions in effect beginning in the 1980s, all claims against Jacobs arising from the design of the Bridge had been extinguished decades before it

collapsed; indeed they were extinguished before they could accrue, and Jacobs is entitled to the immunity from suit or a damages award for which the repose statute provides.[2]

B. The 2007 Amendments to Minn. Stat. § 541.051 Did Not Revive the State's Claims Against Jacobs.

In 2007, the legislature amended § 541.051 with respect to the accrual and timely commencement of actions for contribution and indemnity. The amendments removed the ten-year repose provision for contribution and indemnity claims in subdivision 1(a) and added a new subdivision 1(b), as follows:

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

Minn. Stat. § 541.051, subd. 1(b). *Add.55, 63.* The amendments also provided in subdivision 1(c) that a cause of action for contribution or indemnity accrues upon the earlier of the commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award or settlement. Minn. Stat. § 541.051, subd. 1(c). Subdivision 2 established a repose period of 12 years for injuries occurring during the ninth or tenth year after substantial completion, but provided that "[n]othing in this

---

[2] The district court held that the repose provision of § 541.051 did not extinguish claims against Jacobs because the contract between the State and S&P was executed in 1962, before the enactment of any statute of repose in Minnesota. *See Add.41, 43.* The court of appeals did not address this issue, but the district court's conclusion is certainly wrong. *See, e.g., Calder v. City of Crystal*, 318 N.W.2d 838, 841-42 (Minn. 1982) (applying 1980 version of § 541.051 to bar city's contribution-indemnification claims arising from injury caused by defective drainage system substantially completed in 1958).

subdivision shall limit the time for bringing an action for contribution or indemnity." The legislature made the amendments retroactive to June 30, 2006.[3]

The district court and court of appeals held that the 2007 amendments to § 541.051 revived the State's claims against Jacobs that had been extinguished by the repose provisions of the prior statute. *Add.13, 41.* Specifically, the court of appeals stated that "[b]ecause nothing in the language of the 2007 amendments indicates that the legislature intended to make the amendments retroactive without also reviving time-barred claims, we hold that the retroactive application of the current version of § 541.051 revives the state's indemnity claims against Jacobs." *Add.13* (footnote omitted). *See also U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 101 (Minn. Ct. App. 2008) (holding the 2007 amendments revived claims extinguished before the June 30, 2006 effective date of the amendments), *rev. denied* (Minn. Aug. 5, 2008).

While there is no doubt that the legislature expressly made the 2007 amendments retroactive, it does not follow that the amendments revived claims that had been extinguished *before* the June 30, 2006, effective date, as the claims against Jacobs had been.

---

[3] The 2007 amendments to § 541.051 are contained in two separate laws: 2007 Minn. Laws, ch. 140, art. 8, § 29 (House File No. 1208), signed into law by Governor Pawlenty on May 25, 2007 (*Add.63, 65*) *and* 2007 Minn. Laws, ch. 105, § 4 (Senate File No. 241), signed into law by Governor Pawlenty on May 21, 2007. *Add.55, 60.* The two laws are identical *except* for the "EFFECTIVE DATE" language. The House File version states: "This section is effective retroactive to June 30, 2006" (*Add.64*) and the Senate File version states: "This section is effective retroactively from June 30, 2006." *Add.56.* In codifying the amendments, the Office of the Revisor of Statutes only identifies 2007 Minn. Laws, ch. 140, art. 8, § 29 for the 2007 amendments. The court of appeals held that the separate use of "to" and "from" by the House and Senate has a substantive effect on the scope of the retroactivity (*see Add.12*), a conclusion that is unwarranted for the reasons discussed below. *See infra* at 16-17.

The effective date for a statute would be meaningless if it did not signify an intended distinction and difference in treatment between events before and after the effective date. Under the court of appeals' interpretation, however, the 2007 amendments apply equally to claims extinguished before the effective date and those arising or extinguished afterwards.

In support of its holding on the scope of retroactivity of the amendments, the court of appeals relied on this Court's opinion in *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417 (Minn. 2002). That case considered the effective date of amendments to the State's medical malpractice statute of limitations. The legislature enacted an amendment to the statute deleting a two-year statute of limitations for medical malpractice claims and replacing it with a four-year limitations period, effective on August 1, 1999, for actions "commenced on or after" that date. *Id.* at 415 (citing Act of Mar. 26, 1999, ch. 23, §§ 1-3). This Court held that the plain language "commenced on or after" straightforwardly established the legislature's intent that the amendments applied to revive certain claims that had become time-barred under the prior statute. *Id.* at 417. No additional "revival" language was necessary to evidence the legislature's intent because by its express terms the "commenced on or after" provision effected a revival. *Id.*

The 2007 amendments to § 541.051 do not contain the kind of language considered in *Gomon.* Indeed, what the case instructs is that if the legislature *had* intended for the 2007 amendments to § 541.051 to revive claims extinguished before the effective date, it could have used the same or similar language that it used when amending the medical malpractice statute. Because it did not, this Court should interpret the amendments as applying only to causes of action that had not been extinguished before the June 30, 2006, effective date.

This would give effect to the legislature's express intent that the amendments have a retroactive application, while at the same time giving meaningful significance to the specific retroactive effective date that the legislature selected.

The court of appeals, however, gave the retroactivity language the broadest possible scope. It justified doing so because the separate House and Senate versions signed by the Governor on May 21, 2007, and May 25, 2007, used slightly different language: The Senate session laws provided that the amendments were "effective retroactively from June 30, 2006," while the House session laws made the amendments "effective retroactive to June 30, 2006." *Add.64.* The court of appeals explained the conclusion it drew from this distinction:

> [O]ne session law applies the amended section 541.051 retroactively from May 22 [*sic*], 2007 *to* June 30, 2006; the other applies the amended section 541.051 retroactively *from* June 30, 2006 indefinitely into the past. The combined effect of the two session laws is the continuous retroactive application of amended section 541.051 from May 22 [*sic*], 2007 indefinitely into the past.

Add.12. This interpretation assumes on the basis of no evidence that the choice of "to" by one body of the legislature and "from" by the other was intended by them to have two different and perfectly complementary meanings. It is much more plausible that the two formulations were intended to mean the same thing. The court of appeals' interpretation of the retroactivity language is an unreasonable one, inconsistent with common usage. *See, e.g., Kratzer v. Welsh Cos., LLC,* 771 N.W.2d 14, 21 (Minn. 2009) (plain language of a statute controls, that is, if the language is susceptible to only one reasonable meaning). It is well understood, for example, that when a custom or practice is said to "date from" or "date to" a point in time, the same meaning is conveyed by both phrases; the context of such a

reference makes it clear that the temporal relationship is between a present or forward date, and some earlier date. If one were to say, for example, that manned spaceflight dates from the 1950s, no reasonable person would take this to mean "from the 1950s 'indefinitely into the past.'" Similarly, the concept of retroactivity implies a relationship between some present or forward date (in the case of legislation, the date of enactment) and an earlier date. In ordinary vernacular, then, to say that legislation is retroactive "to" or "from" a date in the past is to state the same thing. In the case of the 2007 amendments to § 541.051, the meaning of the retroactivity language is that the amendments are effective from the retroactive date to the enactment date, or to state the same thing differently, to the retroactive date from the enactment date. Any other interpretation is inconsistent with the plain language of the statute.

The court of appeals' interpretation of the retroactivity language is not only strained and unreasonable, it has the effect of writing words into the law, *viz.* "indefinitely into the past," that are not there, thereby dramatically changing the substance. *See Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001) ("The rules of [legislative] construction forbid adding words or meaning to a statute that were intentionally or inadvertently left out."). Interpreting the retroactive provision to mean, as the court of appeals essentially has done, "both before and after June 30, 2006," also renders the legislature's selection of the specified date superfluous; it might as well read "June 30, 1906," or any other date prior to the enactment date. *See Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (whenever it is possible, no word, phrase, or sentence of a statute should be deemed superfluous, void, or insignificant).

If there is any ambiguity in the scope of the retroactivity of the 2007 amendments to § 541.051, there are several canons of instruction to which this Court can resort, including:

(1) the occasion and necessity for the law;

(2) the circumstances under which it was enacted;

(3) the mischief to be remedied;

(4) the object to be attained;

(5) the former law, if any, including other laws upon the same or similar subject;

(6) the consequences of a particular interpretation;

(7) the contemporaneous legislative history; and

(8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16. Consideration of these factors favors an interpretation of the 2007 amendments that does not revive claims extinguished prior to the June 30, 2006 effective date.

With respect to the first four factors identified above, there is general agreement that the 2007 amendments were passed in response to this Court's decision in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006). The opinion in *Weston* was filed on June 29, 2006. The 2007 amendments were made effective to June 30, 2006, and the selection of date was not a coincidence. *See also* Transcript of May 16, 2007, House Floor Session Part 3 discussion on S.F. 241. *Add.76.*

In *Weston*, the defendant general contractor was sued in May 2003, two months before the end of the ten-year statutory repose period for a home completed in July 1993. *Weston,* 716 N.W.2d at 636-37. The general contractor filed third-party complaints seeking

contribution in March and April 2004, after the ten-year repose period had ended. *Id.* at 637. The district court granted one of the third-party defendant's motion for summary judgment on the ground that the claims for contribution and indemnity had been extinguished by the ten-year repose period. *Id.* This was so even though the repose statute at that time provided that a contribution and indemnity claims did not accrue until "payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition." Minn. Stat. § 541.051, subd. 1(b) (2006). The court of appeals reversed, holding that if a contribution and indemnity claim accrues after the ten-year repose period, then the claim should be deemed as a matter of law to have accrued at the end of the tenth year following completion of substantial construction. *Weston*, 716 N.W.2d at 638. This Court reversed the court of appeals, holding that under the plain meaning of the statutory language, the contribution and indemnity claims had been extinguished by the end of the repose period even though they had not yet "accrued," as defined in the same statute. *Id.* at 639-40.

The general contractor in *Weston* complained that it had no control over when it could bring its contribution and indemnity claims because they were derivative of the underlying action, for which it had no control over the date commenced. *Id.* at 639. This Court responded that the argument:

> presents a distinction that the legislature could have recognized, but did not. We agree with [third-party defendant's] assertion that, had the legislature wanted to declare a separate and different repose period for contribution and indemnity claims, it could have done so explicitly.

Id.

The 2007 amendments addressed the aspects of the former repose statute which, as facts in *Weston* featured, could make the timeliness of a defendant's contribution or indemnity claim a matter of fortuity over which it had no control. Under the prior version, a plaintiff's injury might occur before the end of the repose period, but he or she might commence suit so late in the period (or even afterwards when the plaintiff's claims are not themselves subject to the provisions of the repose statute) that a defendant's contribution and indemnity claims are foreclosed by the plaintiff's tardiness. That fortuity of choice, however, does not arise, as in this case, when the plaintiff's injury occurs after the repose period has already expired. The 2007 amendments eliminated the potential that a plaintiff's election about when to commence an action could determine the timeliness of a defendant's contribution or indemnity claim. While the legislature can certainly do more than pass a law addressing just the facts of a particular case—and here it eliminated the repose provision for contribution and indemnity claims—nothing in these circumstances lends support to the view that the legislature was trying to reach endlessly into the past to revive claims long ago extinguished.

The consequences of an interpretation giving the 2007 amendments retroactive effect into the indefinite past are such that it should not be lightly presumed that this was the legislature's intent. *See* Minn. Stat. § 645.16(6). Such an interpretation would represent a sea change, impacting hundreds or thousands of parties (*e.g.*, contractors, subcontractors, engineers, materials suppliers, owners) who had acquired repose rights against contribution and indemnity claims under the former versions of § 541.051, and who now or some day would face sudden revival of those potential liabilities. Just by way of illustration, it would

pave the way for contribution and indemnity suits against the successors to James J. Hill's Great Northern Railway for injuries arising out of defects in the 1883 Stone Arch Bridge or suits against the successors to Cass Gilbert for injuries arising out of defects in the 1905 Minnesota State Capitol—all because a retroactive date of June 30, 2006, is wrongly interpreted to have intended revival of claims extinguished both before and after that date.

The immunity conferred by § 541.051 is a substantive limitation on acquiring a cause of action, in contrast to the merely procedural limitation of a statute of limitation, which only limits the time that a remedy may be pursued. *Weston*, 716 N.W.2d at 641. In similar contexts, this Court has made explicit that statutes of repose generally create "a substantive right in those protected to be free from liability after the legislatively-determined period of time." *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005) (quoting 54 C.J.S. *Limitations of Actions*, § 5 (2005)). A statute of repose "'is intended to terminate the possibility of liability after a defined period of time . . . . Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune for past conduct.'" *Weston*, 716 N.W.2d at 641 (quoting 51 Am. Jur. 2d *Limitation of Actions* § 18 (2000) (footnotes omitted)). They "provide[ ] certainty and finality with a bright line bar to liability" and give parties the ability "to plan their affairs without the potential for unknown liability." *Weston*, 716 N.W.2d at 642 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. 2000) (upholding ten-year repose statute in favor of product manufacturer)). The repose statute is based on a conclusion that, after a decade of use, "failures are 'due to reasons not fairly laid'" at the door of the party in whose favor the statute operates and are instead "due to wear and tear or other causes." *Weston*, 716 N.W.2d at 642 (quoting

McIntosh, 729 N.E.2d at 980). In the case of structures, repose statutes also reflect the conclusion that long life spans make them susceptible to deterioration and negligent maintenance completely outside the control of the original designer. *See* Michael J. Vardaro & Jennifer E. Waggoner, Note, *Statutes of Repose—The Design Professional's Defense to Perpetual Liability*, 10 St. John's J. Legal Comment. 697, 713 (1995).

Given the longstanding policy in this State underlying the repose statute, the quality of the interest it protects, and the consequences of indefinite retroactive repeal of the immunity, the court of appeals' interpretation of the scope of the retroactive effect of the 2007 amendments is simply not plausible. It is certainly not plausible solely on the basis of the specific retroactivity date that the legislature chose, and it beggars belief to suppose that such an extraordinary interpretation turns on the use by a legislative body of one preposition ("from") over another ("to"). The State's claims against Jacobs were extinguished under prior versions of § 541.051 long before they even accrued, and the 2007 amendments did not revive them.

Finally, it is presumed that "the legislature does not intend to violate the Constitution of the United States or of this state." Minn. Stat. § 645.17(3). For the reasons discussed below, the right of immunity from suit or damages acquired by Jacobs under the prior versions of Minn. Stat. § 541.051 is protected by the due process clauses of the United States and Minnesota constitutions. Depriving Jacobs of its right to repose would violate its constitutional due process rights. If the legislature did in fact intend to revive claims that had been extinguished before the June 30, 2006, effective date of the 2007 amendments to § 541.051, then Jacobs' constitutional claims must be decided. This Court, however, will

avoid deciding a constitutional issue if the case can be decided on another basis. *See State of Minn. v. Jackson*, 742 N.W.2d 163, 175 (Minn. 2007). These rules furnish additional reasons the Court should interpret the scope of the retroactivity as not reviving claims extinguished prior to June 30, 2006.

C. The 2008 Compensation Legislation Did Not Revive the State's Claims Against Jacobs.

The court of appeals did not specifically address whether the 2008 compensation legislation revived claims against Jacobs that had been extinguished by § 541.051, but it held that the intent of the legislature was "to supersede all statutes and the common law in allowing the state to pursue reimbursement of payments made under the compensation statutes." *Add.18*. Its conclusion was based on a provision contained in the statutes that the State could recover its compensation payments from third parties who caused or contributed to the collapse "[n]otwithstanding any statutory or common law to the contrary." Minn. Stat. § 3.7394, subd. 5. While this kind of language has been given broad effect in some cases, *see, e.g.*, *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, (1993), these have not involved revival of extinguished claims. When the Minnesota legislature passed an amendment to revive certain asbestos property damage claims, it also employed the clause "[n]otwithstanding any other law to the contrary," but it did so in conjunction with an express provision in the same statute (indeed, the same sentence) that certain otherwise barred claims were "revived" and extended." Minn. Stat. § 541.22, subd. 2.

The legislature's use of the "notwithstanding" provision in the compensation legislation can reasonably be understood in part to reflect the fact that legislation established a completely new framework for compensation of tort claimants, independent of, and in a

number of respects in conflict with, the longstanding scheme set forth in Minnesota's statutory waiver of sovereign immunity for tort claims, Minn. Stat. § 3.736. It is not necessary to conclude that the legislature intended to go so far as to reach back and revive claims that had been extinguished for decades.

If the legislature, however, did intend through the compensation legislation to revive claims previously extinguished by the statute of repose, then the same constitutional due process considerations discussed below that apply to retroactive revival of extinguished claims under the 2007 amendments to § 541.051 also preclude revival by the compensation statutes.

III. Statutory Revival of Claims for Which Jacobs Has Acquired Vested Right of Immunity From Suit and Liability Would Violate Its Due Process Rights under the United States and Minnesota Constitutions.

A. A Statute of Repose Creates a Substantive Limit on Liability and a Right of Certainty and Finality in Immunity from Suit.

The court of appeals correctly "acknowledged that the Fourteenth Amendment prohibits the legislature from enacting legislation that divests a private interest." *Add.13.* But it went on to hold that Jacobs had nothing more than "a mere expectation, based on an anticipated continuance" that the repose provisions of the former § 541.051 "would protect it indefinitely." *Add.14* (quoting its own *U.S. Home Corp.*, decision, 749 N.W.2d. at 101). The conclusion was reached on the basis of a statement by this Court that there "is no vested right in an existing law nor in an action until final judgment has been entered therein." *Add.14* (quoting *Holen v. Minneapolis-St. Paul Metro Airports Comm'n*, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957) (emphasis omitted)). The court of appeals reached an

incorrect result because its analysis of vested rights was erroneous in some respects and incomplete in others.

When this Court held in *Holen* that the plaintiffs did not have a vested right protected by the due process clause, it was considering amendments to municipal law that had changed retroactively (and while the case was pending on appeal) certain "public rights," *viz.* to a public hearing, before the municipal body took certain action. *Id.* at 138, 84 N.W.2d at 288. The Court repeatedly emphasized the difference between "private" and "public" rights, that case involving the latter only because the plaintiffs-taxpayers were "seeking the enforcement of a public right, a right in which they have no more interest than any other taxpayer." *Id.* The Court's holding rested on the "definite distinction between the effect to be given to a retroactive statute when it relates to private rights and when it relates to public rights." *Id.* at 137, 84 N.W.2d at 287. The public-private distinction was of such significance that the Court held a *public* right could be changed retroactively even *after* a final judgment. *Id.* It stated with equal clarity, however, the principle that "[r]etrospective or curative legislation is, of course, prohibited under U.S. Const. Amend. XIV, when it divests any private vested interest." *Id.*

Jacobs' right of repose, acquired years ago on the basis of facts specific to it under the provisions of § 541.051, cannot reasonably be equated to the kind of "public right" that was at issue in *Holen.* Jacobs seeks not to enforce a generalized right to which it has no greater interest than any other party, but instead a particular right to immunity from suit or damages acquired because of an identifiable event—the expiring of the repose period a specified number of years after substantial completion of construction of the Bridge.

The significance of the distinction between the right involved in *Holen* and the right that Jacobs seeks to enforce is further illuminated by this Court's precedents on repose statutes and particularly by the way in which these cases have explained the nature and difference between statutes of repose and statutes of limitations. The distinction is a crucial one that this Court described succinctly in *Weston*:

> The constitutional legitimacy of statutes of repose stems from their substantive, rather than procedural, nature: a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit).

Weston, 716 N.W.2d at 641. The procedural nature of statutes of limitation is such that they destroy a remedy, even though a right to a cause of action has vested. *Id.; see also City of Willmar v. Short-Elliott-Hendrickson*, 512 N.W.2d 872, 875 (Minn. 1994). In contrast, a statute of repose eliminates the right—the cause of action. *Weston*, 716 N.W.2d at 641.

The substantive-procedural distinction has important consequences when considering whether a law operates retroactively. "It is generally held that legislation dealing *only with remedies and procedures* are not beyond the reach of retrospective legislation." *Peterson v. City of Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969) (emphasis added). Thus:

> In *Donaldson v. Chase Securities Corp.* 216 Minn. 269, 13 N.W.2d 1 (1943), this Court held that the legislature could constitutionally change a statute of limitations. We said that the retroactive change did not violate the due process clause since . . .
>
> '. . . the passage of time creates no vested right in the exemption from the remedy . . . '
>
> 'Statutes of limitation which only bar the recovery of a

> debt or damages for tort are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates.'[4]

Peterson, 285 Minn. at 288, 173 N.W.2d at 357 (quoting *Donaldson*, 216 Minn. at 275, 13 N.W.2d at 4).

The procedural nature of a statute of limitations explains why this Court upheld retroactive application of a change in the medical malpractice statute of limitations in *Gomon v. Northland Family Physicians*, 645 N.W.2d 413, 417-18 (Minn. 2002) (citing and relying on *Donaldson*); *see also Wichelman v. Messner*, 250 Minn. 88, 107, 83 N.W.2d 800, 817 (1957) (recognizing that the "constitutional prohibitions against retrospective legislation do not apply to statutes of limitation"). Precisely for this reason, however, that statutes of repose do not deal "only with remedies and procedures," *Peterson*, 285 Minn. at 288, 173 N.W.2d at 357, but are instead a "substantive limit" on acquiring a cause of action, *Weston*, 716 N.W.2d at 641, what is permissible in the retroactive application of statutes of limitations is not so

---

[4] In *Donaldson*, this Court upheld the validity of a retroactive change in the statute of limitations for claims related to the unlawful sale of securities. The United States Supreme Court affirmed and gave further articulation to the substantive-procedural distinction:

> This Court . . . [has] adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.

Chase Secs. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

with respect to statutes of repose. When the repose period ends, the defendant acquires an "immun[ity] from liability." *Id.* (quoting 51 Am.Jur. 2d *Limitations of Actions* § 18 (2000)). So a substantive limit on an injured person's acquisition of a cause of action is—the other side of the same coin—a substantive right of the defendant to be free from liability. *See Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005). ("Statutes of repose are intended to give finality to the potential defendant and create 'a substantive right in those protected to be free from liability after the legislatively-determined period of time.'") (quoting 54 C.J.S. *Limitations of Actions* § 5 (2005)).

B. Jacobs Acquired under Minn. Stat. § 541.051 a Vested Right of Immunity from Suit and Liability, Entitled to Due Process Protection.

As noted above, the court of appeals in this case held that Jacobs acquired no "vested right not to be sued." *Add.14.* The conclusion is wrong at several levels. First, the operative event that determines whether a defendant has acquired a right of repose under § 541.051 is simple and straightforward: the passage of a specified number of years after substantial completion of construction. There is no dispute about when that occurred with respect to the Bridge—it happened years, decades before any cause of action arising out of the August 1, 2007, collapse of the Bridge accrued. Once the repose period ended, there was nothing more that needed to occur for Jacobs to acquire its right of immunity. The right did not depend on any contingencies to be determined after the expiration of the repose period. In any ordinary sense of the term, Jacobs' right to repose vested on the expiration of the repose period.

Second, it would be absurd to contend that a right to *repose*—which includes the right to be free from liability and *suit*—vests only *after* a defendant has been put to the burden and

expense of litigation all the way through to a non-appealable final judgment. That, however, is the essence of the holding of the court of appeals—that Jacobs has no vested right not to be sued or liable until after it has vindicated that right through to a final judgment. *Add.14.* The court of appeals apparently reached this conclusion on the basis of an erroneous view that the only way any right can vest in a way that invokes due process protections is after final judgment. *Id.* To the extent this interpretation was based on the holding or analysis of this Court in *Holen*, it is wrong for the reasons discussed above. But it is also demonstrably wrong when viewed in light of this Court's other precedents in the area of vested rights and the retroactive application of laws.

In *Peterson v. City of Minneapolis*, this Court stated the rule that "[w]hile courts generally express varying degrees of distaste with retroactive laws, they are usually upheld as long as they do not interfere with Vested legal rights." *Peterson*, 285 Minn. at 287, 173 N.W.2d at 356-57. The Court explained further:

> '. . . The term 'vested interests,' when used in the constitutional sense to describe the kind of interest that cannot be impaired by retroactive legislation, reflects a determination that justice and equity require that the interest be preserved.'

Peterson, 285 Minn. at 287-88, 173 N.W.2d at 357 (quoting *Halverson v. Rolvaag*, 274 Minn. 273, 275, 143 N.W.2d 239, 241 (1966)). It is immediately after and in the context of the above-quoted statement of the rule with respect to vested rights that the Court went on to explain that "[i]t is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retrospective legislation." *Id.* It then adopted from a law review article three factors to be considered in determining "whether a law may be constitutionally

retroactive . . . (1) the nature and strength of the public interest served by the statute; (2) the extent to which the statute modifies or abrogates the preenactment right; and (3) the nature of the right the statute alters." *Id.* at 288, 173 N.W.2d at 357 ("While these tests are as nebulous as the term itself, they may furnish some guidelines in determining whether the right is one that can be abrogated by legislative act.").

In *Peterson*, the issue under consideration was whether the legislature's adoption of comparative fault principles in place of contributory negligence, effective for trials commencing after July 1, 1969, could constitutionally be given retroactive effect, *i.e.* applied to causes of action accruing before the effective date. *Id.* at 285, 173 N.W.2d at 356. The Court held that retroactive application was permissible. It noted that the first two factors provided no difficulty because (1) the Court for a number of years had expressed the view that principles of comparative fault were more equitable than contributory negligence; and (2) the old rule of contributory negligence had not been completely eliminated because a plaintiff's recovery would still be reduced by its percentage of comparative fault. *Id.* at 288-89, 173 N.W.2d at 357.

The Court found the third factor to present the "main difficulty" and concluded that "we simply must use our best judgment in determining whether the right is one that has become so fixed that it would be inequitable to abrogate it by retrospective legislation." *Id.* at 289, 173 N.W.2d at 357. It concluded that it was not, noting that the outcome of the change in law would likely have mixed results insofar as some plaintiffs would recover under the new law who would not have recovered previously due to their contributory negligence, but that plaintiffs would also have their recoveries reduced by the amount of their

comparative fault. The Court held, therefore, that the retroactive effect of the statute "did not affect a right which could be considered such a vested right as to prohibit constitutionally any change in it." *Id.* at 290, 173 N.W.2d at 358.

A consideration of the factors identified in *Peterson* confirms that Jacobs' right of repose acquired under § 541.051 rises to the level of a vested one entitled to protection by constitutional due process. As to the first factor, the question of the nature of the public interest served by the compensation statutes should focus on the only element of the statute challenged here—the reimbursement provision. The interest is not a significant one for several reasons. The repose provision in § 541.051, which also articulates a longstanding public interest in protecting repose rights, does not itself contain an exception for direct, contribution or indemnity claims of the State. They become barred just like any other party's claims after the repose period ends, so the legislature has disclaimed any general public interest in exempting the State from the consequences of the repose statute. There is no principled reason why an asserted public interest in the State's opportunity to recover payments *in this case only* is greater than in others that would be barred by the repose statute. This conclusion is all the more bolstered by the voluntariness with which the legislature acted in appropriating and paying approximately 37 times more to the survivors than it would have been obligated to pay under the statutory tort limits that otherwise would apply.

The second factor—the extent to which the statute modifies or abrogates the preenactment right—is an easy consideration here. The abrogation is total. The right to immunity from suit and liability that Jacobs enjoyed is completely eviscerated if the

reimbursement provision of the compensation statutes is interpreted to permit the State's claim against Jacobs.

The third factor looks to the nature of the right that the State alters. There can be no question that the public policy granting repose rights after the prescribed period has ended is an important and venerable one. As explained elsewhere, the policy reflects the view that there are good reasons a party should not be exposed to liability indefinitely into the future, long after it has furnished design or construction services, or materials for the construction of an improvement to real property. The policy has been that this right arises the instant that the repose period ends; it is not a contingent one that depends on the trier of fact resolving some other fact issue.

Other courts have recognized that statutes of repose confer substantive rights, and that a legislature may not through retroactive legislation revive claims that extinguished under a repose statute. *See, e.g., Farber v. Lok-N-Logs, Inc.* 701 N.W.2d 368, (Neb. 2005); *Ripley v. Tolbert*, 921 P.2d 1210, 1220 (Kan. 1996); *Sch. Bd. of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987). *See also Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 869 (Tex. 2009) (interpreting revival statute as applying only procedural statute of limitations, not to statutes of repose, which "create a substantive right to be free from liability after a legislatively determined period"). A few courts have analyzed the issue of vested rights differently, concluding that a legislature may deprive a party of a right of repose so long as it has a "rational basis" for doing so.[5] *See, e.g., Shadburn-Vinton v. Dalkon Shield*

---

[5] A United States District Court in Minnesota similarly applied the rational-basis test in considering whether the legislature could validly revive certain asbestos property damage claims. *See Indep. Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 296-99 (D. Minn.

Claimants Trust, 60 F.3d 1071 (4th Cir. 1995); *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989). *But see Shadburn-Vinton,* at 1078-81 (Widener, J., dissenting). In part, the result in those cases is explained by the fact that the courts did not consider there to be any significant difference between statutes of repose and statutes of limitations. As discussed above, this Court has consistently differentiated the two types of statutes in a way that has important, constitutional significance. Moreover, as the three-factor analysis in *Peterson* demonstrates, the question in this Court of whether a vested right is entitled to constitutional due process protection does not come down merely to whether the legislature had a rational basis for taking the right away.

Finally while this Court's vested rights analysis has not employed the rational basis test, the reimbursement provision of the compensation statutes would fail even that test because to the extent it is interpreted to create a one-time exemption for the State from application of the repose provision it is completely arbitrary. *See, e.g., Woodhall v. State*, 738 N.W.2d 357, 365 (Minn. 2007) ("A statute does not comport with due process when it is arbitrary or unreasonable."). As discussed above with respect to the first factor under *Peterson*, there is no principled or reasonable ground on which the State should have a general policy of repose which extinguishes even its own claims, except on this one occasion.

1990) (cited in *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591-92 (Minn. Ct. App. 1994)). This portion of the court's decision was dictum, however, because the court earlier determined in its opinion that allegations of fraud precluded application of the repose period to extinguish claims under § 541.051. *See W.R. Grace & Co.*, 752 F. Supp. at 289-292. Moreover, the court explicitly rejected the significance of the substance-procedure distinction between statues of repose and limitations that this Court recognized. This Court never had occasion to address the constitutionality of the asbestos revival statute that was at issue in *W.R Grace & Co.*

IV. If the 2008 Compensation Legislation (Minn. Stat. §§ 3.7391-3.7395) is Interpreted to Permit the State to Assert a Reimbursement Claim Against Jacobs, the Statute Impairs Jacobs' Contractual Rights in Violation of the United States and Minnesota Constitutions.

Both the United States and Minnesota Constitution prohibit state laws "impairing the obligation of contracts." U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. I, § 11. In *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983), the United States Supreme Court developed a three-part test to analyze Contract Clause challenges and determine if a state law unconstitutionally impairs a contract. 459 U.S. at 411-12. Minnesota has adopted the same three-part test. *See Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983). Under that test, "[t]he initial question is whether the state law has, in fact, operated as a substantial impairment of a contractual obligation." *Id.* at 750. If so, "the state, at the second step, must demonstrate a significant and legitimate public purpose behind the legislation." *Id.* at 751. Finally, "the legislation must be reasonably and appropriately tailored to accomplish the asserted public purpose." *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 439 (Minn. Ct. App. 1992) (citing *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986)). In addition, courts apply increased scrutiny to the legislation at issue where the impairment is severe and the State is a party to the impaired contract. *See Christensen*, 331 N.W.2d at 750-51.

Under this three-part test, Jacobs' constitutional right to be free from impairment of contract would be violated if the compensation statutes are interpreted to permit recovery from Jacobs of payments made by the State pursuant to those statutes. At the time the 1962 contract was entered into between S&P and the State, the State enjoyed immunity from tort

liability.[6] Accordingly, the indemnity provision of the contract did not contemplate or encompass liability of S&P to indemnify the State for any tort liability because as a matter of law the State was immune from such liability. It would work a substantial and impermissible impairment of the contract to permit the State to obtain indemnity under that contract provision. This is especially so to the extent that the State seeks to be "indemnified" far in excess of the $ 1 million tort liability it would have today but for its voluntary undertaking through the passage of the compensation legislation to pay much (approximately 37 times) more. The legislature was certainly free to pass the law to appropriate and authorize the payments, but the constitutional impairment occurs when it tries to enforce a self-serving provision written into the law to in effect re-write and vastly expand in its favor an indemnity provision to one of its contracts.

A. The Reimbursement Provisions of the Compensation Legislation Substantially Impairs Jacobs' Rights under the 1962 Design Contract with the State.

The State's sovereign immunity at the time the contract was entered into conferred on S&P both a substantive contractual right and a defense—namely, the contractual right to be free from liability to the State for contribution, indemnity or other reimbursement on a tort claim, and, vicariously, the defense of sovereign immunity should a plaintiff assert a tort claim against the State. The State's sovereign immunity thus became a material term of the 1962 Contract—indeed, a contractual obligation. "It is well established that in order to know the obligations of a contract we must look to the laws in force at the time of its making." *Western States Utilities Co. v. City of Waseca*, 242 Minn. 302, 308, 65 N.W.2d 255, 261

[6] The legislature did not pass a law partially abrogating this sovereign immunity until 1976. 1976 Minn. Laws, ch. 331, § 33.

(1954). "[E]xisting statutes are read into future contracts and enter into their terms by implication." *Id.* at 263. The State cannot now voluntarily abrogate its sovereign immunity under Minn. Stat. §§ 3.7391–.7395 and bring its claims against Jacobs without substantially impairing the 1962 Contract.

It is well-settled under Minnesota law that a contractual right vests when all liabilities have been determined and fixed under the law in effect at the time the contract was formed. *See Yaeger v. Delano Granite Works*, 250 Minn. 303, 307, 84 N.W.2d 363, 366 (Minn. 1957). "[A]ny statute which purports to alter a substantial term of the contract which was in effect at the time the controlling event occurred . . . impairs the obligation of such contract and is therefore unconstitutional." *Yaeger*, 250 Minn. at 308, 84 N.W.2d at 366. Moreover, "[a] vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice." *Pritchard v. Norton*, 106 U.S. 124, 132 (1882).

These principles compel the conclusion that allowing the State to be indemnified for its payments made pursuant to the compensation statutes would constitute a substantial impairment of the 1962 contract. The State's immunity from tort liability was one of the objective expectations of the parties at the time the contract was entered into. Because the State had a complete legal defense against any claims for tort against it, S&P had no exposure to indemnify for such claims. It is inconceivable that allowing indemnity liability now—nearly 50 years after contract signing—and potentially to an extent many multiples of

times greater than the State's tort liability exposure in any other case—is not a substantial impairment of the contract.

The court of appeals determined that the impairment is not substantial because the legislature had on occasion prior to 1976 passed laws allowing in specific cases tort claims against the State. *Add.17-18.* On this ground alone it rejected Jacobs' impairment of contract argument, and it addressed none of the other factors from *Energy Reserves* and *Christensen.* This is an insufficient reason. In none of these instances did the special appropriations attempt to accomplish what the legislature seeks to do here—recoup from a third party the compensation payments made by the legislature. Moreover, it is not the least plausible that a party contracting with the State in 1962 should have had a reasonable expectation that it could later have indemnity liability for tort claims against the State *and* that this liability exposure would be increased exponentially by the State's one time only, voluntary waiver of its statutory tort liability limits.

B. The Reimbursement Provision Lacks a Significant and Legitimate Public Purpose Sufficient to Overcome the Substantial Impairment it Inflicts on Jacobs' Rights under the 1962 Contract.

Because Jacobs has demonstrated substantial impairment, the burden shifts to the State to justify the statute at issue in the second and third parts of the *Energy Reserves* three-part test. *See Christensen,* 331 N.W.2d at 751. The State must show that the statute has a "significant and legitimate public purpose." *Id.* "The severity of the impairment increases the level of scrutiny to which the legislation is subjected." *Christensen,* 331 N.W.2d at 750. One measure of the severity of impairment is the liability exposure the statute imposes on a contracting party, particularly in light of the level of exposure that party faced prior to the

enactment of the statute. *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 247 (1978) (finding "severe disruption of contractual expectations" because the statute at issue nullified a party's contractual obligations and imposed "a completely unexpected liability in potentially disabling amounts"); *Jacobsen,* 392 N.W.2d at 874 (finding substantial impairment because the statute at issue created liability for exercising a contract right where none had previously existed). As in *Allied Structural Steel* and *Jacobsen,* Jacobs now faces the State's claims for millions of dollars in liability exposure arising in tort, whereas at the time of contracting, the State and thus Jacobs were immune from claims based on the State's tort liability. Moreover as discussed above, if the passage of the compensation statutes—applicable to the Bridge case only—is given effect, Jacobs' potential exposure for indemnity liability to the State is greater by an order of magnitude than it would be if the exposure was governed by Minnesota's sovereign immunity tort limits. The impairment is, therefore, severe.

The other factor justifying a stricter scrutiny of factors relevant under *Energy Reserves* and *Christensen* is also, of course present in this case: The State is a party to the contract it seeks to impair. *See Christensen,* 331 N.W.2d at 750-51. "[C]ourts should closely scrutinize state statutes affecting public contracts to make certain that a state is not attempting to escape from its own financial obligations." *Zuehlke v. Indep. Sch. Dist. No. 316,* 538 N.W.2d 721, 727 (Minn. Ct. App. 1995) (citing *U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 29 (1977)).

Avoiding the financial obligations it voluntarily assumed is exactly what the State is attempting to do through the "reimbursement" provisions of Minn. Stat. § 3.7394, subd.

5(a). Jacobs does not challenge the authority of the State to assume greater liability to the personal injury and wrongful death survivors than it had in the absence of passing the compensation statutes. But to the extent it is seeking reimbursement from a third party for those payments, it is transparently seeking to turn its voluntary payments to the survivors into a financial obligation of a third party—Jacobs in this instance. It is settled that a voluntary payment by one who is under no legal duty to pay does not give rise to reimbursement rights against others who may be legally liable. *See Samuelson v. Chicago, R.I. & P.R. Co.*, 178 N.W.2d 620, 624 (Minn. 1970). Heightened scrutiny, therefore is certainly warranted because the impairment is severe and the State seeks to benefit itself.

Energy Reserves and *Christiansen* both require that, if there is substantial impairment, there must be a legitimate public purpose in order to withstand a constitutional challenge. *Energy Reserves*, 459 U.S. at 412; *Christiansen*, 331 N.W.2d at 740, 751. "Public purpose" has generally been defined as "remedying of a broad and general social or economic problem." *Jacobsen*, 392 N.W.2d at 874; *Energy Reserves*, 459 U.S. at 411-12. Otherwise stated, the statute at issue is only permissible if it imposes "a generally applicable rule of conduct designed to advance 'a broad societal interest'" and has only an incidental effect of impairing existing contractual obligations. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241-42 (1978)).

Illustrative of these principles, in *Allied Structural Steel*, 438 U.S. at 249, the United States Supreme Court found that there was no legitimate public purpose sufficient to overcome severe impairment inflicted by the Minnesota Private Pension Benefits Protection Act, which the Court determined was not enacted to protect a "broad societal interest" but

rather a "narrow class." Similarly, in *Jacobsen*, 392 N.W.2d at 874-75, this Court ruled unconstitutional the retroactive application of the Minnesota Beer Brewers and Wholesalers Act, which has "all the earmarks of narrow special interest legislation devoid of any broad public purpose."

The compensation legislation articulates only two purposes: (1) to compensate victims of the Bridge collapse; and (2) to avoid "the uncertainty and expense of potentially complex and protracted litigation." Minn. Stat. § 3.7391, subd. 2. Neither of these justifications furnishes a rational explanation for the *reimbursement* provision (§ 3.7394, subd. 5(a)) of the compensation statutes, which is the source of the contract impairment). Moreover, neither purpose can be said to remedy "a broad and general social or economic problem" or advance "a broad societal interest." Indeed, the statute narrowly focuses on a singular event and makes no provisions for any similar future events. The compensation goes to a small number of individuals, who would have still had, and in fact did resort to, the tort system's remedies for their losses. The liability caps set forth in § 3.736 would have protected the State's economic interests, so no serious argument can be made that by volunteering millions of dollars of payments in excess of the immunity cap the State was furthering the public's economic interests. Instead, the unarticulated but obvious purpose of the reimbursement provision of the statute is to shift the cost of compensation onto a few third parties, which, in Jacobs' case, can be done only by unconstitutionally eviscerating the protections it has through the provisions of the 1962 Contract with the State.

C. Even If the Compensation Legislation Has A Significant and Legitimate Public Purpose, the Reimbursement Provision Is Not Tailored to Accomplish It.

The third part of the *Energy Reserves* three-part test requires that a statute's asserted public purpose, even if legitimate, must be "reasonably and appropriately tailored" to that purpose. *Midwest Family*, 486 N.W.2d at 439. The legislation does not pass this test, certainly not with respect to justifying the reimbursement provision. If the purpose of the legislation is to compensate survivors over and above the limits of the State's immunity caps, this could easily have been accomplished in the absence of the entirely self-serving provisions of the legislation allowing the State to recover those excess payments from third parties. Moreover, to the extent that a genuine purpose of the legislation was to avoid the "uncertainty and expense" of litigation, it is tailored to accomplish the opposite, as evidenced by this ongoing litigation.

V. The State's Releases from the Survivors Preclude Any Liability of Jacobs to the State.

The State entered into settlements with all the personal injury and wrongful death survivors who received a payment from the funds authorized by the compensation legislation. Indeed, the compensation statutes made receipt of signed releases a condition of the payment of any money to a claimant by the special master panel, and the statutes even specified some of the terms and provisions that the special master panel was required to include in the releases. *See* Minn. Stat. § 3.7393, subd. 13.

Certain of those terms preclude the State from recovering any payments from Jacobs, namely those which gave the releases all the elements of a *Pierringer* release. This Court approved the use of *Pierringer* settlements in *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn.

1978) (discussing and approving form of release used in *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963)). By its terms, a *Pierringer* settlement releases the settling defendant from liability, settles a part of the cause of action equal to that part of the overall fault for which the settling defendant is liable, and reserves the balance of the plaintiff's whole cause of action against the non-settling defendants. Its basic elements are:

> (1) The release of the settling defendant from the action and the discharge of a part of the cause of action equal to that part attributable to the settling defendant's causal negligence;
>
> (2) The reservation of the remainder of the plaintiff's causes of action against the non-settling defendants; and
>
> (3) Plaintiff's agreement to indemnify the settling defendants from any claims of contribution made by the nonsettling parties and to satisfy any judgment obtained from the nonsettling defendants to the extent the settling defendants have been released, [*i.e.*, plaintiff's claims are fully satisfied to the extent of the settling defendant's fault].

Frey v. Snelgrove, 269 N.W.2d at 921 n.1.

The State's releases ("Releases") include the following language:[7]

> (1) ". . . Claimant . . . completely releases and forever discharges the State of Minnesota . . . from each and every legal claim or demand of any kind that Claimant ever had or might now have, which in any way arises out of or relates to the Collapse . . ." and "Claimant fully releases and discharges the State Releasees for any claims of contribution or indemnity with respect to any claim for damages of Claimant, and the claims of Claimant are satisfied to the extent of that fraction, portion or percentage of the total claims for damage Claimant may have against all persons or entities that in any way arise

[7] A copy of one of the executed Releases is attached. *A.182.*

> out of or relate to the Collapse, which shall hereafter, by trial or other disposition of any action or proceeding, be determined to be the percentage of causal fault or responsibility attributable to the State Releasees..";
>
> (2) "Claimant specifically reserves any and all causes of action against any person or entity other than the State Releasees;" and
>
> (3) "Claimant hereby agrees to indemnify, defend and save the State Releasees harmless from liability for any claims, demands, causes of action or judgments for contribution or indemnity on or under any theory of liability . . . if the claim, demand, cause of action or judgment relates in any way to a claim of the Claimant arising out of or relating to the Collapse."[8]

A.182-A.184. This language contains all the elements of a *Pierringer* release, so the consequences for the State's claims must be evaluated accordingly.

Through a *Pierringer* release, a plaintiff can release the settling defendant without also releasing all non-settling defendants or other parties for their share of fault, and the settling defendant can both buy its peace with plaintiff and avoid contribution or indemnity liability to the non-settling defendants. *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn. 1989). In entering into a *Pierringer* release, the settling defendant gives up any right to collect any portion of its settlement payments from non-settling parties. *See, e.g., Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 855-56 (Minn. Ct. App. 2005). Indeed, when now-settled PCI commenced its

---

[8] The court of appeals opined that it was "unclear from the record which of the plaintiffs entered into settlement agreements with the state under the compensation statutes." *Add.18.* The State has at no time disputed that it made payments to and received releases from all of the claimants who were paid money for which the State now seeks reimbursement. Nor has the State disputed that all of these releases contain the *Pierringer* provisions quoted above. Jacobs, accordingly did not burden the record with more than a hundred releases, the terms of which are in material respects identical.

third-party contribution action against the State for any liability that PCI might have to the plaintiffs, the State pled the releases as defense and bar to any liability to PCI. *A.116, A.136.* Thus, a *Pierringer* release brings to an end the litigation as to the settling party, a result consistent with public policy. The State seeks here to create a new settlement agreement that perpetuates litigation rather than brings peace.

The State's releases also contained the following provision:

> The State is entitled to reimbursement by a third party regardless of whether Claimant is fully compensated. Claimant agrees to cooperate with the State in the State's pursuit of any claims the State may have against any third party for reimbursement or otherwise, including subrogation . . . .

A.186. Despite the fact that the Releases contain this language, they must be treated as *Pierringer* releases. In *Bunce*, the court of appeals considered and rejected the defendant's attempt to avoid the consequences of a *Pierringer* law by including a provision in the release specifically reserving the defendant's claims for contribution, indemnity, or subrogation against other persons or entities. *See Bunce*, 696 N.W. at 857-58. The court concluded that the defendant could not, for his own self-interest, rewrite *Pierringer* and make the non-settling defendants, non-signatories to the release, bound by it. *Id.* at 857. The court stated, "[Defendant] crafted its own legal theory to attempt to build in a chance to recoup more money, while remaining absolutely immune from having to pay anybody one dollar more than it paid Bunce, the original plaintiff. Under *Pierringer/Frey*, it just can't be done." *Id.* at 858.

The same result is required here. The State has admitted that the compensation statutes permit it to recover only "to the extent it could show that it paid for more than its

comparative fault-based share." *A.190.* Indeed, the language quoted above from the statute is clear that the State's recovery is limited accordingly. *See* Minn. Stat. § 3.7394, subd. 5(a). By the terms of the State's releases, the State has only paid for its own share of fault. Such a conclusion is factually and legally compelled from the agreement in the releases that the survivors have fully and finally released and discharged the State for "each and every legal claim or demand"

> . . . *to the extent of that fraction, portion or percentage of the total claims for damage* . . . which shall hereafter, by trial or other disposition of any action or proceeding, be determined to be *the percentage of causal fault or responsibility attributable to [the State Releasees.]*

A.184 (emphasis added). This consideration—release from a defendant's own share of causal fault in exchange for payment of money—is one of the key identifying characteristics of a *Pierringer* release. *Frey*, 269 N.W.2d 918.

The court of appeals declined to reach or discuss the merits of Jacobs' argument because it concluded on the basis of the "[n]otwithstanding any statutory or common law to the contrary" clause contained in § 3.7394, subd. 5(a), that the legislature "has clearly stated its intent to supersede all statutes and the common law in allowing the state to pursue reimbursement of payments made under the compensation statutes." *Add.18.* Jacobs' argument, however, is not inconsistent with giving effect to the terms of the statute. It is important to remember that however broad the scope of the "[n]otwithstanding . . ." clause, it is circumscribed by the limitation contained in the same sentence that the State can recover its compensation payments from a third party—*only*—"to the extent the third party caused or contributed to the catastrophe." Given that the terms of the releases equate the

State's payments to the survivors with the State's percentage of causal fault, it is illogical and contrary to the plain language of the statute to permit the State to recover from Jacobs any of the payments the State made in exchange for the releases. Instead, to permit such a recovery would read entirely out of the statute the limitation on the State's right of recovery to payments "to the extent the third party caused or contributed to the catastrophe."

VI. The State's Claims Are Precluded to the Extent They Were Made Voluntarily and in the Absence of Legal Duty.

As discussed above, a voluntary payment by one who is under no legal duty to pay does not give rise to reimbursement rights against others who may be legally liable. *See Samuelson v. Chicago, R.I. & P.R. Co.*, 178 N.W.2d 620, 624 (Minn. 1970). The State's payments to the personal injury and wrongful death survivors arising from the Bridge collapse were made voluntarily and in the absence of legal duty to the extent the payments exceeded the tort limit (aggregate of $1 million on the date the Bridge collapse occurrence) contained in § 3.736, subd. 4(e). The compensation legislation expressly waived that limit. *See* Minn. Stat. § 3.7393, subd. 11(b). Moreover, the legislation even contains an acknowledgment that the State had no legal duty under those statutes to make the payments. "The establishment of the special compensation process under § 3.7393 and the emergency relief fund, and an offer of settlement or a settlement agreement . . . *does not establish a duty of the state, a municipality, or their employees to compensate survivors.*" *Id.* § 3.7394, subd. 1 (emphasis added).

The court of appeals also declined to reach the merits of this argument on the basis of the "nothwithstanding . . ." clause in the reimbursement provision of the statutes. *See Add.18.* Whatever effect the clause has on a claim under the compensation legislation, the

voluntary nature of the State's payments precludes any recovery for contractual indemnity in excess of the $1 million aggregate cap under § 3.736, subd. 4(e) The indemnity provision of the contract here provides that S&P would indemnify, save and hold harmless the State from "any and all claims, demands, actions or causes of action" arising out of or by reason of S&P's performance of the work under the contract. "The whole doctrine of indemnity rests upon the proposition that, when one is *compelled* to pay money which in justice another ought to pay, the former may recover of the latter the sum so paid...." *Lunderberg v. Bierman*, 241 Minn. 354, 362, 63 N.W.2d 355, 359 (1954) (emphasis added). Here, had the State decided to pay the survivors nothing, they would have had no legal recourse against the State in excess of the $1 million aggregate statutory limit. Jacobs should not be compelled to indemnify the State for those voluntary payments.

The voluntariness of the payments also precludes any recovery under the reimbursement provision of the compensation legislation, and the State's claim is not saved by the "notwithstanding . . ." provision. The concept of legal duty is too fundamental a feature of our legal system—at the heart of any legal obligation of one to another—for there to be a presumption that the legislature casually tossed it aside on the basis of a general reference to "any statutory or common law to the contrary." To the extent that it did so intend, enforcing the provision would deprive Jacobs of constitutional due process for all the reasons discussed above.

Conclusion

For the foregoing reasons, the decisions of the district court and court of appeals should be reversed, and judgment of dismissal ordered.

Dated: December 16, 2010.

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND, LLP

By _____

David F. Herr (#44441)
James Duffy O'Connor (#80780)
Kirk O. Kolbo (#151129)
Nicole Narotzky (#0329885)
Abigail Richey-Allen (#0388864)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

Attorneys for Appellant Jacobs Engineering Group Inc.

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 13,866 words. This brief was prepared using Microsoft Word 2003.

Dated: December 16, 2010.

MASLON EDELMAN BORMAN & BRAND, LLP

By _____

David F. Herr (#44441)
James Duffy O'Connor (#80780)
Kirk O. Kolbo (#151129)
Nicole Narotzky (#0329885)
Abigail Richey-Allen (#0388864)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

Attorneys for Appellant Jacobs Engineering Group Inc.