

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

In re: Individual 35W Bridge Litigation

MASTER FILE NO. 27-CV-09-7519
Schwebel Personal Injury: 27 CV 09-7274
Schwebel Wrongful Death: 27 CV 08-18245

ORDER

The above-entitled matters came on for hearing before the undersigned Judge of District Court on June 12, 2009, pursuant to Third-Party Defendant Jacobs Engineering Group, Inc.'s motion to dismiss the third-party claims of Defendants URS Corporation and Progressive Contractors, Inc.

Kirk Kolbo, Esq. and R. Lawrence Purdy, Esq. appeared on behalf of Third-Party Defendant Jacobs Engineering Group, Inc. Jocelyn Knoll, Esq. and Eric Ruzicka, Esq., appeared on behalf of Defendant URS Corporation. Kyle Hart, Esq. and Theodore Robert, Esq., appeared on behalf of Defendant Progressive Contractors Incorporated. Other appearances were as noted on the record.

Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Third-party Defendant Jacobs Engineering Group, Inc.'s motion to dismiss the third-party claims of Defendants URS Corporation and Progressive Contractors, Inc. is denied.
2. The attached Memorandum of Law is made a part of this Order.

Dated: August 28, 2009

BY THE COURT:


Deborah Hedlund
Judge of District Court

MEMORANDUM OF LAW

In October 1962, the State of Minnesota (“State”) contracted with Sverdrup & Parcel and Associates, Inc. (“Sverdrup”) to prepare design and construction plans for the I-35W Bridge (“Bridge”). Article VIII, Section 2(b) of the contract (“Contract”) provides:

[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.

Sverdrup certified the final Bridge design plans in March 1965. Construction of the Bridge was completed in 1967. Between 1966 and 1999, Sverdrup went through a series of name changes and mergers. In 1999, Third-Party Defendant Jacobs Engineering Group, Inc. (“Jacobs”) acquired or merged with Sverdrup.

In 2003, the State entered into a series of contracts with Defendant URS Corporation (“URS”) to conduct an inspection of the Bridge. In March 2007, the State hired Defendant Progressive Contractors Incorporated (“PCI”) to perform repairs to the Bridge. On August 1, 2007, the Bridge collapsed, resulting in the death of 13 people and injury of 145 people. Plaintiffs initiated these actions seeking damages arising from the collapse of the Bridge. Plaintiffs sued URS and PCI (collectively, “Defendants”) alleging negligence and breach of contract. In an Order filed on April 16, 2009, the Court dismissed Plaintiffs’ claims for breach of contract.

Defendants then commenced third-party actions for contribution and indemnity against Jacobs.

PCI also asserted a contractual indemnity claim. Defendants claim Sverdrup negligently designed the Bridge.

Jacobs moves the Court to dismiss Defendants’ third-party claims for failing to state a claim upon which relief can be granted. See Minn. R. Civ. P. 12.02(e). The Court must determine whether the complaints set forth legally sufficient claims for relief. Elzie v. Comm’r

of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980). If any theory of recovery is available to the claimant, the motion should be denied. Group Health Plan, Inc v. Philip Morris, Inc., 621 N.W.2d 2, 14 (Minn. 2001). The facts of the complaints must be taken as true and considered in the light most favorable to the non-moving party. Martens v. Minnesota Mining & Mfg. Co., 616 N.W.2d 732, 739 (Minn. 2000). For this motion, the Court considered the Contract since it is referenced in the complaints and is central to PCI's claim for contractual indemnity. See, e.g., In re Hennepin County 1986 Recycling Bond Litig., 540 N.W.2d 494, 497 (Minn. 1995).

Defendants' claims for contribution and indemnity against Jacobs are actions to recover damages arising out of the allegedly negligent design of the Bridge. In 1965, the Legislature enacted a statute of repose for claims regarding improvements to real property, codified as Minn. Stat. § 541.051. Laws of Minnesota 1965, Ch. 564, § 1. Subdivision 1(a) of the statute provided that actions for contribution and indemnity had to be brought within two years of accrual and within ten years of substantial completion of the project. Specifically, that statute stated:

Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. ...

In May 2007, the Legislature amended Minn. Stat. § 541.051, subd. 1 to remove any reference to claims for contribution and indemnity in paragraph (a) and added a paragraph (b) so that the statute now provides:

a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for

bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

(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).

The amendment also changed the definition of when a claim for contribution and indemnity accrues from payment of a final judgment, arbitration award, or settlement to “the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.”

The plain language of the statute allows Defendants’ claims for contribution and indemnity. Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning. American Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001). The language of Minn. Stat. § 541.051, as amended in 2007 and effective at the time the Bridge collapsed on August 1, 2007, is plain and unambiguous. Claims for contribution and indemnity may be brought no later than two years from accrual regardless of whether they accrue before or after the ten-year repose period for direct claims. Here, Defendants initiated their claims within two years from the commencement of Plaintiffs’ actions and Defendants’ claims may be brought even though ten years had past since completion of the Bridge. Defendants thus have a right to bring their claims for contribution and indemnity against Jacobs.

Jacobs argues that the 2007 amendment did not revive causes of action that were already extinguished under the previous statute. The Legislature made the amendment “effective retroactively from June 30, 2006.” 2007 Minn. Laws, Ch. 105, § 4 at 625-26. Specific language indicating claims are revived is unnecessary when the Legislature clearly expresses such intent in retroactive application. Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 419 (Minn. 2002). In U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc., 749 N.W.2d 98, 103 (Minn. Ct. App. 2008), rev. denied (Minn. Aug. 5, 2008), the Minnesota Court of Appeals determined that the language of the 2007 amendment to Minn. Stat. § 541.051 manifests a clear legislative intent that the statute have retroactive application. Based on this finding, the Court held that the 2007 amendment applied retroactively, reviving a claim for contribution and indemnity that had previously expired. Id. Thus, while Defendants’ claims for contribution and indemnity were barred by the previous version of Minn. Stat. § 541.051, the amended 2007 version removes the ten-year repose barrier to assertion of the claims.

Jacobs next contends that the revival of time-barred claims by Minn. Stat. § 541.051 is unconstitutional. Minnesota statutes are presumed constitutional. Doll v. Barnell, 693 N.W.2d 455, 460-61 (Minn. Ct. App. 2005). Jacobs bears the burden of demonstrating beyond a reasonable doubt that the statute violates a Constitutional provision. See Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988). The due process clauses of both the United States and Minnesota Constitutions protect against deprivations of life, liberty, or property made without due process of law. U.S. Const. Amend. XIV, § 1; Minnesota Const., Art. I, § 7. “Although a civil defendant’s repose is important, it does not receive constitutional protection.” Wschola v. Snyder, 478 N.W.2d 225, 227 (Minn. Ct. App. 1992). The “legislature can constitutionally modify time limitations and thereby divest a party of previously obtained rights.”

Larson v. Babcock & Wilcox, 525 N.W.2d 589, 591 (Minn. Ct. App. 1994). The Minnesota Court of Appeals in U.S. Home Corp., held that the right to repose is not vested until final judgment has been entered. U.S. Home Corp., 749 N.W.2d at 103. The Court thus upheld the retroactive application and revival of time-barred claims under the 2007 amendment to Minn. Stat. § 541.051. Id. Jacobs did not have a vested property interest in the prior repose statute because it was an affirmative defense that did not arise until litigation and judgment.

Even if Jacobs had a constitutionally recognized property interest in the repose period of the previous version of Minn. Stat. § 541.051, the 2007 amendment is constitutional because the Legislature had rational reasons for the changes. Since Minn. Stat. § 541.051 does not limit a fundamental right or use a suspect classification, minimal judicial scrutiny is appropriate. See Doll, 693 N.W.2d at 463. “Legislation is constitutional if it is not unreasonable, arbitrary or capricious and bears a rational relation to the public purpose it seeks to promote.” Id. Here, it is not unreasonable, arbitrary or capricious to remove the ten-year repose period from claims for contribution and indemnity in construction defect cases because it prevents defendants from being liable for others’ negligence in certain situations. See, e.g., Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006). The 2007 amendment is rationally related to the purpose of allocating liability among all tortfeasors. Jacobs has not shown beyond a reasonable doubt that Minn. Stat. § 541.051 is unconstitutional.

Defendants’ claim for contribution is a “flexible, equitable remedy designed to accomplish a fair allocation of loss among parties.” Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 688 (Minn. 1977). It requires that “persons under a common burden share that burden equally.” Spitzack v. Schumacher, 241 N.W.2d 641, 643 (Minn. 1976). A claim for contribution requires: 1) common liability of two or more actors to the injured party; and 2) the payment by one of the

actors of more than its fair share of that common liability. City of Willmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872, 874 (Minn. 1994). Common liability is created at the instant the tort is committed. Spitzack, 241 N.W.2d at 643. It arises when both parties are liable to the injured party for part or all of the same damages. Milbank Mut. Ins. Co. v. Village of Rose Creek, 225 N.W.2d 6, 8-9 (Minn. 1974). Common liability may exist even though the parties' liability depends on different legal theories. City of Willmar, 512 N.W.2d at 874.

Jacobs argues that it has no common liability with the Defendants because at the time the Bridge collapsed, the statute of repose had extinguished the Plaintiffs' direct claims against Jacobs. Technical defenses that do not go to the merits of a case do not extinguish common liability even though they eliminate one party's direct obligation to compensate the injured party. Jones v. Fisher, 309 N.W.2d 726, 729 (Minn. 1981). Thus, even when a plaintiff cannot enforce recovery against a defendant, common liability remains if the factor preventing enforcement is extrinsic to the tort itself, and the acts or omissions of the defendant are otherwise sufficient to subject the defendant to liability. Horton v. Orbeth, 342 N.W.2d 112, 114 (Minn. 1984). Examples of factors that prevent recovery but do not destroy common liability are failure to provide statutory notice, a covenant not to sue, personal immunity, and the expiration of the statute of limitations. Id. A statute of repose limits the time within which a party can acquire a cause of action. Weston, 716 N.W.2d at 641. It is a substantive rather than procedural limit. Id. While such a defense is not labeled technical, it does not go to the underlying merits of the claim. The defense is unrelated to Jacobs' acts, omissions, or culpability. Based on these equitable principles, Plaintiffs' lack of direct claims against Jacobs does not extinguish common liability. Defendants' claims for contribution are legally sufficient and dismissal is inappropriate.

Defendants' claims for indemnity do not require common liability. See Blomgren v. Marshall Mgmt Svcs, Inc., 483 N.W.2d 504, 506 (Minn. Ct. App. 1992). Indemnity arises out of a contractual relationship, either express or implied by law, which requires one party to reimburse the other entirely. Hendrickson v. Minnesota Power & Light Co., 104 N.W.2d 843, 847 (Minn. 1960). A claimant may recover indemnity where the one seeking indemnity: 1) has only a derivative or vicarious liability for damages; 2) has incurred liability by action at the direction, in the interest of, and in reliance upon the other party; 3) has incurred liability because of a breach of duty owed to him by the other; or 4) where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved. See Engvall v. Soo Line Railroad Co., 632 N.W.2d 560, 571 (Minn. 2001). Defendants' complaints indicate that Defendants' liability for Plaintiffs' damages is derivative or vicarious or incurred due to Jacobs' liability. Defendants have pled facts sufficient to go forward with claims for indemnity.

PCI asserts a claim for contractual indemnity as a third-party beneficiary under the Contract between Jacobs and the State. As noted above, the statute of repose in Minn. Stat. § 541.051 does not bar PCI's claim for indemnity. Generally, only parties to a contract have enforceable rights under the contract. See Hickman v. Safeco Ins. Co. of America, 695 N.W.2d 365, 369 (Minn. 2005). There is an exception to this general rule for third-parties who are intended beneficiaries of a contract. Id. Minnesota has adopted the Restatement (Second) of Contract's approach to determine if a party is an intended third-party beneficiary. Cretex Cos., Inc. v. Construction Leaders, Inc., 342 N.W.2d 135, 139 (Minn. 1984). Section 302 of the Restatement (Second) of Contracts provides:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [duty owed test]; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance [intent to benefit test].

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

If recognition of third-party beneficiary rights is “appropriate” and either the duty owed or the intent to benefit test is satisfied, the third-party can recover as an intended beneficiary. Cretex, 342 N.W.2d at 139. The intent to benefit a third party “must be found in the contract as read in light of all the surrounding circumstances.” Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minnesota, 215 N.W.2d 479, 483 (Minn. 1974).

PCI argues it is “an agent” of the State and entitled to indemnity under Article VIII, Section 2(b) of the Contract. The rights of a third-party beneficiary are based upon the terms of the contract. See Brix v. General Accident & Assurance Corp., 93 N.W.2d 542, 544 (Minn. 1958).

Where the intention of the parties is clear from the face of a contract, construction of the contract is a question of law for the court. Hickman 695 N.W.2d at 369. If there is ambiguity, extrinsic evidence may be used, and construction of the contract is a question of fact for the jury unless such evidence is conclusive. Id. Here, the parties’ intention is ambiguous with respect to the use of the word “agent.” Extrinsic evidence and construction of the contract is necessary to determine whether PCI had an agency relationship with the State and is entitled to indemnity under the Contract. Considering the complaint in a light most favorable to PCI, it has stated a legally cognizable claim for relief and dismissal is inappropriate at this time.

D.H.